



**Nyambura & 3 others v Administrators of the Estate of Virginia Waithera Gathuku (Deceased) & 5 others (Environment & Land Case 150 of 2023) [2024] KEELC 4540 (KLR) (30 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4540 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 150 OF 2023**

**J OMANGE, J  
MAY 30, 2024**

**BETWEEN**

**TERESIAH NYAMBURA ..... 1<sup>ST</sup> PLAINTIFF  
STEPHEN WANYEE GATHUKU ..... 2<sup>ND</sup> PLAINTIFF  
FRANCIS KIRAGU GATHUKU ..... 3<sup>RD</sup> PLAINTIFF  
VINCENT MAUGAI GATHUKU ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**ADMINISTRATORS OF THE ESTATE OF VIRGINIA WAITHERA GATHUKU (DECEASED) ..... 1<sup>ST</sup> DEFENDANT  
SUSAN MUTHONI GATHUKU ..... 2<sup>ND</sup> DEFENDANT  
KIBATHI GATHUKU ..... 3<sup>RD</sup> DEFENDANT  
ROSEMARY WANJIKU ..... 4<sup>TH</sup> DEFENDANT  
TERESIAH NYAMBURA ..... 5<sup>TH</sup> DEFENDANT  
DORCAS WACHEKE WANYEE ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. By a plaint dated 3<sup>rd</sup> November 2023 the Plaintiffs herein sued the Defendants seeking declaratory orders and injunctive orders in respect of the suit properties herein which are registered in the name of the deceased who is the late wife of the Plaintiff's father the initial owner of the suit property.



2. The Plaintiffs aver that they have noticed elements of fraud in the Defendants dealings of the estate which actions were carried out without involving the Plaintiffs who are beneficiaries to the estate thereby infringing on their rights to the estate.
3. The suit herein was filed to seek the courts intervention in restraining the Defendants from dealing with the suit property in any manner including selling and subdivision of the same. The Plaintiffs also sought temporary injunctive orders.
4. The Defendants filed a statement of defence denying the contents of the Plaint and further filed grounds of opposition to the application and replying affidavit. They contend that they had initiated Succession proceedings in which they had been issued with a Certificate of Grant.
5. On 27<sup>th</sup> March 2024, the Plaintiff filed a Notice of Withdrawal of suit under order 25 rule 1 of the [Civil Procedure Rules](#). When the matter came up in court on the 15<sup>th</sup> May 2024, the Defendants submitted they had no objection to withdrawal of the suit but requested for costs. The court allowed the Plaintiff to withdraw the suit but reserved decision on the issue of costs. This is the issue that is before the court for determination.
6. Order 25 rule 1 and 2 of the [Civil Procedure Rules](#) 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 discontinuance 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 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.”
7. Order 25 rule 2(2) of the [Civil Procedure Rules](#) provides that a party may withdraw a suit subject to terms the court considers just. These terms include payment of costs. The Supreme court in the case of [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others](#) [2014] eKLR held as follows:

“ A party’s right to withdraw a matter before the court cannot be taken away. A court cannot bar a party from withdrawing his matter. All that the court can do is to make an order as to costs where it is deemed appropriate.”
8. The defendants entered appearance and filed their statement of defence and response to the application. The matter did not proceed for hearing. It is against this backdrop that the court is enjoined to consider whether the defendants are entitled to costs. In the case of [Cecilia Karuru Ngayu](#)



*v. Barclays Bank of Kenya & another* [2016] eKLR, in which the Court cited the case of *Impressa Ing Fortunato Federice v. Nabwire* [2001] 2 EA 383 the Supreme Court of Uganda held that:

“The effect of section 27 of the *Civil Procedure Act* is that the Judge or court dealing with the issue of costs in any suit, action, cause or matter has absolute discretion to determine by whom and to what extent such costs are to be paid; of course, like all judicial discretions, the discretion on costs must be exercised judiciously and how a court or judge exercises such discretion depends on the facts of each case. If there were mathematical formula, it would no longer be discretion... while it is true that ordinarily, costs should follow the event unless for some good reason the court orders otherwise, the principles to be applied are: -

- i. under section 27 (1) of the *Civil Procedure Act*, costs should follow the event unless the court orders otherwise. This provision gives the judge discretion in awarding costs, but that discretion has to be exercised judicially.
- ii. A successful party can be denied costs if it is proved that but for his conduct the action would not have been brought... It is trite law that where judgement is given on the basis of consent of parties, a court may not inquire into what motivated the parties to consent or to admit liability....”

9. Similarly, in the above case the court held that:

“To my mind, in determining the issue of costs, the court is entitled to look at inter alia

- (i) the conduct of the parties,
- (ii) the subject of litigation,
- (iii) the circumstances which led to the institution of the proceedings,
- (iv) the events which eventually led to their termination,
- (v) the stage at which the proceedings were terminated,
- (vi) the manner in which they were terminated,
- (vii) the relationship between the parties and
- (viii) the need to promote reconciliation amongst the disputing parties pursuant to article 159 (2) (c) of the *Constitution*. In other words, the court may not only consider the conduct of the party in the actual litigation, but the matters which led to the litigation, the eventual termination thereof and the likely consequences of the order for costs.”

10. The court has taken into account the foregoing principle. In the instant case, the dispute arises out of a family succession matter. The Plaintiff has withdrawn the suit even before it is set down for hearing.

In the spirit of promoting reconciliation amongst the parties I order that each party bear their own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 30<sup>TH</sup> DAY OF MAY 2024.**

**JUDY OMANGE**

**JUDGE**



In the presence of: -

- Ms. Wayua for the Plaintiff/Applicant.

- Steve - Court Assistant

