IN THE COURT OF APEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A

CIVIL APPEAL NO. 1 OF 2015

BETWEEN

BEIJING INDUSTRIAL DESIGNING &

RESEARCHING INSTITUTE ……..……APPELLANT

AND

LAGOON DEVELOPMENT LIMITED……..RESPONDENT

(Appeal from the ruling and order of the Environment & Land Court at Malindi, (Angote, J.) dated 29th October 2014

in

HCCC No. 2 of 2014)

****

JUDGMENT OF THE COURT

The cut and dry issue in this appeal is, in our assessment, whether the High Court erred by allowing the respondent, ***Lagoon Development Ltd***, to discontinue ***High Court Civil Suit No 2 of 2014*** whilst the appellant, ***Beijing Industrial Designing & Researching Institute***, had contempt of court proceedings pending for hearing and determination in that suit. That fact however has not deterred the parties from clouding the issue by introducing a myriad of peripheral issues, such as the competence and propriety of the contempt proceedings and even of the injunctive orders upon which the contempt proceedings were founded. In addition accusations and counter accusations of unethical and unprofessional conduct on the part of counsel have been hurled with abandon. Be that as it may, we shall not be sidetracked and will strive to focus on the real issue in dispute in this appeal.

The background to the appeal is a construction contract entered into between the appellant and the respondent on 5th March 2012. By that agreement the respondent contracted the appellant to construct an up-market holiday resort known as ***Madharini*** on ***LR No. 12889/265, Kilifi County***. In furtherance of the contract, the appellant obtained, on 4th December 2012, Advance Payment and Performance Guarantees from the ***Bank of China, Beijing Branch,*** irrevocably guaranteeing the respondent payment of ***US $ 422,297.00*** in the event of the appellant's failure to perform its obligations under the contract. ***Clause 45*** of the contract provided for the referral of any disputes arising from the contract to arbitration.

Soon the project ran into headwinds and on 7th January 2014 the respondent served upon the appellant a default notice. By a letter dated 19th January 2014, the respondent purported to terminate the contract and three days later, on 21st January 2014, filed ***HCCC No. 2 of 2014*** seeking an order ejecting the appellant from the site and an injunction to restrain the appellant from accessing the site, removing equipment and machinery therefrom, or otherwise interfering with construction works, pending referral of the dispute to arbitration under clause 45 of the contract. Contemporaneously with the suit, the respondent applied for and obtained from ***Meoli, J***. an *ex parte* prohibitory injunction against the appellant. On its part, the appellant, on 30th January 2014, applied in the same suit for an injunction to restrain the respondent from handing over the site to any other contractor or continuing with further construction works on the project, pending the arbitration proceedings. On the same day ***Angote, J***. granted *ex parte* the orders sought by the appellant. On 3rd February 2014, however, the learned judge vacated the orders he had issued on 30th January 2014 and reaffirmed those that had been issued by Meoli, J. on 21st January 2014.

Ultimately ***Angote, J***. heard the two applications *inter partes* and by a ruling dated 30th May 2014, dismissed the respondent's application and discharged the interim injunction. The learned Judge however allowed the appellant's application and restrained the respondent from proceeding with the construction pending the arbitration. The latter order was stayed by the High Court for 14 days and later the stay was extended to 20th June 2014.

Aggrieved by the dismissal of its application, the respondent lodged a notice of appeal, followed by an application ***(Civil Application No. 12 of 2014)*** under ***Rule 5(2) (b)*** of the Rules of this Court, seeking stay of execution of the orders of Angote J. This Court granted interim stay of execution but ultimately found the application to be unmeritorious and dismissed the same with costs in a ruling dated 10th October 2014. In the ruling, the Court observed thus:

"For it would appear that after the applicant terminated the contract and obtained temporary orders on 21st January 2014 restraining the respondent from any sort of access or interference with the project, the applicant repaired the works that the respondent was alleged not to have satisfactorily performed, and continued with works even on the 4 houses, That is to say that despite any orders that were in force then, the applicant repaired the work it deemed defective on the 4 house/units and has continued the work with other contractors. This means that the applicant did not use the order issued in its favour as an interim measure of protection to protect evidence or preserve the status quo pending the inter parte hearing of its application or resolution of the dispute, but took advantage of the orders to continue to exercise its rights under the contract specifically clause 38.5 of the contract that allegedly gave it rights to rectify any defects and to use all temporary buildings, equipment, goods and materials on site for completion of the works."

