



**Watsuma v Muraria (Environment & Land Case 190 of 2021)  
[2024] KEELC 4062 (KLR) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 4062 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 190 OF 2021**

**LL NAIKUNI, J  
APRIL 30, 2024**

**BETWEEN**

**ANDERSON CHIBULE WATSUMA ..... PLAINTIFF**

**AND**

**CATHERINE NYAMBURA MURARIA ..... DEFENDANT**

**RULING**

**I. Introduction**

1. What is before the Honourable Court are two issues for determination raised orally by the Learned Counsels prior to the case that was slated for formal proof hearing on 3<sup>rd</sup> April, 2024. The first issue pertains to a dispute on representation of parties by the two (2) Advocates while the second matter is on legal effect of a Notice of withdrawal of a suit filed by one of the disputant Advocate.
2. The two law firms involved in this discourse are on the one hand Messrs. Marende Necheza & Co. Advocates and on the other Messrs. O.M Robinson & Co. Advocates. The said law firms were each claiming to be on record for the Plaintiff through several notices of change of advocates that seem to have marred the whole of this proceedings a rather straight forward case unnecessarily complex and confusing for no apparent good reason.
3. Nonetheless, it is instructive to note that at the very initial stage, the Plaintiff instructed the Law firm of Marende Necheza & Company Advocates to act for him in this matter. Pursuant to that, it is this Law firm that prepared the pleadings and filed this suit against the Defendant by the Plaintiff vide a Plaint dated 16<sup>th</sup> September, 2021. Despite of service of Summons to enter appearance having been effect through substituted means the Defendant never complied by filing any Defence nor list of documents and witnesses as required by the provisions of Orders 6 and 7 of the *Civil Procedure Rules*, 2010. Thus, having caused proper service through substituted means under Order 5 Rule 17 of the *Civil Procedure*



Rules, 2010, and as demonstrated from an affidavit of service having been effected it was slated for formal proof on 3<sup>rd</sup> April, 2024.

4. As indicated, from the record, this matter has been marred with a myriad of dramatic theatrics by these two Law firms. On 18<sup>th</sup> October, 2023, the Law firm of Messrs. O. M Robinson & Company Advocates filed a Notice of Change of Advocates for the Plaintiff which they served upon the Law firm of Messrs. Marende Necheza & Company Advocates vide an Affidavit of Service dated 26<sup>th</sup> October, 2023. Thereafter, the Law firm of Messrs. Marende, Necheza & Company Advocates filed yet another Notice of Change of Advocates for the Plaintiff dated 12<sup>th</sup> March, 2024. Subsequently, the Law firm of O.M Robinson & Company Advocates filed another Notice of Change of Advocates for the Plaintiff dated 18<sup>th</sup> March, 2024, while vide a Notice of Change of Advocates for the Plaintiff dated 22<sup>nd</sup> March, 2024 was filed by the Law firm of Messrs. Marende, Necheza and Company Advocates. Hence, in essence they were the current Advocates on record for the Plaintiff. However, while that was the situation, the Law firm of O. M Robinson & Company Advocates filed a Notice of withdrawal of the suit altogether dated 2<sup>nd</sup> April, 2024. On 3<sup>rd</sup> April, 2024 when this matter was slated for hearing of the case, all these issues emerged in a hotly contested debate.
5. Resultantly, it was from this brief background that the Honourable Court undertook to deliver this directions upon keen perusal of the filed pleadings.

## **II. Submissions**

6. To ameliorate the above stated situation, prior to providing the directions, the Honorable Court granted each of these parties an opportunity to file and exchange a brief skeletal submissions within given duration. Pursuant to that, they all obliged. The said submissions are as stated herein below:-

