



**Gisege & another (Suing as administrators of the Estate of Dorica Ondieki Gisege)
v Chairman School Management Committee Daraja Mbili Mixed Secondary School
(Environment & Land Case 56 of 2016) [2024] KEELC 5412 (KLR) (16 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5412 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 56 OF 2016**

**M SILA, J
JULY 16, 2024**

BETWEEN

**WILLIAM GISEGE & BARCLAYS NYANDUSI GISEGE (SUING
AS ADMINISTRATORS OF THE ESTATE OF DORICA ONDIEKI
GISEGE) PLAINTIFF**

AND

**THE CHAIRMAN SCHOOL MANAGEMENT COMMITTEE DARAJA MBILI
MIXED SECONDARY SCHOOL DEFENDANT**

RULING

(Application to reinstate a withdrawn suit; whether withdrawn suit can be reinstated; Order 25 Civil Procedure Rules; court of opinion that it will require a compelling case to have a withdrawn suit reinstated; application dismissed)

1. The application before me is that dated 24 November 2023 filed by the plaintiffs. The plaintiffs seek an order to have their suit, which was marked as withdrawn, reinstated. The application is opposed.
2. To put matters into perspective, this suit was commenced by Dorica Ondieki Gisege (now deceased) though a plaint filed on 11 March 2016 by the law firm of M/s Ochoki & Company Advocates. In her plaint, the original plaintiff averred to be the proprietor of the land parcel Kisii Municipality/Block III/581 having been issued with a certificate of lease on 18 December 2013. She complained that the defendant, a public school, had trespassed into her property. In her suit she wished to have the defendant evicted from the suit land and permanently restrained from it. She subsequently amended the plaint on 6 June 2016 to add a prayer for compensation for the value of the land.
3. The defendant entered appearance through the State Law Office and filed defence. The defendant denied trespassing into the plaintiff's land and contended that the land is public land planned and set



aside for a public school. The defence was later amended to add a counterclaim. In the counterclaim the defendant inter alia asked for nullification of the title of the plaintiff and the plaintiff to be permanently restrained from the land.

4. On 21 March 2019, the original plaintiff appointed the law firm of M/s Otwal & Manwa Associates Advocates to take over from the law firm of M/s Ochoki & Company Advocates. On the same day, the new firm filed an application dated 18 March 2019 under certificate of urgency seeking to withdraw the suit. That application was based on grounds that on 17 July 2017, the National Land Commission had proceeded to revoke the plaintiff's title through Gazette Notice No 6862 upon which the plaintiff proceeded to file Kisii ELC Judicial Review Case No 6 of 2017. The supporting affidavit to the said application was sworn by Dorica Ondieki Gisege. She deposed that since she no longer has ownership of the land, she wished to withdraw the suit, so that she can continue challenging the decision of the National Land Commission in the judicial review suit.
5. The application first came up before Mutungi J on 8 April 2019, when Ms. Ochwal, learned counsel for the defendant, stated that she was opposed to the withdrawal of the suit since her client had a counterclaim. Mr. Manwa asked for time to seek further instructions. The court adjourned the application to 20 May 2019. On the said day, Mr. Godia, holding brief for Mr. Manwa, stated that Mr. Manwa would wish to proceed with his application to withdraw the plaintiff's suit. The court (Mutungi J) held as follows :

“As the plaintiff is entitled to withdraw a suit at any stage of the proceedings, the court will allow the plaintiff to withdraw his suit against the defendants. The defendants have a counterclaim against the plaintiff and will therefore be at liberty to prosecute the counterclaim. The costs of the withdrawn suit will await the determination of the counterclaim.”
6. Subsequently the matter was mentioned a couple of times and listed for hearing on 30 June 2020. On that day, there was no appearance for the plaintiff, but it was mentioned by counsel for the defendant that the matter cannot proceed as the original plaintiff had died. The suit was fixed for mention a couple of times until an application dated 10 May 2022 was filed for substitution of the deceased original plaintiff. The application was not opposed and was allowed on 2 June 2022 by Onyango J. The court further directed that the plaint be amended within 7 days. The plaint was duly amended indicating that William Gisege and Barclays Nyandusi Gisege are now suing on behalf of Dorica Ondieki Gisege (deceased). The matter was then fixed for hearing before me on 17 May 2023.
7. On that day, Mr. Manwa was present for the plaintiff and he stated that he filed an amended plaint on 13 May 2023. I pointed out to him that 13 May 2023 was a Saturday and I could not see any amended plaint in the file. I adjourned the matter to 6 July 2023 for counsel to confirm the position. On 6 July 2023, Mr. Manwa now stated that he filed and served the amended plaint on 19 May 2023. I inquired on what basis an amended plaint was filed since the suit was already withdrawn on 20 May 2019 and the answer I received from Mr. Manwa is that he was not aware of the withdrawal of suit. I held that since the plaintiff had already withdrawn the suit on 20 May 2019, the order allowing amendment was an error apparent on the face of the record as there was no basis upon which to direct an amendment of the plaint when the plaintiff had already withdrawn the suit. I proceeded to strike out the amended plaint filed on 19 May 2023 and found that the matter is only awaiting hearing of the counterclaim which I fixed for 28 November 2023. Prior to that date, this application was then filed.
8. The supporting affidavit is sworn by William Gisege, one of the personal representatives of the estate of the original plaintiff. He avers that he took over the suit upon substitution and complied with the court's directions on amendment of the plaint. He adds that he was ready to proceed for hearing of the



case. He states that unknown to him and ‘to his amusement’ is the fact that his case has been previously withdrawn ‘despite filing applications, pleadings as from the year 2020, and proceeding thereto’(sic). He avers that despite his advocate attempting to address the court to explain that the suit has never been withdrawn, ‘the court declined the explanation and directed that the order of amendment ensuing from the application was an error on the face of the record.’ He deposes that ‘the said error and/or mistake is not intentional on the part of the plaintiff and the withdrawal is heavily prejudicial to its case as the Honourable (sic) had previously directed in Kisii ELC Judicial Review No 6 of 2017 that parties seek to protect their interest in this suit.’ He has annexed a copy of the ruling in Judicial Review No 6 of 2017 which I observe was made on 27 July 2018. He avers that he has an arguable case that should be heard on merits.

9. The application is opposed by the replying affidavit of Lucia Gwaro, the current Principal of Daraja Mbili Mixed Secondary School. She deposes that the original plaintiff filed the application dated 18 March 2019 seeking to withdraw this suit and the said application was allowed. She adds that the court ordered the striking out of the amended plaint filed on 19 May 2023 as the suit had already been withdrawn. She states that the orders of 20 May 2019 and 6 July 2023 (striking out the amended plaint) have not been set aside.
10. I directed both counsel for the applicants and respondent to file submissions towards the application and I have seen the submissions of Mr. Wabwire, learned State Counsel, for the respondent, and Mr. Manwa for the applicants. On the part of the applicants, it was submitted that the court should exercise its discretion under Section 3A of the Civil Procedure Act. It was submitted that the plaintiff applied to withdraw the suit so as to pursue the judicial review matter. He referred to the ruling of Mutungi J in the judicial review suit where he stated that the issues in the case ought to be adjudicated in the substantive suit. He referred me to the case of Beijing Industrial Designing & Researching Institute v Lagoon Development Limited [2015] eKLR on principles considered under Order 25 in withdrawing a suit. He submitted that the court has discretion to reinstate the suit so as to allow the plaintiffs fully present their case.
11. On his part, Mr. Wabwire submitted that once a suit is withdrawn it cannot be reinstated. He referred me to the case of Priscila Nyambura Njue v Geovhem Middle East Limited & another (2021) eKLR and Charles Kiptarbei Birech v Paul Waweru Mbugua & another (2021) eKLR. He further submitted that the order of withdrawal was by consent and he referred me to several authorities regarding the setting aside of consent orders. He added that if the application is for review, the threshold for review under Order 45 has not been met and he also referred me to various authorities touching on review.
12. I have considered all the above.
13. Before I go too far, let me address a little matter in the supporting affidavit of Mr. Gisege. It is curious that he deposes that he finds it ‘amusing’ that despite the case having been withdrawn he has continued filing documents in the matter as if the case was alive. It was him filing documents on a withdrawn suit and I am in fact the one who is bemused that a party can continue filing documents on a suit that has already been withdrawn. Secondly, is the deposition that the court ‘declined’ to hear his advocate’s explanation that the suit had not been withdrawn. This deposition is completely unfortunate and uncalled for. This court never declined to hear any explanation by counsel for the applicants on the withdrawal of the suit. It did. And what this court pointed out to counsel is that it is on record that the plaintiff withdrew the suit on 20 May 2019 before Mutungi J and as such the plaintiff no longer had any suit pending before court. The record concerning withdrawal of the suit speaks for itself and I am at a loss as to what explanation could be presented that the case has not been withdrawn, when the record is stark, that the suit has been withdrawn. I thought it important to set the record straight on that before I embark on the application itself which I now do.