The respondent ultimately filed ***Civil Appeal No. 26 of 2014***, but withdrew the same on 17th November 2014 when it was due to be heard.

On 16th October 2014 the appellant filed two applications in the High Court. In the first application it sought an injunction to restrain the respondent from calling for or enforcing the advance payment and performance guarantees, whilst in the second it applied for committal of two directors of the respondent, ***Richard Michael Ashley*** and ***Ashton Towler*** for contempt of court. On the same date Angote, J. granted the first application *ex parte* and issued an injunction for 14 days, restraining the respondent as regards the guarantees.

In opposition to the application for contempt of Court, the respondent filed a notice of preliminary objection dated 24th October 2014 and a 35-paragraph long affidavit sworn by Ashton Towler on the same day.

The two applications were set down for hearing on 29th October 2014. On the date of the scheduled hearing, the respondent literally pulled the rug under the appellant's feet and filed a notice of discontinuation of the suit. The appellant strenuously opposed the discontinuation of the suit, but ***Angote,***

J. upheld the respondent's right to discontinue the suit, holding that once a suit is discontinued, there's nothing the court can do about any pending application therein and that the appellant's remedy was to pursue a counter-claim, if any, costs, or to file a new suit. The learned judge did not make any order on costs of the withdrawn applications or suit.

Convinced further that the respondent's discontinuation of the suit was in bad faith and calculated solely or primarily to defeat the contempt of court application against it, the appellant lodged a notice of appeal on 12th November 2014 and followed it up with the appeal now before us. As a postscript to this saga, after discontinuing ***Malindi HCCC No. 2 of 2014***, the very next day, on 30th October 2014, the respondent filed a new suit over the same subject matter against the appellant, namely ***Nairobi HCCC No 486 of 2014***. At the hearing of this appeal, we were informed that a ruling was awaited in the new suit.

The appellant has put forth 5 grounds of appeal. But as we have already stated, the central issue is really whether the learned judge erred by allowing the respondent to discontinue its suit in Malindi, with a secondary issue being whether the judge erred by declining to award the appellant costs of the suit. With the consent of both parties the appeal was heard through written submissions with both parties being afforded an opportunity for summation.

In support of the appeal, ***Mr. Boniface Masinde***, learned counsel for the appellant, submitted that the learned judge erred by allowing the respondent to discontinue the suit while a contempt of court application against the respondent was pending in the same suit. The decision of the High Court in ***ECONET WIRELESS KENYA LTD V. THE MINISTER FOR INFORMATION & COMMUNICATION & ANOTHER, HC MISC. APP. NO. 1640 OF 2003*** where that court heard an application for contempt of court in priority to an application to set aside the orders allegedly violated, was cited in support of the proposition that where allegations of contempt are made, the court will treat the same with seriousness and urgency and suspend all other proceedings.

Relying on ***BOARD OF GOVERNORS, MOI HIGH SCHOOL KABARAK V MALCOLM BELL & ANOTHER, SC PETITION NOS. 7 & 7 OF 2013***, in which the Supreme Court identified the power of a court to punish for contempt as one of the indisputable attributes of inherent power, counsel argued that the contempt of court application had implications beyond the appellant and the respondent and involved the cause of justice, the rule of law and the supremacy of the law and therefore ought not to have been frustrated.

