IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, GATEMBU KAIRU & ODEK, JJ.A.)

CIVIL APPEAL NO. 33 OF 2013

BETWEEN

NTARANGWI IKIARA ….……..……APPELLANT

AND

THE COMMISSIONER OF LANDS …..... 1ST RESPONDENT

MUNICIPAL COUNCIL OF MERU …… 2ND RESPONDENT

JACKSON MUNYUA MUTUERA ……...…... 3RD RESPONDENT

(An appeal from the Ruling of Lady Justice Mary Kasango dated 28th May, 2010, and 29th September, 2011

in

HCCC No. 153 of 1995 (O.S.)

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JUDGMENT OF THE COURT

1. The appellant as plaintiff filed two civil suits at the Meru High Court against the respondents. The first case is ***HCCC No. 153 of 1995*** where the listed defendants are the respondents herein. The second case is ***HCCC No. 164 of 1995*** where the 3rd respondent herein Jackson Munyua Mutuera is the sole defendant. This second case on being transferred to Meru High Court was assigned High Court Civil Suit No. 202 of 1995.

2. In ***Civil Case No. 2002 of 1995***, the appellant sued the 3rd respondent seeking an order for eviction from Plot No. Ntima/Igoki/2224 and mesne profit on the plot. In ***HCCC No. 153 of 1995 (O.S)***, the appellant sued the 1st and 2nd respondents claiming a determination of whether the 1st and 2nd respondents wrongly and in violation of his rights acquired ***Plot No. Ntima/Igoki/2224*** which it then allocated to the 3rd respondent. The cases were fixed for hearing before the High Court and learned judge consolidated the two cases.

3. At the hearing of this appeal, learned counsel M. M. Kioga appeared for the appellant while the 1st

respondent was represented by learned counsel E. Kieti and the 2nd and 3rd respondents were represented by learned counsel M. Kariuki. The appellant reiterated the grounds of appeal and the respondents strenuously opposed the appeal.

4. Counsel for the appellant submitted that at the hearing of the suit in the High Court on 18th January, 2001, the appellant requested for adjournment to enable him file a Notice to Discontinue ***Civil Suit No. 153 of 1995***. By a Notice dated 31st January, 2011, the appellant under ***Order 25 Rule 2 (2)*** of the ***Civil Procedure Rules*** filed a notice of discontinuance of suit against the 1st and 2nd respondents in relation to ***Civil Suit No. 153 of 1995***. At the hearing on 24th May, 2011, the respondents objected to discontinuance of the suit and the learned judge directed that the objection be heard as a preliminary matter. On 8th June, 2011, the preliminary hearing was conducted and the judge delivered a ruling dated 29th September, 2011, in which he struck out with costs the appellant's notice of discontinuance of the suit. This ruling is the subject of appeal in this case.

5. The appellant filed a Notice of Appeal dated 6th October, 2011, in which he is appealing the ruling delivered on 29th September, 2011. In the memorandum of appeal filed in this matter, the appellant states that the appeal is in relation to the two rulings delivered on 28th May, 2010 and 29th September, 2011. We have examined the record of appeal and have established that there is no Notice of Appeal filed in relation to the ruling delivered on 28th May, 2010. There being no Notice of Appeal in relation to the ruling delivered on 28th May, 2010, we hold that the appellant cannot argue and challenge the ruling delivered on 28th May, 2010 in the present appeal. The memorandum of appeal and the grounds of appeal relating to the ruling delivered on 28th May, 2010, are hereby declared incompetent.

6. The pending issue now before this Court relate to the ruling delivered on 29th September, 2011, that struck out the notice of discontinuance of the ***Civil Suit no. 153 of 2010***. In striking out the notice of discontinuance, we find that the learned judge erred when he stated as follows:

> ***"Further, on my perusal of the proceedings in HCCC No. 153 of 1995 (O.S), I found that on 26th July 1995, Ong'undi J. ordered that there be a temporary maintenance of status quo in respect of parcel no. 2224, the suit property. On 14th May 1995, Etyang J. confirmed those orders and granted interlocutory orders of status quo to be maintained on the suit property until the determination of this suit. To allow the plaintiff to discontinue his suit against the 1st and 2nd defendant would be to allow the plaintiff perpetually have that order in his favour in respect of the 1st and 2nd defendants. It is mainly for that reason that the plaintiff cannot be allowed to discontinue his suit against the 1st and 2nd defendant when orders of status quo continue to subsist against those defendants and which have not been discharged to date".***

7. With due respect to the learned judge, the statement that a status quo order shall continue to subsist if a suit is discontinued is an error of law. It is trite law that when a suit is withdrawn or discontinued, any subsisting orders made in the suit collapse and come to an end with the withdrawal or discontinuation. We find that the learned judge erred in law in arriving at the decision to strike out the appellant's notice of discontinuation based on the erroneous interpretation of the effect of withdrawal of suit on a status quo order.

8. We find that the learned judge committed another error of law when he stated as follows:

> ***"The 1st and 2nd defendants could possibly have a claim in respect of the suit property which claim they would not be able to litigate upon if they were not parties in this claim. It is alleged that the government acquired the suit property. It is for this reason that I find that the objection raised by the defendant in respect to the notice of discontinuance has merit".***

9. It is our considered view that the learned judge erred in law in the above quoted statement. The record shows that the government through the Commissioner of Lands as defendant in ***Civil Suit No. 153 of 1995***, does not have a counterclaim or any other claim by way of relief. In any event, if the government has a claim

against the suit property, there is nothing to prevent the government from filing its own case against the appellant. It is an error of law to hold that the government can only ventilate its claim in this suit which was filed by the appellant when there is no counterclaim by the State.

10. Finally, we find that the respondents in this appeal have not demonstrated what prejudice they stand to suffer if ***Civil Suit No. 153 of 1995***, is withdrawn. It is our considered view that a party or plaintiff is entitled to withdraw or discontinue a suit he/she has filed subject to the payment of costs to the other party. In the present case, it is our view that costs are an adequate recompense to the respondents if Civil Suit No. 153 of 1995 is withdrawn or discontinued.

11. In totality, we find that this appeal has merit. The final order of this Court is that High Court ***Civil Case No. 153 of 1995,*** be and is hereby withdrawn in entirety against the respondents. The appellant shall pay costs of the ***HCCC No. 153 of 1995,*** to the respndents. There shall be no order as to costs in this appeal.

Dated and Delivered at Nyeri this 23rd day of June, 2014.

ALNASHIR VISRAM

….....

JUDGE OF APPEAL

M. K. KOOME

….....

JUDGE OF APPEAL

J. OTIENO – ODEK

….....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR