



**Muchira v Lifebank Technology and Logistics Ltd (Cause
E376 of 2022) [2023] KEELRC 1077 (KLR) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1077 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E376 OF 2022
AN MWAURE, J
APRIL 28, 2023**

BETWEEN

EDWIN MAGAI MUCHIRA CLAIMANT

AND

LIFEBANK TECHNOLOGY AND LOGISTICS LTD RESPONDENT

RULING

1. The Respondent applicant by the Notice of Motion dated the 25th July 2022 is seeking for the following orders;
 - a. That the honourable court be pleased to review, rescind, vacate vary or set aside its orders made on the 12th July, 2022 and issued on the 18th July 2022, striking off the Notice of Withdrawal dated the 14th June 2022.
 - b. Costs of the application.
2. It is deposed in the affidavit supporting the Motion that the Court decreed that the Notice of Withdrawal by the claimant dated 14/6/2022 be struck off, and that the subject suit proceed to hearing. That the said orders were issued without notification, audience and / or participation of the Respondent herein, whom was not aware, neither was it served with a mention notice to attend the honourable court on the 12th June 2022, by the claimant and /or his advocates on record.
3. It is further stated that the orders are as against the Respondent who had marked the matter as settled upon receipt of the claimant's notice of withdrawal and is now being called upon to take a hearing date, without being accorded necessary time or opportunity to respond to the claimant's claim and more so prior to the conduct of pre-trial conference, which in all respects may occasion a miscarriage of justice. That there are manifest material and/or statutory inconsistencies resulting to the court's order of the 12th June 2022, thus sufficient reason to move this court to urgently review it's hitherto issued orders.



4. The Respondent/claimant in the replying deposition by Martin Muchiri, advocate says that at all material times the firm did not have instructions and or the intention to withdraw the suit, but to withdraw a settled matter they were having conduct of in the small claims court on behalf of the claimant.
5. It is deposed that the claimant had previously introduced his business associate Edward Muthui t/a Blue line Auto Solutions and instructed them to pursue a claim on their behalf which they did by instituting SCCCOMM No. E 3382 of 2022 Edward Muthui T/A Blueline Auto Solutions v Kenneth Kipkorir. That upon communication of payment of the outstanding amount in the matter they set out to file a notice of withdrawal in the matter but in the process inadvertently filed the same in this matter.
6. The matter was then placed before the Deputy Registrar on the 27th June 2022 who directed that the matter be placed before the judge for directions on the 12th July 2022. The advocate says he did appear before this Court on that date and addressed the issue of withdrawal of the claim. The court allowed the application and struck off the notice of withdrawal.
7. It is deposed that the impugned orders do not in any manner prejudice the applicant and given the Respondent/claimant would still be at liberty to file a fresh suit it would be wastage of court's time to allow the application.
8. The Applicant in the submissions relies on the case of *Priscilla Nyambura Njue v Geovhem Middle East Ltd; Kenya Bureau of Standards (Interested Party)* [2021] eKLR where the court held that: '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 the 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 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 in the rule and not by the courts. In the same vein, the rules do not confer the court with the power to reinstate a suit once withdrawn.
9. The Respondent/applicant says that it is evident that the suit dated 6th June 2022 ceased to exist at the date of filing and subsequent notice of withdrawal dated 14th June 2022 was ineffectual, null, void and of no consequence thereunder. The Applicant contends that the suit ceased to exist on the day of withdrawal and the court cannot be moved when it is functus officio. The applicant says that the claimant took a whole month to realize that he had erroneously filed the withdrawn suit. The applicant further submitted that the court lacked the jurisdiction to hear the claimant *ex parte* on the 12th July 2022 and neither did it have any jurisdiction to reinstate the suit *vide* the orders of 18th July 2022 as the suit ceased to exist.
10. The claimant/Respondent argued that the court ought to strike out the supporting affidavit sworn in support on the Notice of Motion for being defective having been sworn by a party who had no personal knowledge of the facts in contention and thus is incapable of proving the averments made therein. The claimant relied on the case of *Kenya Power & Lighting Company Limited v Julius Wambale & Another* 2019 eKLR where the court struck out the supporting affidavit that had been sworn by a legal officer from CIC General Insurance Company who had been a stranger to the suit in the lower court and in the intended appeal.



11. The claimant also relied on the case of *Simon Isaac Ngui v Overseas Courier Services (k) Ltd* [1998] where the court citing the decision in *Kisya Investments Limited and Others v Kenya Finance Corporation Ltd* where the court said that ‘The applicant’s counsel has deposed to contested matters of fact and said that the same are true within his knowledge, information and belief. It is not competent for a party’s advocate to depone to evidentiary facts at any stage of the suit.
12. The claimant argues that given that the supporting affidavit is defective, having been sworn by a party who was not privy to the facts deposed, the Notice of Motion dated 25th July 2022 ought to be struck out as it has been left without any legs to stand on there being no other affidavit sworn out of the aforesaid Notice of Motion. The claimant further relied on the case of *Condominium Plan No. 0724494 v Efuwape*, 2012 ABQB 355 for proposition that where the limitation period has accrued, a discontinuance can be withdrawn only if there are special circumstances such as where plaintiff discontinued the wrong action or where the defendant breached conditions upon which the discontinuance was given.

Determination

13. It is common place that a claimant at Common law has the right to withdraw or discontinue his claim at any time prior to the judgment being given in the case. This right has a statutory footing under Order 25 of the *Civil Procedure Rules*. 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.
 - (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.
14. In *Antony Kayaya Juma v Humprey Ekesa Khaunya & Another* the court held that:

“I have already pointed out that the suit was withdrawn pursuant to provisions of order XXIV rule 2 (2) of the *Civil Procedure Rules*, though the Plaintiff did not cite the above provisions when making the application. 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.”
15. In *Priscilla Nyambura Njue v Geovhem Middle East Ltd; Kenya Bureau of Standards (Interested Party)* [2021] eKLR the High Court held that:

”The wisdom flowing from the above references is; what can the High Court do, in exercise of its inherent jurisdiction, to achieve the desirable justice and practicality in the prayers sought in an application which the law does not specifically provide for” In this respect, it



must be mentioned at the outset the inherent powers of the court are not an open licence for the court's exercise of unlimited discretion. It is invoked to effect procedural fairness between the parties where a statute falls short of doing so or where there is a gap in the law. The inherent power claimed is not merely one derived from the need to make the court's order effective, and to control its own procedure, but also to hold the scales of justice where no specific law provides directly for a given situation. As stated above, Order 25 provides in clear terms three circumstances upon which a Plaintiff can withdraw his suit. Had Parliament desired a reinstatement, it could have provided so in clear terms.

16. In *Bahati Shee Mwafundi v Elijah Wambua* 2015 eKLR the High Court held that:

“In this case the Respondent had notice of the withdrawal or discontinuance of this appeal before seeking to set aside the consent before Kwale Court. That notice of the withdrawal or discontinuance had the effect of terminating this appeal. The Appeal having terminated it cannot in my humble view be reinstated or resuscitated.”

17. The court has considered the applicants submissions dated 17th October 2022 as well as claimants submission also dated 16th November 2022.

18. The court was presented with an application in form of a letter dated 15th June 2022 where claimant averred they had withdrawn Case No E376 of 2022 erroneously as they intended to withdraw another matter in the small claims court.

19. The court proceeded to make an order to strike off the said notice of withdrawal.

20. The court in hindsight made an erroneous order of striking the withdrawal notice and hence reinstating the suit which was not proper to do. The court genuinely was of the view the claimant had withdrawn another suit in the small claims court. But from what is in the letter of the claimant he had withdrawn this particular case and so was erroneously reinstated.

21. Section 33 of *Employment And Labour Relations Court (procedural Rules)* 2016 a court can review its decree or order in various circumstances and one of them being discovery of new matter which was not known at the time of making the same. A review can also be justified where there is some mistake or error apparent on the face of the record. The court is persuaded there was a mistake which was being presented with information that there were two separate cases but in essence it was one and the same case.

22. The claimant has raised an issue that Mr Nicholas Muturi the advocate who deponed the supporting affidavit was new in the case and so was not a party to the suit. The court finds that allegation is erroneous because there was no evidence produced as to when the advocate took over the conduct of the matter. Furthermore what he was deponing was on matter of law not facts and so there is no conflict that he was deponing to facts that were not within his knowledge.

23. In section 34 of the same *Employment And Labour Relations Court Procedural Rules* the court can even correct its mistake even on its own motion.

24. Flowing from the above the court is inclined to grant the order for striking off the notice of withdrawal dated the 14th June 2022 and granted on 12th July 2022. The suit dated 6th June 2022 is therefore withdrawn accordingly.

25. Each party will meet their costs of this application.



DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 28TH DAY OF APRIL, 2023.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