Relying further on ***Order 40 Rule 3(3)*** of the ***Civil Procedure Rules***, it was submitted that the appellant was obliged to file the contempt proceedings in the suit and by allowing the discontinuation of the suit at the instance of the respondent; the court had denied the appellant access to justice. It was also argued that by filing a new suit in Nairobi over the same subject matter barely a day after discontinuing the suit in Malindi, the respondent was abusing the process of the court and forum shopping.

Next the appellant contended that the High Court erred by allowing discontinuing of the suit because once the dispute between the parties was referred to arbitration, there was nothing left in the suit to discontinue and that none of the parties could revoke the reference to arbitration without the leave of the court.

The Court was also faulted for failure to award costs of the discontinued suit to the appellant. It was submitted that under ***section 27(1)*** of the ***Civil Procedure Act***, costs follow the event unless the judge, for good reason orders otherwise and that in the instant case the learned judge did not give any reasons for declining to award the appellant costs.

Lastly it was urged that the conduct of the respondent's counsel in the discontinuation of the suit was neither ethical nor professional and that counsel ought to be ordered to personally pay costs of this appeal assessed at Kshs 3,500,000.00. This drastic request was founded on the allegation that the respondent's counsel had personally assumed the menial and clerical task of filing and serving the notice of discontinuation of the suit and the list of authorities in support of discontinuation on the very morning of the hearing. It was also contended that by ambushing counsel for the appellant, discontinuing the suit and filing a fresh one on the same subject matter, the respondent's counsel had subverted and obstructed the

cause of justice.

Mr. Allen Gichuki, learned counsel for the respondent, opposed the appeal on three fronts, namely the competence and merits of the application for contempt of court, the power of the court to discontinue a suit, and the baselessness of the prayer for an order for payment of costs of this appeal personally by counsel.

As regards the application for contempt of court, it was submitted that the same was fatally defective and an abuse of the process of the court; that the application violated ***Rule 81.4*** of the ***Rules of the Supreme Court of England;*** that the said application did not set out any acts of the alleged contempt; and that the application was also defective because it was supported by an affidavit sworn by counsel rather than by an officer of the appellant.

Moving on to the merits of the contempt of court application, it was submitted that the respondent was not in contempt of court; that the interim orders issued by Meoli, J. on 21st January 2014 did not bar the respondent from employing other persons to complete the works and rectify defects; that the value of the outstanding works was merely ***Kshs 1,776,217*** and involved only 4 out of 18 units; that the works were finished before the ruling of 30th May 2014 which set aside the ruling of 21st January 2014; that the contempt proceedings were taken out with the ulterior motive of stalling the entire project, whilst the appellant was contracted to develop only phase1; and that the appellant's real motivation was to ruin the respondent financially.

On the propriety of the discontinuation of the suit, learned counsel submitted that the High Court did not err by allowing discontinuation of the suit because the appellant, having failed to challenge the final Architect Certificate for Kshs 23,658,357.84, there was no live dispute to refer to arbitration; that HCCC No 2 of 2014 was therefore spent; that on account of the foregoing the court had properly allowed discontinuation; that upon discontinuation no application founded on the suit could survive, including the contempt of court application; and that the appellant's remedy lay in award of costs or filing of a new suit. In support of that argument the respondent relied on the decisions in ***NTARANGWI IKIARA V. COMMISSIONER OF LANDS & 2 OTHERS; EIDEN ENTERPRISES LTD. & 2 OTHERS V. PARADISE MOMBASA MARKETING LTD. & 5 OTHERS;*** and ***SUSHILABEN RAMNIKLAL SHAH V. VEGETABLE BARGAIN CENTRE LTD.***

Even the injunctive orders that had given rise to the contempt of court application were described as being in *vacuo* and irregular because they were issued in favour of the appellant when it had not filed any defence or counterclaim.

Lastly, regarding the question of payment of costs by counsel personally, Mr. Gichuhi submitted that it was his counterpart who was guilty of professional misconduct by lack of decorum and use of intemperate language in pleadings and submissions. On the authority of the decision of the Ontario Superior Court of Justice in ***GROIA V. THE LAW SOCIETY OF UPPER CANADA [2015] ONSC 686,*** counsel urged us to decline to make any order for payment of costs against him, censure the appellant's advocate for incivility manifested by rudeness, abrasiveness, sarcastic, demeaning and abusive conduct, and to dismiss the appeal with costs for lack of merit.

