



**Ahmed v Shariff Forex Bureau Co Ltd (Environment & Land Case
497 of 2018) [2024] KEELC 6683 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 6683 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 497 OF 2018**

MD MWANGI, J

JULY 25, 2024

BETWEEN

MARIAM ADAM AHMED PLAINTIFF

AND

SHARIFF FOREX BUREAU CO LTD DEFENDANT

RULING

Background.

1. The Defendant's application dated 15th March, 2024 seeks orders that the court awards costs of the entire suit to it and that the Defendant be granted leave to tax its bill of costs against the plaintiff who withdrew the suit without notifying the Defendant. The Defendant too prays for the costs of this application.
2. The application is premised on the grounds on the face of it and on the supporting affidavit of Jaffar Omar Shariff. The affidavit was sworn on 13th March, 2024.
3. The Defendant avers that the plaintiff instituted this suit on 19th November, 2018, claiming adverse possession over the suit property and an order of permanent injunction against the Defendant. The suit was accompanied by an application for a temporary injunction which the Defendant responded to.
4. The application for a temporary injunction was subsequently dismissed with costs to the Defendant. The court then scheduled the matter for hearing of the main suit on 19th April, 2021. It was on this date that the plaintiff filed a notice of withdrawal of suit which was not served on the Defendant.
5. The Defendant asserts that it had incurred costs defending the suit and was therefore entitled to costs.
6. The Plaintiff responded to the Defendant's application by way of a replying affidavit sworn on 5th April, 2024 whereby she states that she is the wife of one Mohammed Omar Shariff, one of the Directors of the Defendant company. She confirms that the matter came up for mention before Justice Obaga on



- 10th June, 2020 for directions and a hearing date was set for 19th April, 2021, in the presence of the Advocates for both parties.
7. The Plaintiff further affirms that on 19th April, 2022, when the matter came up for hearing before Justice Obaga, her Advocate informed the court that she had filed a notice of withdrawal of the suit dated 7th January, 2021 with the intention of wholly withdrawing the suit against the Defendant with no orders as to costs. The court allowed the withdrawal of the suit, after considering the same on merit. At that time, the Defendant was represented by Omboga & Company Advocates.
 8. The plaintiff asserts that the costs of a suit are not a matter of right. They are awarded at the discretion of the court. She reiterates that her notice of withdrawal was proper and having been endorsed by Justice Obaga, the withdrawal order became a final order rendering the court functus officio.
 9. The Plaintiff states that the Defendants application inviting this court to interfere with the final orders of Justice Obaga is unprocedural and amounts to an abuse of the process of court. She further points out that there has been inordinate delay in filing this application, in any event.
 10. The Plaintiff at paragraph 26 of her Replying Affidavit avers that after the withdrawal of this suit, the Directors of the Defendant company agreed to withdraw all suits pending in court with a view to amicably settling their disputes. It is therefore in the interest of justice that the application before the court be dismissed.
 11. Alongside the plaintiff's Replying Affidavit was another affidavit titled, 'affidavit in support of the Replying Affidavit to the amended application', sworn by one Mohammed Omar Shariff. The deponent alleges that he is a Director of the Defendant Company and the husband of the Plaintiff in this case.
 12. The deponent asserts that as a Director of the Defendant company he has not authorized or consented to the firm of Quincy Jesse Kiptoo & Associates being appointed to represent the company in this matter. He further states that no board resolution of the Defendant company's Board of Directors has been passed appointing the said Law Firm to represent the Company in this matter.
 13. Mohammed Omar Sheriff further depones that he entered into an agreement with his co-director Jaffer Omar Sheriff vide a deed of variation dated 14th February, 2022, whereby they agreed to withdraw all pending matters in court between themselves as Directors, between the company and any Director, and or between the company and a wife of the Director with each party bearing its own costs. That agreement according to the deponent applies to this case too.
 14. In a further affidavit deposed on 6th May, 2024, Jaffer Omar Shariff asserts that the 'affidavit in support of the Replying Affidavit' has been sworn by a non-party to the suit and is therefore bad in law necessitating its striking out. It is a document unheard of in the *Civil Procedure Act*, and the deponent has no locus standi or authority to swear any document before the court.
 15. Jaffer Omar Shariff further attaches a CR 12 form as proof that Mohammed Omar Shariff is not a Director of the Defendant Company and has not been so for the past 4 years.
 16. The deponent of the further affidavit insists that the Defendant was not notified of the withdrawal of this suit and there is no evidence to show that the Applicant was served with a mention notice for 10th June 2020 and 19th April, 2021.
 17. It is the deponent's position that this court is not functus officio. He asserts that he is not asking the court to review or appeal the judgment of Justice Obaga. He is only asking for costs, having not been



given a chance to plead for the same. The delay in making the application was occasioned by the failure of the Respondent to serve him with a mention notice or a Notice of Withdrawal of the suit.

Court's Directions.

18. The court's directions were that the application be canvassed by way of written submissions. Both parties complied and the court has had the occasion to read through the submissions.

Submissions by the Defendant/Applicant.

19. In its submissions dated 6th May, 2024, the Defendant reiterates the assertions in its supporting and further affidavit to the effect that the plaintiff withdrew the suit without any notice to it whatsoever. That explains the reason why it was not awarded costs of the main suit. There is no evidence of service of the notice of withdrawal availed before the court. The failure to serve the withdrawal notice, according to the Defendant, was calculated to deny it the chance to plead for costs. The plaintiff therefore breached the mandatory provisions of Order 25 Rule 1 of the *Civil Procedure Rules* that requires a notice of withdrawal to be served upon all the parties. Though the plaintiff was entitled to withdraw the suit, that right was subject to costs being paid to the Defendant.