### **A. The Written Submission by the Plaintiffs on Notice of withdrawal of the suit.**

7. The Law firm of Messrs. Marende Necheza & Company Advocates filed their written Submissions dated 12<sup>th</sup> April, 2024. Mr. Shimaka Advocate commenced the submissions by stating that the Plaintiff instructed their Law firm to act for him in this matter, It is them who drew the pleadings herein. to act for him in this matter. He stated that the Plaintiff instituted this suit against the Defendants being ELC 190/2021 on 20<sup>th</sup> September, 2021. He had been represented by the said firm throughout until sometime on 18<sup>th</sup> October, 2023 when the Law firm of Messrs. O.M Robinson & Company Advocates filed a notice of change of Advocates. On 30<sup>th</sup> October, 2023, the Law firm of Messrs. Marende Necheza & Company Advocates wrote to the law firm of Messrs. O.M Robinson & Company Advocates to furnish the instructions given to them. Despite of that, no response was given to date. This prompted the firm of Messrs. Marende Necheza & Company Advocates to file a notice of change of Advocates.
8. On 15<sup>th</sup> February, 2024, Mr. Shimaka Advocate from the Law firm Marende Necheza & Company Advocates appeared in court in the absence of Mr. Malombo ready to proceed with the hearing of the matter. The Honourable court gave directions that the Plaintiff do undergo medical examination for mental assessment. Noting the status of the Plaintiff and the fact that the medical assessment was still pending, Mr. Shimaka was baffled that the same Plaintiff could have instructed Mr. Malombo to come on record and withdraw the matter. More suspicious was the fact that the notice of change and the notice of withdrawal were filed on the same dated - 2<sup>nd</sup> April 2024 and which was just a day before the hearing of the case on 3<sup>rd</sup> April, 2024. This matter having been set down for hearing parties ought to either file a consent or the court grant the Plaintiff leave to withdraw the suit upon such terms as to costs. To buttress his point, he relied on the provision of Section 25 (2) of the Civil Procedure Rules, 2010.



9. The Learned Counsel submitted that the suit having been set down for hearing on 3<sup>rd</sup> April, 2024 and there being no consent filed for withdrawal, he prayed that this Honorable Court declines to grant leave for the withdrawal of this suit. He averred that it was for the best interest of the Plaintiff where his mental status was yet to be confirmed. He urged that the Plaintiff be taken for the medical assessment and report filed in court for the court to determine his mental status and ability to testify. Further, he was of the view that the Court should order that the Plaintiff appeared before court to confirm to whom he gave instructions and if he truly intended to withdraw the matter. This Honorable court should thus decline to have the matter withdrawn until the issues were determined and more so if at all the same was withdrawn after confirmation from the Plaintiff then the Law firm of Messrs. Marende Necheza & Company Advocates be paid their costs accordingly.

**B. The Written Submissions by the Plaintiffs – on the Withdrawal of the Suit dated 2<sup>nd</sup> April, 2024**

10. The Law firm of Messrs. O.M. Robinson & company advocates filed their written submissions dated 25<sup>th</sup> April, 2024. M/s. Malombo Advocate commenced her submissions by stating that on the 2<sup>nd</sup> April 2024 the Plaintiff filed a Notice of Withdrawal of suit dated on even date. On 3<sup>rd</sup> April, 2024 when this matter was slated for hearing, Mr. Shimaka appeared on behalf of M/s. Marende Necheza & Company Advocates who were the Plaintiff's former Advocates. Mr. Shimaka objected to the filing of the said Notice of Withdrawal of suit. Subsequently, the Court then directed parties to file short submissions in regard to the import of a Notice of Withdrawal of suit.
11. The Learned Counsel relied on the provisions of Order 25 of the Civil Procedure Rules, 2010. She submitted that since the Defendant had not entered appearance despite being served; the Plaintiff reserved the right and was at liberty to withdraw his suit at any time. The argument of the Law firm of Messrs. Marende Necheza & Company Advocates that they ought to be awarded costs was misguided as they were not a party to the suit. There was an elaborate procedure on how advocates may pursue their costs from a client. The costs herein if indeed they were to be awarded were party & party cost not costs between advocates and his client. Therefore such an argument was dead on arrival. According to the Learned Counsel, the legal effect of a Notice of Withdrawal or discontinuance of a suit in whichever manner howsoever, it ceased to exist. This was because once a suit was withdrawn there was no party that existed in relation to that suit. The Learned Counsel lend credence in the case of: "[\*Charles Kiptarbei Birech v Paul Waweru Mbugua & another\*](#) [2021] eKLR where it was held that:

“Of importance to note is that the Rules that provide for the discontinuance or withdrawal of a suit do not provide for the revocation of withdrawal notice or the setting aside of the suit. And once a suit is discontinued in whichever manner howsoever, it ceases to exist. A party cannot breathe life into it by whichever means, not even by a consent setting aside the orders of withdrawal. This is because, once a suit is withdrawn there is no party that exists in relation to that suit. The existence of a suit can be equated to the existence of light from a bulb: it only exists if there is an electric current and the gadget known as “bulb”. Once either the light or the bulb ceases to be in contact, the light goes out and in its place is darkness. The only way to get light again in that bulb is to supply current to it. The light that comes into existence again is not the continuation of the one that went out: it is new.”