14. What is before me is an application to reinstate a withdrawn suit. A party is at liberty to withdraw a suit as provided for under Order 25. The whole of Order 25 is drawn as follows :

Order 25 : Withdrawal, Discontinuance and Adjustment of Suits

1. Withdrawal by plaintiff [Order 25, rule 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 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.

3. Costs [Order 25, rule 3]

Upon request in writing by any defendant the registrar shall sign judgment for the costs of a suit which has been wholly discontinued, and any defendant may apply at the hearing for the costs of any part of the claim against him which has been withdrawn.

4. Stay of subsequent suit [Order 25, rule 4]

If any subsequent suit shall be brought before payment of the costs of a discontinued suit, upon the same, or substantially the same cause of action, the court may order a stay of such subsequent suit until such costs shall have been paid.

5. Compromise of a suit [Order 25, rule 5]

(1) Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith.



- (2) The Court, on the application of any party, may make any further order necessary for the implementation and execution of the terms of the decree.

15. In our instance, the original plaintiff did not file a notice to withdraw suit pursuant to Rule 1. What she did was to file a formal application by way of a notice of motion said to be brought under “Order 25” without specifying the actual rule under which she was applying. However, I observe from the record that the matter had been given a hearing date, and I believe therefore, that the application to withdraw was being made under Rule 2 (2) which requires the leave of court for a party to discontinue a suit. The motion was dated 18 March 2019 and was filed on 21 March 2019. I have already mentioned that in that application the applicant stated that she wished to withdraw the case so that she may prosecute her judicial review suit to quash the gazette notice whereby her title to the suit land was cancelled. The judicial review motion was filed on 16 January 2018. The applicants herein have attached the outcome of the judicial review motion and I observe that the said judicial review motion was dismissed on 27 July 2018 by Mutungi J. In it, he held that the issues raised are best canvassed in a full suit and since the ex parte applicant had a pending suit (this suit) then it is advisable that she prosecutes the suit on merits rather than proceeding with the judicial review motion. It will be noted that by the time this ruling was being made, the application to withdraw suit had not yet been filed. It was filed on 21 March 2019 after Mutungi J had already dismissed the judicial review motion. On 8 April 2019, Mr. Manwa was in court for the plaintiff and he asked for time to seek instructions. On 20 May 2019, Mr. Godia held his brief and stated that Mr. Manwa wishes to proceed with his application to withdraw suit. The court did not see why it should stand in the way of the plaintiff withdrawing the suit and indeed mentioned that the plaintiff is entitled to withdraw suit at any stage of the proceedings.
16. What is important in our case is that the suit was withdrawn after the judicial review motion had already been dismissed. In essence, what Mutungi J held was that he will not proceed with the judicial review suit since the plaintiff already had a pending case where her issues could be addressed. Thereafter the plaintiff chose not to proceed with the case (this case) but instead withdrew it when she was very much alive to the ruling of the court dismissing her judicial review motion and the implications thereof. It would have been a different matter if the plaintiff had first withdrawn the suit then the court in the judicial review motion sends her back here to prosecute her case. The applicants herein cannot therefore use the ruling of 27 July 2018 dismissing the judicial review motion to their advantage.
17. It is apparent therefore that for reasons best known to her, the original plaintiff, despite having lost in the judicial review suit, made the decision to withdraw the suit herein. In essence she made a choice not to proceed with it. Can her successors now be allowed to change that? I do not think so.
18. First, to allow the application would be to go against the wishes of the original plaintiff of whom the applicants represent. The original plaintiff, when she was alive, already made the choice not to proceed with the case. To try and change that would be to go against the wishes of the estate of the original plaintiff.
19. Secondly, it is not routine to reinstate a withdrawn suit. In his submissions, Mr. Wabwire urged that a withdrawn suit cannot be reinstated and he cited the case of *Priscilla Nyambura Njue v Geovhem Middle East Ltd & another* (Nairobi HCCC No 415 of 2016) [2021] eKLR and *Charles Kiptarbei Birech v Paul Waweru Mbugua & another* [2021] eKLR. In the case of *Priscilla Nyambura Njue v Geovhem Middle East Ltd & another*, an application to reinstate a withdrawn suit was made. Mativo J, dismissed the application stating as follows :



