



**Ntutu v County Government of Narok & another (Environment and Land Case 21 of 2021) [2024] KEELC 1327 (KLR) (12 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1327 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT AND LAND CASE 21 OF 2021  
CG MBOGO, J  
MARCH 12, 2024**

**BETWEEN**

**LIVINGSTONE KUNINI NTUTU ..... PLAINTIFF**

**AND**

**COUNTY GOVERNMENT OF NAROK ..... 1<sup>ST</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before this court for determination is the Notice of Motion dated 1<sup>st</sup> February, 2024 filed by Peggy Resiatio Keiuwa and is expressed to be brought under Order 25 Rule 3 of the [Civil Procedure Rules](#) seeking the following orders: -
  1. Spent.
  2. That this honourable court be pleased to set aside/vacate the order given on 27<sup>th</sup> April, 2023 and reinstate Ol Kiombo Limited as a party to this suit.
  3. That this honourable court be pleased to grant any other orders it may deem just.
  4. That costs of the application be provided for.
2. The application is premised on the grounds *inter alia*, that the firm of Rachier & Amollo Advocates filed a notice for the interested party to withdraw from the suit dated 26<sup>th</sup> April, 2023 and the Directors and Shareholders of the interested party had not passed any resolution nor given the firm the instructions to withdraw from the suit.
3. The application is supported by the affidavit of Peggy Resiatio Keiwua sworn on 19<sup>th</sup> January, 2024. In her affidavit, the applicant deposed that as the administrator of the estate of the late Moiyo Ole Keiwua, she knows that the deceased was the majority shareholder of the company and he was also an original



subscriber. Further, that while following up the interests of the estate, she learnt that the interested party had filed a notice to withdraw from the suit dated 26<sup>th</sup> April, 2023. To her own knowledge, the directors and shareholders of the interested party had not passed any resolution nor had they given the firm of Rachier & Amollo Advocates, any instructions to withdraw from the suit. Further, that the said withdrawal is highly prejudicial to the interested party's interest since it has tented camps which stand on 400 acres.

4. The applicant deposed that the withdrawal from the suit could only have been done through fraud and misrepresentation which completely interferes with their rights over what has been theirs since inception. Also, that the interested party company will suffer prejudice if it is not reinstated to the suit and allowed to participate in the proceedings.
5. The application was opposed by the replying affidavit of the plaintiff sworn on 15<sup>th</sup> February, 2024. The plaintiff deposed that it is clear that Order 25 Rule 3 of the *Civil Procedure Rules*, which the application is anchored, does not donate legal power to reinstate a party to a suit. Further, that there is no evidence tendered to prove that the applicant is a shareholder of Ol Kiombo Limited, as the application is not brought by Ol Kiombo Limited as a corporate body, and no resolution from the corporate body has been produced before the court.
6. The plaintiff further deposed that the applicant has not produced evidence that the firm of Rachier & Amollo Advocates acted without instructions, and engaged in criminal activities in filing the notice of withdrawal. Further, that Ol Kiombo Limited being his tenant, cannot challenge the validity of his title. He deposed that the proper party in any proceedings or action, in respect of a wrong done to a corporate body, is the corporate body itself. As such, the applicant lacks capacity to institute the application before this court on her own behalf, for lack of locus standi. Further, that the applicant is not a shareholder and no leave has been sought as per Sections 238 and 239 of the *Companies Act*.
7. The plaintiff further deposed that he will be greatly prejudiced if the former interested party is reinstated in the matter, considering that it is part heard and it would mean that witnesses are to be called to give fresh evidence occasioning delay.
8. The application was canvassed by way of written submissions.
9. On the 16<sup>th</sup> February, 2024 the plaintiff filed his written submissions of even date where he raised four issues for determination as listed below: -
  - a. Whether the application is competent.
  - b. Whether the applicant is capable of bringing an application for reinstatement of Ol Kiombo Limited, previously an interested party.
  - c. Whether the applicant is entitled to the order of reinstatement.
  - d. Whether a tenant can sue a landlord on the validity of his title.
10. On the first issue, the plaintiff submitted that the cited and invoked statutory provision i.e. Order 25 Rule 3 of the *Civil Procedure Rules* does not clothe the court with the power to order reinstatement of a party who has withdrawn from proceedings and as such, the application is incompetent and rife for dismissal.
11. On the second issue, the plaintiff submitted that the applicant, being an administratrix, can only administer the shareholding that the deceased had at the time of his demise in the corporate body. Further, that it is only Ol Kiombo Limited in its corporate name that can move the court to be