Submissions by the Plaintiff/Respondent

20. In her submissions, the plaintiff too reiterated the averments in her replying affidavit. She insists that she withdrew her suit vide the notice of withdrawal dated 7th January, 2021 wholly against the Defendant and with no orders as to costs. The court after considering her application to withdraw the suit, on merit proceeded to endorse the notice of withdrawal as an order of the court.
21. The Plaintiff submits that the court became functus officio after the withdrawal of the suit. She relies on the case of *Priscilla Nyambura Njue v Geovhem Middle East Ltd* (2024)eKLR.
22. On the Defendant's allegations that it was not served with a notice of withdrawal of the suit, the plaintiff's points out there is no affidavit sworn by the Law Firm previously on record for the Defendant to confirm whether they were served with the notice or not. She further affirms that the Defendant has not offered any reasonable explanation for the inordinate delay in filing the application after the withdrawal of the suit. The delay is not excusable.

Issues for Determination.

23. From my appraisal of the Defendant's application and the response by the plaintiff, the critical issue in dispute is whether this court is functus officio. Arising from the finding on that first issue is a second issue whether the court can grant the orders sought by the Defendant. On the question whether the Defendant's Advocates ought to be granted leave to come on record in place of the previous Advocates, I find that to be a non-issue. The Advocates previously on record have consented to the current Advocates replacing them to act on the Defendant.
24. It is trite that a plaintiff has an absolute right to withdraw and or discontinue his/her suit either wholly or partially at any stage of the proceedings and before judgment. The Court of Appeal in the case of *Beijing Industrial Designing & Researching Institute v Lagoon Development Ltd* (2015) eKLR stated that: -

“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."

25. The Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others* SC.APP. No.16 of 2014 had this to say on withdrawal of a suit"-

"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."

26. Order 25 of the *Civil Procedure Rules* makes provision for withdrawal of suits under rules 1 and 2 thereof. It provides that: -

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. 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.

27. In the *Beijing Industrial Designing & Research Institute* Case (*Supra*), the Court of Appeal discussed the instances of discontinuance of suits or withdrawal of claims. The court stated as follows: -

"The first scenario arises where the suit has not been set down for hearing. In such an instance, the Plaintiff is at liberty, any time, to discontinue the suit or withdraw the claim or any part thereof. All that is required is for the Plaintiff to give notice in writing to that effect and serve it upon 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 of it thereof withdrawn by all the parties signing and filing a 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 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 leave of the court. That such leave is granted on terms suggests that it is not a mere formality."

28. From the averments in the Defendant's application and the response by the Plaintiff as well as my own perusal of the file, scenario number 3 as described in the above cited case obtains in this case. This matter had already been set down for hearing. The plaintiff filed a notice of withdrawal of the suit in its entirety and on 19th April, 2021, the court allowed the withdrawal, marking the suit as withdrawn in accordance with the withdrawal notice filed on 07.01.2021.
29. The withdrawal notice as has been reiterated by the Plaintiff sought to withdraw the suit wholly with no orders as to costs. The court granted leave for the withdrawal of the suit in accordance with the said withdrawal notice meaning, without costs.
30. The import of this grant of leave to the Plaintiff to withdraw her suit without costs is that the court already pronounced itself on the issue of costs. The court in exercising its discretion allowed the withdrawal without costs.
31. I need to emphasize that the court has the discretion on the issue of costs in any suit. As rightly put by the Plaintiff in her submissions, the award of costs is not automatic but is subject to the discretion of the court.
32. Retired Justice Kuloba in his book, *Judicial Hints on Civil Procedure*, 2nd edition, (Nairobi) (Law Africa), 2011, at Page 94 states that: -

"Costs are the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of the law for the time being in force, but they must follow the event unless the court has good reason to order otherwise."
33. This proposition is in tandem with the provisions of Section 27 of the *Civil Procedure Act* which gives the court the discretion to determine by whom and out of what property and to what extent such costs are to be paid.
34. In this case, the court exercised its discretion on costs and granted leave to the plaintiff to withdraw the suit in accordance with her withdrawal notice and further determined that the suit be marked as withdrawn with no orders as to costs.
35. I must clarify that the order that the suit be marked as withdrawn with no orders as to costs does not in any way affect the earlier order granting the Defendant the costs of the Notice of Motion dated 19th November, 2018. The Defendant may proceed to tax the costs for that application only.
36. Upon rendering itself on the issue, and the suit having been withdrawn, the court became functus officio. The court had performed all its duties in this particular case. As the Supreme Court of Kenya stated in the case of *Raila Odinga v IEBC & 3 others*, Petition No.5 of 2013;

"According to the doctrine (functus officio) a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise these powers only once in relation to the same matter. The principle is that once such a decision has been given it is, subject to any right of appeal to superior body or functionary, final and conclusive."
37. The purpose of the doctrine of functus officio is to provide finality in litigation. Any challenge to the decision of the court must be taken to a higher court, if that right is available.



38. The Court of Appeal in *Telkom Kenya Ltd v John Ochanda* (2014) eKLR, pointed out the various exceptions to the doctrine of functus officio to include an application for stay, an application for accounts, an application to correct a decree, an application for execution, including garnishee proceedings, and applications under Section 34 of the *Civil Procedure Act*.
39. The Defendant's application does not fall under any of the above exceptions. The Defendant was categorical that his was not an application for review of the orders of Justice Obaga. It is therefore unmerited. I accordingly dismiss the application with costs to the Plaintiff/Respondent.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25th DAY OF JULY, 2024

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Mwangi h/b for Mr. Kinaro for the Plaintiff/Respondent

N/A for the Defendant/Applicant

Court Assistant: Yvette

M.D. MWANGI

JUDGE

