



Bawan Limited v County Council of Kwale & another (Environment & Land Case 522 of 2011) [2024] KEELC 13488 (KLR) (20 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13488 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 522 OF 2011
LL NAIKUNI, J
NOVEMBER 20, 2024**

BETWEEN

BAWAN LIMITED PLAINTIFF

AND

COUNTY COUNCIL OF KWALE 1ST DEFENDANT

KINYUA AND COMPANY AUCTIONEERS 2ND DEFENDANT

RULING

I. Introduction

1. This Honourable Court was called upon to determine the oral application made by the Plaintiff on 3rd October, 2024 to withdraw its case against the 1st Defendant without any orders to costs. The Counsel for the Plaintiff Mr. Hassan, intimated to the Court that he had discussed with his client and as the cause of action did not exist anymore they had agreed on the withdrawal of the suit against the 1st Defendant.
2. Although the application for the withdrawal of the suit was accepted by the Consent of parties, but the Learned Counsel for the 1st Defendant, Mr. Kazungu vehemently pressed on being awarded costs. Of course, the issue of “order as to costs” is for the determination of the Court, and as it looked out the defendant objected to the “no order as to costs” provision and claimed his costs of the withdrawn suit, which objection is the subject of this ruling

II. Analysis and Determination

3. I have carefully read and considered the pleadings herein and the relevant provisions made by the by the Learned Counsels. In order to arrive at an informed decision, the Honorable Court has framed the following issues for determination.



- a. Whether in the circumstances of this case, the Plaintiff's Notice of Withdrawal of the claim and whether the Plaintiff's withdrawal of the Plaintiff should be subject to payment of costs to the 1st Defendant.

ISSUE No. a). Whether in the circumstances of this case, the Plaintiff's Notice of Withdrawal of the claim and whether the Plaintiff's withdrawal of the Plaintiff should be subject to payment of costs to the 1st Defendant.

4. This court is a court of law and justice. In determining the matters before it, it is guided by *the Constitution* of Kenya, the provisions of law and equity and the principles of natural justice. Given these, the Court is enjoined to give effect to the overriding objective both Sections 3(1) of the Environment and *Land Act*, No. 19 of 2011 and 1A (1) of the *Civil Procedure Act*, that it to say, to facilitate "... the just, expeditious, proportionate and accessible resolution of disputes". That has to be done without procedural technicalities, as contemplated in Article 159 (2) (d) of *the Constitution* of Kenya 2010.
5. The provision of Order 25 of the *Civil Procedure Rules*, 2010 provides for withdrawal of suits as follows: -
 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."
6. The right to withdraw a suit under Order 25 Rules 1 and 2(1) is not fettered by any conditions and a party who intends to withdraw their suit, has an absolute right to do so. However, under Order 25 Rule 2 (2), withdrawal of a suit requires permission of the court and the withdrawal may be subject to terms that the court considers just, including payment of costs or filing of any other suit.
7. In the case of "Nicholas Kiptoo Arap Korir Salat – Versus - IEBC & 7 Others, Supreme Court Application No. 16 of 2014", the Supreme Court stated as follows:-

"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."
8. Additionally, in the case of "*Beijing Industrial Designing & Researching Institute – Versus - Lagoon Development Limited* [2015] eKLR", the court of appeal stated as follows:-

"As a general proposition, the right of 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 vs. 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 relitigate the claim at a more auspicious time if necessary.
9. From the court record it is not in dispute that the suit herein was withdrawn by consent of both counsel on record for the parties herein. A discussion on the law relating to withdrawal of suits is apt so as to analyze its import and that of the consent that withdrew the suit herein. 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.
10. 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 it not the continuation of the one that went out: it is new.
11. 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 – Versus - Humprey Ekesa Khaunya & Another* [2004] e KLR", 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.”
12. The legal effect of the withdrawal therefore is discontinuance of the claim which was levelled against the Defendants, or a Plaintiff in the case of a counterclaim withdrawn or discontinued. In the case of "*Nicholas Kiptoo Arap Korir Salat – Versus - 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 defendants.
13. 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’.
14. 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. It is replica of switching off the electricity and all the bulbs go off.

15. Be that as it may, when I suit is withdrawn against a party, Costs follow. Costs of a suit or other proceedings are always in the discretion of the Court in terms of section 27 of the Civil Procedure Act, which provides as follows:

“27. Costs

1. Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
 2. The Court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”
16. It is a settled principle of costs that costs follow the event, meaning that the successful party takes the costs unless the Court for sufficient reason orders otherwise. In considering this exercise of the discretion, the Court may properly take into account the length of time that the suit or proceedings has been going in Court before the withdrawal or other determination; the nature of the relief sought; the steps taken in the proceedings; the stage of hearing of the suit or proceedings; the need to promote access to justice by indigent suitors; and other sufficient reason in the interest of justice.
17. I do not see, in terms of the wording of section 27 of the Civil Procedure Act, a “good reason” to order against the general principle that “costs shall follow the event.” Once withdraw the suit wholly, the suitor must as a general rule pay to the Defendant the costs of the suit. I do not see a good reason in this suit to depart from this general rule.
18. Suffice it to say, just immediately prior to the Court on the date scheduled for making its pronouncement, the parties informed Court that they had mutually already arrived at a consent. They indicated their efforts to reach Court before it spent resources on peening down the ruling but in vain. All said and done, the parties indicated that they had agreed that the withdrawal of the suit was to be without any orders to costs. Clearly, the Court was bound by the parties wishes. Thus, the matter rested there.

III. Conclusion and Disposition

19. In long analysis, the Honorable Court has carefully considered, weighed the conflicting parties’ interest as regards to balance of convenience and the prevailing circumstances in the matter. Thus, in a nutshell, I proceed to order the following:-
- a. That by the consent of the parties, there shall be withdrawal of suit with no orders to costs.
 - b. That the suit stands withdrawn pursuant to the provisions of Order 25 (1) & (2) of the Civil Procedure Rules, 2010.



It is so ordered Accordingly.

RULING DELIVERED THROUGH THE MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 20TH DAY OF NOVEMBER 2024.

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HON. MR. JUSTICE L. L. NAIKUNI
ENVIRONMENT AND LAND COURT AT
MOMBASA

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. Hassan Advocate for the Plaintiff.
- c. Mr. Kazungu Advocate for the 1st Defendant.
- d. No appearance for the 2nd Defendant.