- reinstated in the proceedings and that a resolution will be required to prove that indeed it's a corporate decision that has been taken to approach this court.
12. The petitioner further submitted that the legal principle in Company Law is that an individual shareholder, cannot sue for wrongs done to a company or complain of any internal irregularities. Further, that the application does not come with the exceptions laid down in the case of *Foss v Harbottle* as cited in the case of *Tara Singh Dogra suing through Manmohan Singh Dogra v Elesb Chandrakant Gheewala (Kenyan) & 4 Others* [2018] eKLR. Further, he submitted that if the applicant was a shareholder, and was to benefit from the exceptions, she would seek and obtain leave of the court to bring a derivative action. He submitted that there is no evidence that the applicant is a shareholder of Ol Kiombo Limited and in her affidavit, she does not assert to be a shareholder. To buttress on this submission, the plaintiff relied on the cases of *Gbelani Metals Limited & 3 Others v Elesb Gbelani Natwarlal & Another* [2017] eKLR and *Joseph Munyoki Nzioka v Raindrops Limited & 3 Others* [2019] eKLR.
  13. On the third issue, the applicant deposed that the court must satisfy itself that there is a prima facie case on any of the cause of action noted under Sections 238 (3) and 239 (2) of the *Companies Act*. Further, that the application for permission to initiate a derivative action will be dismissed if the evidence adduced in support does not disclose a case for granting of permission. He further submitted that Ol Kiombo Limited, previously an interested party, procedurally filed a notice of withdrawal effectively withdrawing any claim against the plaintiff and that no evidence has been tendered that they acted without instructions. Reliance was placed in the case of *Shiawse Limited & Another v Pianesi Gino* [2012] eKLR.
  14. On the fourth issue, the plaintiff submitted that the claim by Ol Kiombo Limited in the suit was limited to a leasehold of a portion of the suit land in which Mara Intrepid operates from. Further that Ol Kiombo Limited leased 9 hectares as opposed to the 400 acres alleged in the supporting affidavit of the applicant. That presently, Ol Kiombo Limited operates from the same piece of land leased to her by the plaintiff and that a tenant who is enjoying the rights under a lease agreement, is estopped from challenging the validity of the landlord's title. In support of this submission, the plaintiff relied on the cases of *Abdukrzak Khalifa Salimu v Harun Rashid Khator & 2 Others* [2018] eKLR and *Kaka Mohamed v Mohamed Ali* [2018] eKLR.
  15. The plaintiff urged this court to consider the issue of delay as there was a directive by the Supreme Court that this matter be heard on priority.
  16. On the 19<sup>th</sup> February, 2024 the applicant filed her written submissions of even date. The applicant submitted that from the prayers sought by the plaintiff in his amended plaint dated 18<sup>th</sup> December, 2000, the interested party's presence at the hearing of the matter will assist this court in determining how much rent, tariffs, royalties, fees and other revenue have been collected or received by the 1<sup>st</sup> defendant from the applicant. The applicant relied on the cases of *John Harun Mwau v Simone Haysom & 2 Others; Attorney General & 2 Others (Interested Parties)* [2021] eKLR, *Florence Nafula Ayodi & 5 Others v Jonathan Ayodi Ligure v John Tabalya Mukite & Another; Benson Girenge Kidiavi & 67 Others (Applicants/Interested Parties)* [2021] eKLR, *Skov Estate Limited & 5 Others v Agricultural Development Corporation & Another* [2015] eKLR, *Communications Commission of Kenya & 4 Others v Royal Media Services Limited & 7 Others* [2014] eKLR and *Elina Mwayitsi Nakaya & Another v Nancy Wanjiru Wanga; Ephraim Miano Thamani & Another (Interested Parties)* [2022] eKLR.
  17. The 1<sup>st</sup> defendant opted not to participate in this particular application. Be that as it may, I have considered the application, the replying affidavit and the written submissions as well as the authorities



cited by the plaintiff and the applicant herein. The issue for determination is, in my view, whether the application has merit.

18. On 27<sup>th</sup> April, 2023, the applicant herein, being represented by the firm of Rachier & Amollo LLP, filed a notice of withdrawal pursuant to Order 25 Rule 1 of the [Civil Procedure Rules](#) dated 26<sup>th</sup> April, 2023. In its notice, Ol Kiombo Limited withdrew their claim against the plaintiff in the suit, with no orders as to costs.
19. On 9<sup>th</sup> May, 2023, the court noted the notice of withdrawal filed by Ol Kiombo Limited and marked the suit as withdrawn with no orders as to costs.
20. The applicant now wants this court to reinstate Ol Kiombo Limited, a former interested party on the grounds that the withdrawal could only have been done through fraud and misrepresentation. In addition, the applicant contended that no instructions were obtained from the Directors and Shareholders of Ol Kiombo Limited and no resolution was passed by Ol Kiombo Limited directing the said withdrawal. She contended that the withdrawal would be prejudicial to their interests as Ol Kiombo Limited has tented camps which stand on 400 acres of the suit land.
21. The application was opposed on grounds that the applicant herein lacks the locus standi as she is not a Director or a Shareholder of Ol Kiombo Limited. Further, that no evidence has been shown that indeed there was fraud on the part of the firm of Rachier & Amollo LLP to file the notice of withdrawal of the suit.
22. Order 25 of the [Civil Procedure Rules](#), which provides: -

- “ 1. At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.
2. Where a suit has been set down for hearing it may be discontinued, or any part  
(1) of the claim withdrawn, upon the filing of a written consent signed by all the parties.  
(2) Where a suit has been set down for hearing the court may grant the plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just.”  
(3) The provisions of this rule and rule 1 shall apply to counter claims.