As we observed at the beginning of this judgment the appeal before us turns on whether or not the learned judge erred in the circumstances of this appeal by allowing the respondent to discontinue its suit. Whether the pending contempt application is competent or meritorious or whether the order of injunction upon which that application was based was valid or not has not been considered by the High Court and therefore cannot be issues before us. If this appeal succeeds, the issues raised on the merit of the application will fall rightly for consideration by the High Court. If it does not succeed, on the other hand, that will be the end of the matter. We shall therefore proceed on that footing.

As a general proposition, the right of a party to discontinue a suit or withdraw his claim cannot be questioned. There are many circumstances when a plaintiff may legitimately wish to discontinue his suit or withdraw his claim. The Supreme Court of Nigeria in ***ABAYOMI BABATUNDE V. PAN ATLANTIC***

SHIPPING & TRANSPORT AGENCIES LTD ***& OTHERS, SC 154/2002*** identified those circumstances to include where:

(i) a plaintiff realizes the weakness of his claim in the light of the defence put up by the defendant,

(ii) a plaintiff's vital witnesses are not available at the material time and will not be so at any certain future date,

(iii) where by abandoning the prosecution of the case, the plaintiff could substantially reduce the high costs that would have otherwise followed after a full-scale but unsuccessful litigation, or

(iv) a plaintiff may possibly retain the right to re-litigate the claim at a more auspicious time if necessary.

In the above case ***Justice Ibrahim Tanko Mohammad*** also addressed his mind, albeit in the context of the law of Nigeria, to the right of a party to withdraw his suit, and made observations, which we think are pertinent to the central issue before us. The learned judge stated that a plaintiff has a right to discontinue his action if he so chooses because the filing of the action does not necessarily imply that the parties have irrevocably committed themselves to resolving their dispute by litigation. In addition, a court of law cannot force an unwilling plaintiff to continue with an action because, even if the court insists that he should continue, he may well refuse to tender evidence or take any further steps in the action.

Here in Kenya, the Supreme Court has adopted a similar approach of not inhibiting a party's wish to withdraw proceedings. Thus in ***JOHN OCHANDA V. TELKOM KENYA LTD, SC APP. NO 25 OF 2014***, ***Ibrahim SCJ,*** was considering an application for leave to withdraw a notice of appeal under ***Rule 19*** of the ***Supreme Court Rules*** which allows a party, at any time before judgment, to withdraw any proceedings with leave of the Court. He stated:

"I do hold the view that a prospective Appellant is at liberty to withdraw a Notice of Appeal at any time before the Appeal has been lodged and any further steps taken. No proceedings have commenced strictly. I am also of the view that just like under the Civil Procedure Rules or Court of Appeal Rules, the right to withdraw or discontinue proceedings or withdraw a Notice of Appeal respectively ought to be allowed as a matter of right subject to any issue of costs, which can be claimed by the respondents, if any. In this particular case, there cannot be any reason for inter partes hearing and the matter can proceed ex parte as the right to withdraw cannot be taken away."

That proposition was accepted and followed by the Supreme Court in ***NICHOLAS KIPTOO ARAP KORIR SALAT V. IEBC & 7 OTHERS, SC APP. NO. 16 OF 2014*** where it was reiterated that:

"A party's right to withdraw a matter before the court cannot be taken way. 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."

Order 25 of the ***Civil Procedure Rules*** provides for withdrawal, discontinuance and adjustment of suits. As far as is relevant to this appeal, the Order provides thus:

"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."

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.

