



**Aden & 4 others v Kiptum & 6 others; Xplico Insurance Company
(Under Statutory Management) (Interested Party) (Environment & Land
Case E050 of 2023) [2024] KEELC 4636 (KLR) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4636 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E050 OF 2023**

**NA MATHEKA, J
JUNE 13, 2024**

BETWEEN

**ISSACK NOOR ADEN 1ST PLAINTIFF
HASHIM AHMED MOHAMED 2ND PLAINTIFF
ALEX MUTWA 3RD PLAINTIFF
ABDISIRAF AHMED 4TH PLAINTIFF
HASHIM JAFFER 5TH PLAINTIFF**

AND

**GODFREY KIMAIYO KIPTUM 1ST DEFENDANT
INSURANCE REGULATORY AUTHORITY 2ND DEFENDANT
POLICY HOLDERS COMPENSATION 3RD DEFENDANT
REGISTRAR OF COMPANIES 4TH DEFENDANT
REGISTRAR OF LAND MOMBASA COUNTY 5TH DEFENDANT
CABINET SECRETARY NATIONAL TREASURY 6TH DEFENDANT
THE HON. ATTORNEY GENERAL 7TH DEFENDANT**

AND

**XPLICO INSURANCE COMPANY (UNDER STATUTORY
MANAGEMENT) INTERESTED PARTY**



RULING

1. The application is dated 15th February 2024 and is brought under articles, 40, 47, 159, 165 and 259 of *the Constitution* of Kenya, Sections 1A, 1B and 3A of the Civil Procedure Rules, Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders;
 1. That this Honourable Court does certify this Application as very urgent and dispose of it ex-parte in the first instance
 2. That the Honourable Court be pleased to set aside the notice of withdrawal of the suit dated 28TH December, 2023
 3. That the Honourable Court be pleased to give further directions as it may deem necessary.
 4. That costs be provided for. #
2. It is based on grounds that the 1st 2nd and 3rd Respondents/ Defendants have renegaded on the mutual understanding and the memorandum of understanding that resulted in the plaintiff/ Applicants file the Notice of withdrawal of the suit dated 28th December, 2023. The 1st, 2nd and 3rd Respondents/ Defendants have made all efforts and directions of Professor Njuguna Ndungu- Cabinet Secretary — National Treasury at a meeting held in his office with parties herein on 20th December, 2023 a big joke. The 1st and 2nd Respondents/ Defendants have acted in out-worst faith, subjecting the Plaintiffs/ Applicants' assets to great risk.
3. The 1st and 2nd Respondents filed grounds of opposition. They state that the application offends the provisions of the Civil Procedure Rules 2010 which provide for the discontinuance or withdrawal of a suit and does not provide for the right to reinstate a withdrawn suit or set aside a withdrawal. That once a suit is voluntarily discontinued by the Plaintiffs, it ceased to exist, thus there is no party or cause of which the suit can be pursued further. That the court is functus officio thus lacks jurisdiction to entertain the application.
4. This court has considered the application and the submissions therein. Order 25 Rule 1 & 2 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) Discontinuance (Order 25 Rule 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 of 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 counterclaims.”
5. The Petitioners state that the 1st 2nd and 3rd Respondents/ Defendants have renegaded on the mutual understanding and the memorandum of understanding that resulted in the plaintiff/ Applicants file



the Notice of withdrawal of the suit dated 28th December, 2023. That the notice of withdrawal was never served on them and the Petitioners now want the suit reinstated.

6 I find that if there is no suit there cannot be Petitioners and they have no capacity to act as such. Once they withdrew the suit herein by filing the notice, they ceased to be Petitioners. The law does not permit them to take any step in this matter after that withdrawal. The legal effect of the withdrawal therefore is discontinuance of the claim which was levelled against the Respondents in the case was withdrawn. In the case of *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 Others, SC App. No. 16 of 2014* the court was of the view that a party has the right to withdraw a claim or part thereof against another party and that right cannot be taken away from him. In the instant case, the court granted the plaintiff the opportunity to exercise his right of withdrawal of the claim against the Respondents.

7. As regards the withdrawal, under Order 25, the Court held in *Bahati Shee Mwafundi vs Elijah Wambua (2015)eKLR*, 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."

8. In arriving at the finding above, the learned Judge relied on the excerpt by Stuart Sime in his book "A Practical Approach to Civil Procedure", 9th Edition where the learned author stated:

'Notice to discontinue takes effect and brings the proceedings to an end as against each defendant, on the date it is served upon the defendant'.

9. In instant case, the Plaintiff filed a notice of withdrawal of the whole suit dated 28th December 2023 and paid for the same. The notice stated the following;

QUOTE

TAKE NOTICE that the Petitioner has withdrawn the whole instant suit against the Respondents with no orders as to costs."

10. This notice terminated the suit forever. By filing the notice, the suit ceased to exist. Put in simple language, the suit came to an end. It does not matter the means by which the suit was withdrawn, that is to say, whether by notice of withdrawal, leave of court or consent of the parties. Each of these three has one and the same effect, the suit, if withdrawn wholly as was in the instant case, ceased to be in existence. In the case of *George Mwangi Kinuthia vs Attorney General (2019) eKLR* it was held that;

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, 200. 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."



11. In the case of Priscilla Nyambura Njue vs Geovhem Middle East Ltd; Kenya Bureau of Standards (Interested Party) (2021) eKLR which cited the case of Smt. Rais Sultana Begam vs Abdul Qadir & Others where the court held;

The consequence of an act of withdrawal is that the Plaintiff ceases to be a Plaintiff before the Court. If he is the only plaintiff and withdraws the whole of the suit, the suit comes to an end and nothing remains pending before the Court, if he withdraws only a part of the suit that part goes out of the jurisdiction of the court and it is left with only the other part. This is a natural consequence of the act; a further consequence imposed by sub rule (3) is that he cannot institute a fresh suit in respect of the subject-matter. He becomes a subject to this bar as soon as he withdraws the suit. It follows as a corollary that he cannot revoke or withdraw the act of withdrawal. If he absolutely barred from instituting a fresh suit, it means that he is absolutely barred from reviving his status as a Plaintiff before the Court.

It stands reason that when on withdrawal the Plaintiff ceased to be a party and the Court ceased to have jurisdiction over the suit and thus became functus officio nothing but a fresh suit can again invest the Court with jurisdiction over it. As far as the withdrawn suit is concerned the suit is at an end and no further proceedings can be taken in it; the suit and the Plaintiff do not exist and no application such as an for revoking the withdrawal can be made in the suit or by the Plaintiff.”

12. In regard to the Procedure relevant to the facts of this case, then, the only recourse an individual who was a party to a withdrawn or discontinued suit has is to file a fresh suit if the law permits him or her. The withdrawal does not activate the bar of res judicata. In Antony Kayaya Juma vs 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. In Priscilla Nyambura Njue vs Geovhem Middle East Ltd; Kenya Bureau of Standards (Interested Party) (2021) eKLR, Justice Mativo 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.”

14. In conclusion then I concur with the submissions from the Respondents that the import of a withdrawal of a suit, means the suit ceases to exist and it can never be recalled into existence in that very withdrawn suit. Only a fresh one can be instituted if the law permits it. I find that this application is not merited and I dismiss it with costs.

It is so ordered.



DELIVERED, DATED AND SIGNED AT MOMBASA THIS 13TH DAY OF JUNE 2024.

N.A. MATHEKA

JUDGE