23. Under Rule 1, the same provides for discontinuance of the whole or any part of the claim where a suit has not been set down for hearing, as it was at the time of filing the notice of withdrawal dated 26<sup>th</sup> April, 2023. In [Beijing Industrial Designing & Research Institute v Lagoon Development Ltd](#) [2015] eKLR, the Court of Appeal stated as follows: -

“The above provision presents three clear scenarios regarding discontinuance of suits or withdrawal of claims. The first scenario arises where the suit has not been set down for hearing. In such an instance, the plaintiff is at liberty, at any time, to discontinue the suit or to withdraw the claim or any part thereof. All that is required of the plaintiff is to give notice in writing to that effect and serve it upon the all the parties. In that scenario, the plaintiff has an absolute right to withdraw his suit, which we agree cannot be curtailed. The second scenario arises where the suit has been set down for hearing. In such a case, the suit



may be discontinued or the claim or any part thereof withdrawn by all the parties signing and filing a written consent. In this scenario, the right of the plaintiff is circumscribed by the requirement that he must obtain the written consent of all the other parties. The last scenario arises where the suit has been set down for hearing but all the parties have not reached any consent on discontinuance of the suit or withdrawal of the claim or any part thereof. In such eventuality, the plaintiff must obtain leave of the court to discontinue the suit or to withdraw the claim or any part thereof, which is granted upon such terms as are just. In this scenario too, the plaintiff's right to discontinue his suit is circumscribed by the requirement that he must obtain the leave of the court. That such leave is granted on terms suggests that it is not a mere formality.”

24. In the case of *Babati Shee Mwafundi v Elijah Wambua* [2015] eKLR, the court held as follows:

“I have considered the Appellants’ Application. ... Order 25 envisages that once a party withdraws or discontinues a suit such a party may file another suit and such withdrawal or discontinuation cannot be raised as a defence in a subsequent suit.

It follows that Order 25 does not permit a party to withdraw a notice to withdraw or discontinue a suit. The filing of such a notice to withdraw or discontinue a suit terminates the suit and there cannot be, thereafter, a setting aside of the notice to withdraw or discontinue a suit.”

25. From the above provision of the law and the cited authorities, it is clear that once a party withdraws its suit as was with the interested party, there is no room again for the party to seek reinstatement.

26. I am persuaded by the case of *George Mwangi Kinuthia v Attorney General* [2019] eKLR which held:

“It follows a party who withdraws his suit cannot seek to reinstate the same but a party withdrawing a suit has an option of instituting a fresh action as per provisions of Order 25 Rule 4 of the *Civil Procedure Rules*, 2010. The order and rule herein above do not envisage a litigant who has withdrawn the suit to seek a reinstatement; as a withdrawal means there is no suit pending anymore. In view of the above it is my view once a suit has been withdrawn there is nothing that can be sought to be reinstated.”

27. Also, in *Priscilla Nyambura Njue v Geovhem Middle East Ltd; Kenya Bureau of Standards (Interested Party)* [2021] eKLR, Justice Mativo (as he then was) observed:

“Withdrawal of a suit is itself its end. The right of a plaintiff to withdraw his suit is not a divine right but a right expressly conferred upon him by Order 25 and no right is similarly conferred upon him to revoke or rescind the withdrawal. So long as he remains the plaintiff, he may do any act which he may do in that capacity; he cannot, after withdrawal of the suit resulting in the loss of the capacity, do an act which can be done only in that capacity. Put differently, there is no provision conferring the right to revoke the withdrawal and there is no justification for saying that the right to withdraw includes in itself a right to revoke the withdrawal. ...The withdrawal took effect immediately the court permitted it and as observed earlier, Order 25 has no provision permitting reinstatement of a suit once the withdrawal has taken effect.”

28. Secondly, the application has been brought by an applicant on the strength that she is an administratrix of the estate of the late Mojjo Ole Keiwua, who was an original subscriber of the interested party. The Interested party herein is a company limited with Shareholders as the owners of the company and



Directors as well who I presume would also be the shareholders. In such an instance, the procedure in instituting such an application would be in accordance with the provisions of the *Companies Act* as well as the Articles of Association the said Company.

29. In this case, there is no resolution by the Directors of Ol Kiombo Limited directing the filing of the instant application. Further, it has not been shown that the shares of the late Moiyo Ole Keiwua formed part of the estate of the deceased to enable this court take any further step.
30. More importantly, the applicant contended allegations of fraud and misrepresentation which was not proved at all. This leads me to the conclusion that fraud and misrepresentation have not been established.
31. Arising from the above, I find that the applicant herein has no locus to file the present application and even if she had, the law does not permit reinstatement of a suit once withdrawn.
32. The notice of motion dated 1<sup>st</sup> February, 2024 is hereby dismissed. I make no orders as to costs.

It is so ordered.

**DATED, SIGNED & DELIVERED VIA EMAIL THIS 12<sup>TH</sup> DAY OF MARCH, 2024.**

**HON. MBOGO C.G.**

**JUDGE**

**12/03/2024.**

In the presence of:

Mr. Meyoki Pere – C. A