12. She stated that, the court in this case went ahead to observe that:

“In *Antony Kayaya Juma v Humprey Ekesa Khaunya & another* [2004] eKLR the court held:-

“It is my humble view that a suit which has been withdrawn pursuant to Order XXIV of the Civil Procedure Rules cannot be reinstated...the law under this Order does not envisage a litigant to seek for an order of reinstatement.”

13. Flowing from above, the Learned Counsel reiterated and contended that the Notice of Withdrawal of the suit dated 2<sup>nd</sup> April, 2024 signaled the end of the suit. The suit was now comparable to a dead horse. To the Counsel, therefore no matter how hard one kept flogging it no life would be breathed back to it. It was a waste of time. According to the Counsel, the firm of Messrs. Marende Necheza & Company Advocates were not party to the suit hence could not pray for costs envisaged under Order 25 Rule 3 of the *Civil Procedure Rules*, 2010 reproduced herein above.
14. In conclusion, the Learned Counsel stressed that the effect of the Notice of Withdrawal of suit dated 2<sup>nd</sup> April, 2024 was that no suit existed anymore.

### III. Analysis & Determination

15. I have critically assessed the filed pleadings, the proceedings in this matter and the filed submissions and the authorities cited by parties herein, the provision of *the Constitution* of Kenya, 2010 and the statutes.
16. In order to arrive at a fair, reasonable and informed decision in the matter, the Honourable Court has crafted three (3) issues for its determination. These are:-
- What are the legal effects of the Notice of Change of Advocates and Withdrawal of suits as provided for by law.
  - What are the practical directions in this matter in the given circumstances.
  - Who will bear the costs.

**Issue No. a). What are the legal effects of the Notice of Change of Advocates and Withdrawal of suits as provided for by law.**

#### Brief facts

17. Under this Sub – title, the Honourable Court has deciphered that the main substratum of the matter is on representation and the legal effect of withdrawal of suits. However, before embarking on the analysis of the issues herein, it is imperative to extrapolate on the brief facts of the case hereof which are simple and to the point. From the filed pleadings, this is a case of specific performance (breach of contract). The Plaintiff instituted this suit against the Defendant through a Complaint dated 16<sup>th</sup> September, 2021 and filed in Court on 20<sup>th</sup> September, 2021. The Plaintiff claimed that at all material times the Defendant was the beneficial and/or registered proprietor of the all that parcel of land known as Mombasa/Block XXVI 940 (Hereinafter referred to as “the Suit Land”). By dint of an agreement dated 15<sup>th</sup> November, 2005 made between the Plaintiff as the purchaser and the Defendant as the Vendor of the suit land terms and conditions stipulated thereof. In a nutshell, the Plaintiff claimed to have made the full payments of the purchase price of a sum of Kenya Shillings Five Million (kshs. 5, 000, 000.00/=) which the Defendant acknowledged. Despite of this, the Vendor failed to cause the transfer and give vacant possession thereof thereby frustrating the Plaintiff. The Plaintiff sought to be declared as the



legal owner of the property, eviction, vacant possession and costs of the suit among other orders. That is adequate on the brief facts.

18. The provision of the Law that govern representation of Advocates are founded under the provision of Article 50 ( 2 ) (g) and ( h) of the Constitution of Kenya, 2010. They provided as follows:-

“Every person has the right to a fair hearing which includes the right:-

- g). to choose, and be represented by, an Advocate and to be informed of this right promptly;
- h). to have an advocate assigned to the accused person by the State and at the State expenses, if substantial injustice would otherwise result, and to be informed of this right promptly”

19. Further, the provision of Order 9 of the Civil Procedure Rules, 2010 provides for representation of a party by his/her advocate and more specifically rule 1 which emphasizes that an advocate must be duly appointed. Rule 5 provides for change of advocates and states as follows:

“A party suing or defending by an Advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

20. The above-mentioned Rule 6 states as follows:

“The party giving the notice shall serve on every other party to the cause or matter (not being a party in default as to entry of appearance) and on the former advocate a copy of the notice endorsed with a memorandum stating that the notice has been duly filed in the appropriate court (naming it).”

21. With regard to withdrawal of suits, it is governed under the provision of Order 25 (1) and (2) of the Civil Procedure Rules, 2010 provides as follows:

- “ 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 discontinue or withdrawal shall not be a defence to any subsequent action.
- 2. (1)Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn, upon the filing of a written consent signed by all parties.
- 3. 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.
- 4. The provisions of this rule and rule I shall apply to counterclaims.



5. Upon request in writing by any defendant the registrar shall sign Judgment for the costs of a suit which has been wholly discontinued, and any Defendant may apply at the hearing for the costs of any part of the claim against him which has been withdrawn."
22. The above provisions of the law in as far as representation of parties and the withdrawal of the suit is concerned are rather straightforward. Evidently, from the competing match by the two Law firms in filing numerous notice of change of Advocates the situation has become completely muddled up and the Court will for the time being keep off from that mundane issue. Primarily, and for the time being in force, the only singular point that the Court wishes to emphasis on and which certainly is central point is on the client. To me the client who is the instructing party ought to be of sound mind and understanding to be competent to provided clear instructions to the Advocates where he or she wishes to attain legal and proper representations. Thus, above all else, it is critical to assess the mental condition by the Plaintiff herein before proceeding any further.
23. On 15<sup>th</sup> February, 2024 when this matter was stated for formal proof and time for hearing was allocated by Court, later on Mr. Shimaka Advocate sought for adjournment by stating the following:-
- “Indeed I do confirm that this matter was fixed for hearing today a date taken on 12<sup>th</sup> July, 2023. During the call over this morning my colleague confirmed and rightfully so that I would be ready to proceed. Unfortunately, the Plaintiff’s son – Mr. Faizal and the younger bother of the Plaintiff – Mr. Willis Prince Tsuma (both are present in Court) visited me in office and in formed me that the Plaintiff is in critical health condition. He suffers from dementia a condition of loss of memory and judgement hence he may not withstand trial as required by law. I propose I have him substituted or a Power of Attorney be executed....”
24. Based on this, the Honourable Court while granting an adjournment until 3<sup>rd</sup> April, 2024, it advised the Learned Counsel to consider subjecting the Plaintiff to undergo a medical check up under the provision of the *Mental Health Act*, Cap. 248 prior to applying for his substitution in the matter. From the face of it, and for no apparent good nor justifiable reason, this never happened. Had the Counsel adhered with the advise by the Court, the current situation would never had a risen.
25. Be that as it may, the Law firm of Messrs. O. M Robinson & Company ostensibly acting behalf of the Plaintiff filed a notice of Change of Advocates dated 22<sup>nd</sup> March, 2024 and a Notice of Withdrawal of the entire suit dated 2<sup>nd</sup> April, 2024. As indicated above, on 3<sup>rd</sup> April, 2024 there was a heated debate over the representation of the Plaintiff and the withdrawal of the suit. The Learned Counsel Malombo indicated that she had filed a notice of change of advocates as well as the above notice of withdrawal of the entire suit leading to a non – existence of the suit altogether. This was vehemently opposed by the Learned Counsel Shimaka for the law firm of Messrs. Marende Necheza & Co. Advocates who argued that he filed the pleadings and other documentation and had been handling the suit on behalf of the Plaintiff which included causing it to served through advertisement in the newspapers, appearing in Court with the Plaintiff’s son and younger brother to the Plaintiff and undertaking to subject him for a medical examination for purposes of applying for substitution. According to him, this was not the proper way to handle this matter. As already noted, the genesis of this conflict as can be seen from the records is that it is true that the firm of Marende Necheza & Co. Advocates has been acting on behalf of the Plaintiff and more specifically the Learned Counsel Shimaka has been on record from the inception. They argued that the court gave directions that the Plaintiff should undergo a medical examination for mental assessment which is also pending to date. However, they state that it is unexpected that the Plaintiff in his condition could have instructed the Law firm of Messrs. O.M Robinson & Co.