It is in that context that we understand the decisions of the Supreme Court that we have cited above. In the first scenario the right of the plaintiff to withdraw his suit cannot be taken away. It is a kind of absolute and untrammeled right. We understand the apex Court to say that even where leave of the Court is required, subject to considerations such as costs, (terms that are just) the courts ought not to stand in the way of a plaintiff who wishes to discontinue his suit. The decisions of the Supreme Court cannot be interpreted to mean, as the respondent implied, that a plaintiff has a right to discontinue his suit in sundry and all cases, even without leave where the law requires such leave. To so hold would be to reduce the requirement for leave to a mere formality, which we do not think is what was intended by the decisions of the Supreme Court or Order 25.

In the appeal before us the respondent's suit had not been set down for hearing. In fact, it could not be set down for hearing as it was instituted purely for interim relief under ***section 7*** of the Arbitration Act pending referral of the dispute to arbitration. The appellant did not file a defence, and we doubt whether it could have filed a defence without prejudicing or forfeiting its right to have the dispute referred to arbitration. (See ***KISUMUWALLA OIL INDUSTRIES LTD V. PAN ASIATIC COMMODITIES PTE LTD & ANOTHER, CA NO. 100 OF 1995*** and ***CORPORATE INSURANCE CO V. LOISE WANJIRU WACHIRA, CA NO. 151 OF 1995).***

Under normal circumstances, the respondent would have, in our view, been able to discontinue the suit or withdraw the claim without leave or hindrance if issues of violation of a court order by the respondent were not pending for determination by the court. Granted the peculiar circumstances of this appeal, we ask ourselves whether at the time of the discontinuation of the suit, the matter was still a straightforward dispute between only the appellant and the respondent so as to fall neatly within the confines of Order 25 Rule 1. From the circumstances surrounding the discontinuation of the suit while an application seeking committal of two of its directors for contempt of court and the filing by the respondent of a new suit the very next day raising exactly the same issues as those in the suit it had discontinued, the contention by the appellant that the sole purpose of the discontinuation of the suit was to defeat the contempt of court proceedings is not, with respect, an idle complaint.

Contempt of court proceedings are quasi-criminal (see ***IN RE BRAMBLEVALE LTD (1970) CH 128)***. That explains the reason why in this jurisdiction the standard of proof in contempt of court case has been held to be ***"higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt."*** **(See *MUTITIKA V. BAHARINI FARM* *(1982-88) 1 KAR, 863.*** Clearly, criminal or quasi-criminal proceedings ought not to be terminated at the exclusive instance or discretion of the party alleged to be a perpetrator of a criminal or quasi-criminal act.

There is yet an additional and more compelling reason why we are convinced that the respondent, who was alleged to be in contempt of court, was not at liberty to discontinue the suit at its own instance or

discretion. As ***Lord President Clyde*** noted way back in 1923 in ***JOHNSON V. GRANT, 1923 SC 789 AT 790***, the purpose of the law on contempt of court is not to protect the personal dignity of the judiciary or the private rights of parties or litigants. Nor is it intended to assuage the offended dignity of the court. Rather, it is intended to uphold and protect the supremacy of the law. To that extent, contempt proceedings involve much more than the private interests of the plaintiff and the defendant and implicate the public interest at large. On compliance with court orders, which the respondent is alleged to have failed to do, ***Justice Froneman*** had the following to say in the South African case of ***BURCHELL V. BURCHELL, CASE NO 364/2005***

"Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The Constitution states that the rule of law and supremacy of the Constitution are foundational values of our society. It vests the judicial authority of the state in the courts and requires other organs of state to assist and protect the courts. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law."

The uncritical application of Order 25 Rule 1 to the facts of this case resulted, in our respectful view, in an anomalous situation where the public interest in the upholding and protection the rule of law was sacrificed, without the slightest of consideration, at the altar of the respondent's alleged absolute right to withdraw its suit, even when it was alleged to have deliberately undermined the rule of law. The public interest was placed at the mercy of the respondent, because to vindicate the supremacy of the law depended on the continued existence of the respondent's suit, even if for the limited purpose of facilitating the hearing and determination of the contempt of court application alone.