24. 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. Certain consequences arise from the withdrawal which prevent a party from revoking the withdrawal. The withdrawal is complete or effective as soon as it takes place. The right to revoke the withdrawal can only be allowed by the legislature by expressly providing so in the rule and not by the courts. In the same vein, the rules do not confer the court with power to reinstate a suit once withdrawn. Order 25 Rule 1 provides that the withdrawal shall not be a defence to any subsequent action. Before me is not a subsequent action, but the same suit.
20. In the case of *Charles Kiptarbei Birech v Paul Waweru Mbugua & another*, Nyagaka J, also declined to allow an application to reinstate a withdrawn suit. In this case, the plaintiff filed suit in the year 2012 for the eviction of the defendant from a certain parcel of land. On 3 December 2013, a consent was filed by the parties withdrawing the suit. It however appears that despite this consent the matter continued to be mentioned in preparation for trial and was at some stage even listed for dismissal for want of prosecution. It was on 24 July 2018 that the court's attention was brought to the consent that was filed withdrawing the suit. On 11 December 2020, the plaintiff filed an application to set aside the consent withdrawing the suit and have it reinstated for hearing. The good Judge was of the following opinion :
19. Of importance to note is that the Rules that provide for the discontinuance or withdrawal of a suit do not provide for the revocation of withdrawal notice or the setting aside of the suit. And once a suit is discontinued in whichever manner howsoever, it ceases to exist. A party cannot breathe life into it by whichever means, not even by a consent setting aside the orders of withdrawal. This is because, once a suit is withdrawn there is no party that exists in relation to that suit. The existence of a suit can be equated to the existence of light from a bulb: it only exists if there is an electric current and the gadget known as "bulb". Once the either the light or the bulb cease to be in contact, the light goes out and in its place is darkness. The only way to get light again in that bulb is to supply current to it. The light that comes into existence again is not the continuation of the one that went out: it is new.
26. In instant case, the Plaintiff and the 2nd Defendant entered into a consent withdrawing the suit and filed it and it was recorded as such. The same terminated the suit forever. By their act, 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. A suit is not matter which science teaches that it cannot be created not destroyed. A suit is "destroyed forever" by its withdrawal.
30. In conclusion, I am of the view that the import of a withdrawal of a suit, by whichever of the three options mentioned in paragraph 26 above seals the fate of that suit or the part of that suit that is withdrawn forever in so far as that suit is concerned. Its life goes into oblivion: a bottomless pit from where it can never be recalled into existence in that very withdrawn suit. Only a fresh one can be instituted if the law permits it.



21. In arriving at the above decision, the court stated that it was persuaded by the dictum in the case of *George Mwangi Kinuthia v Attorney General* [2019] eKLR which held:

“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.”

22. It would appear that the judges in the two decisions above held the view that once withdrawn a suit cannot be reinstated. I would hesitate to say that there can be no instances whatsoever where a court cannot utilise its discretion to reinstate a withdrawn suit. However, such instances will need to be extremely compelling. For example, I would believe that if a party shows that the withdrawal is a fraud, or was occasioned by a genuine mistake, then the court may be moved to exercise its discretion to set aside the order of withdrawal. The conduct of the parties after the withdrawal is also one to consider, for the defendant may very well have moved on, in the knowledge that the matter against him is a thing of the past and it may be unfair to drag him back into litigation. The circumstances, as I have said, will need to be extremely compelling.

23. In our case, I see no fraud. Neither do I see any mistake. The original plaintiff had an application to withdraw suit which she herself opted to prosecute after the ruling in the judicial review suit had been made. She could as well have opted to withdraw the application if she wished to continue with the suit in light of the decision dismissing her judicial review matter but she did not do so. It was her prerogative to withdraw the suit. I am not persuaded that the administrators can now turn around to set aside that order of withdrawal that was made consciously by the original plaintiff.

24. The long and short of it is that I am not persuaded as to the merits of this application and it is hereby dismissed with costs. The suit of the original plaintiff remains withdrawn pursuant to the order made by Mutungi J on 20 May 2019. Following that withdrawal, there was no plaint capable of amendment by the legal representatives of the original plaintiff and the purported amended plaint filed on 19 May 2023 remains struck out as ordered on 6 July 2023.

25. Orders accordingly.

DATED AND DELIVERED THIS 16 DAY OF JULY 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