Advocates to come on record and withdraw the entire suit. In conclusion, counsel alleged that there was no consent filed for withdrawal and that in view of the current mental condition of the Plaintiff, the suit should not be withdrawn until a mental assessment has been conducted and filed so as to determine whether or not the Plaintiff is able to appear and testify in court to confirm if he truly issued instructions for withdrawal. Further, the Learned Counsel also argued that if the Court finds that the Plaintiff intends to withdraw, then the suit ought not to be withdrawn until costs due to them are paid.

26. On the other hand, the firm of O.M Robinson & Co. Advocates filed their submissions dated 25<sup>th</sup> April, 2024 and argued purely on the law. They also relied on the provision of Order 25 of the Civil Procedure Rules, 2010. The Learned Counsel contended that since the Defendant was yet to enter appearance, the Plaintiff was permitted to withdraw his suit at any time. Further, the Learned Counsel argued that the issue of costs was misguided as the Law firm of Messrs. Marende Necheza & Co. advocates was not a party to the suit and that they were entitled to pursue costs in the form of taxation. The Learned Counsel also relied on “*Charles Kiptarbei v Paul Waweru Mbugua & another* (2021) eKLR, where the court held that the civil procedure rules do not provide for a revocation of a notice of withdrawal or discontinuance of a suit and hence once it is on record, the concerned suit ceases to exist and that not even a consent setting aside can bring it back to life. With the above, authority, she argued that the court has got its work cut out and they stopped short of saying the court lacked jurisdiction to revive the suit.
27. From these submission by the parties herein, certainly, the Court finds that both parties have critical issues of great legal importance to be dealt with and considered. However, in the interest of Justice and fairness, in the meantime, the Court wishes to keep the same in abeyance until the Mental examination of the Plaintiff has been undertaken. And also including the Plaintiff himself appearing in Court in person to state his position.

**Issue No. b). What are the practical directions in this matter in the given circumstances.**

26. Under this sub – heading, and having already made the above pronouncement, it is just, fair and reasonable that the Court provides a robust, practical and pragmatic directions of how to tackle the issues before it once and for all otherwise, in the fullness of time, they will keep on recurring from the look of things. The Honourable Court specifically arrives at the following conclusion through making the following orders:-
- a. That the Law firm of Messrs. Marende Necheza WITHIN THE NEXT THRITY (30) DAYS from the date of this Ruling directed to subject the Plaintiff undergo a proper medical examination under the provisions of the *Mental Health Act*, Cap. 248 of the Laws of Kenya to ascertain his medical condition to withstand trial.
  - b. That immediately thereafter, a Medical report to be furnished to this Court and where the physical presence of the Plaintiff will be required.
  - c. That in the meantime, there be stay of this proceedings – including the Notice of Change of Advocates and the Notice of Withdrawal of the Suit by the Law firm of Messrs. O.M Robinson & Company Advocates until these pre – conditions and steps under Clause a) and b). herein are fully accomplished.
  - d. That failure to adhere with these conditions, the suit will automatically stand withdrawal under the provision of Order 25 of the *Civil Procedure Rules*, 2010 based on the Notice of Withdrawal by the Law firm of Messrs. O.M. Robinson & Company Advocates dated 2<sup>nd</sup> April, 2024.



- e. That there be a mention on 10<sup>th</sup> June, 2024 to ascertain compliance and further direction by the Court.
- f. That each party to bear their own costs.

It is so ordered accordingly.

**RULING DELIVERED THROUGH MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 30<sup>TH</sup> DAY OF APRIL, 2024.**

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**HON. JUSTICE L.L. NAIKUNI,  
ENVIRONMENT & LAND COURT AT  
MOMBASA**

Ruling delivered in the presence of:-

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. No appearance for the Law firm of Messrs. Marende, Necheza & Co. Advocates.
- c. M/s. Malombo Advocate for the Law firm of O.M Robinson & Company Advocates.

**JUSTICE L.L. NAIKUNI**