Order 40 Rule 3 of the Civil Procedure Rules provides that in the event of disobedience of an injunction or breach of its terms, the court that granted the injunction may order the attachment of the property of the person in breach and may order such person to be detained in prison for a term not exceeding 6 months. Under Order 40 Rule 3(3) an application against a person alleged to be in breach of an injunction must be made in the suit in which the order of injunction was made. It follows therefore that a literal application of Order 25 Rule 1 in the circumstances of this suit would enable a party who is alleged to have undermined the rule of law to walk away scot-free by simply withdrawing the suit in which the law compels the respondent to file the application for contempt of court. As has consistently been stated by the courts, the law will not countenance a person benefiting from his wrongdoing or alleged wrongdoing. ***Lord Finlay*** expressed the principle as follows in ***NEW ZEALAND SHIPPING V. SOCIETE DES ATELIERS ET CHANTIERS DE FRANCE (1919) AC 1,*** which we agree with:

"The decisions on the point are really illustrations of the very old principle laid down by Lord Coke (Co Litt. 206b) that a man shall not be allowed to take advantage of a condition which he himself brought about."

Our conclusion that it was inappropriate to allow the respondent, at its sole discretion, to withdraw its suit in the circumstances of this case, finds favour and support from the decision of the House of Lords in ***CASTANHO V. BROWN & ROOT (UK) LTD & ANOTHER (1981) 1 ALL ER 143.*** In that case the plaintiff commenced proceedings in the UK for damages for personal injuries and obtained an order for interim payment of damages. While the proceedings in the UK were still pending, and in the hope of obtaining a higher award of damages, the plaintiff commenced another action in the USA. The defendant applied for stay of the USA suit upon which the plaintiff served a notice of discontinuance of the suit in the UK. ***Order 21 Rule 2(1)*** of the ***Rules of the Supreme Court*** allowed the plaintiff to discontinue the same without leave. The High Court struck out the notice of discontinuance on the ground that it was an abuse of the process of court. On appeal, the Court of Appeal reversed the decision and restored the notice of discontinuance.

On a further appeal, the House of Lords held that termination of legal process such as a notice of discontinuance, like any other step in the process, could be used by a party to obtain a collateral advantage which would be unjust for him to retain and could therefore be prevented by the court under its

inherent jurisdiction to prevent an abuse of the process of the court. Speaking for the House, ***Lord Scarman*** stated:

"The court has inherent power to prevent a party from obtaining by the use of its process a collateral advantage which it would be unjust for him to retain; and termination of the process can, like in any other step in the process, be so used. I agree, therefore, with Parker J and Lord Denning MR that service of a notice of discontinuance without leave, though it complies with the rules, can be an abuse of the process of the court. Was it, then, in the circumstances of this case an abuse? In my judgment, it was. A sensible test is that which both the judge ad Lord Denning MR applied. Suppose leave had been required…, would the court have granted unconditional leave? It is inconceivable that the court would have allowed a plaintiff, who had secured interim payments and an admission of liability by proceeding in the English court, to discontinue his action in order to improve his chances in a foreign suit without being put on terms, which could well include not only repayment of the moneys received but an undertaking not to issue a second writ in England."

We entertain no doubt in our minds that the withdrawal by the respondent of its suit for the purpose of defeating the contempt of court application against it was an abuse of the process of court. Under ***section 3A*** of the Civil Procedure Act the High Court's inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court is preserved. Where a party uses the right to discontinue a suit in manner that amounts to abuse of process of court or to defeat the ends of justice, the court has power to stop such abuse or undermining of justice.

We have come to the ultimate conclusion that in the circumstances of this case the High Court erred by upholding the right of the respondent to discontinue its suit without setting any terms for such discontinuance. Having so found, we do not consider it necessary to address the issue of costs of the withdrawn suit. We accordingly allow this appeal and set aside the order of the High Court dated 29th October 2014. The appellant shall have costs of this appeal.

Dated and delivered at Malindi this 9th day of October, 2015

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR.