



Oluta (Substituted with Leonard Wafula Makhanu) v Nandieki & 3 others (Environmental and Land Originating Summons 67 of 2015) [2024] KEELC 7375 (KLR) (7 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7375 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 67 OF 2015**

BN OLAO, J

NOVEMBER 7, 2024

BETWEEN

FRANCIS BEDE JUMA OLUTA (SUBSTITUTED WITH LEONARD WAFULA MAKHANU) PLAINTIFF

AND

FRANCIS WESONGA NANDIEKI 1ST DEFENDANT

JAMES OKELLO NANDIEKI 2ND DEFENDANT

NYONGESA NANDIEKI EUGINE 3RD DEFENDANT

GEORGE CHARLES NANDIEKI 4TH DEFENDANT

RULING

- Francis Bede Juma Oluta(the Plaintiff and later substituted with Leonard Wafula Makhanu) first moved to this Court on June 29, 2015 *vide* his Originating Summons in which he sought against Francis Wesonga Nandieki, James Okello Nandieki, Nyongesa Nandieki Eugene and George Charles Nandieki (the 1st, 2nd, 3rd and 4th Defendants respectively), the main order that he had acquired by way of adverse possession, a portion of land measuring 10.8 Hectares out of the land parcel No Bukhayo/lupidiA/1125 (the suit land).
- The Defendants defended the suit *vide* their replying affidavit dated December 3, 2015 in which they pleaded, *inter alia*, that they had applied to be Administrators to the Estate of Jacob Nandieki whose Estate included the suit land.
- It would appear from the record that the Defendants as Administrators of the Estate of Jacob Nandiekidid not move as required to have the grant issued to them confirmed. By a ruling dated



September 28, 2023, Musyoka J revoked the grant issued to the Defendants on November 19, 2012 in Busia HC Succession Cause No 296 of 2011 and added further that:

“Fresh administrators will have to be appointed who shall not include the administrators appointed in the grant of November 19, 2012”

The administrators appointed on November 19, 2012 are the Defendants herein.

4. Faced with that hurdle the Plaintiff opted to withdraw his suit against the Defendants on July 22, 2024. While applying for the withdrawal of the suit, Mr Wanyama counsel for the Plaintiff urged the Court not to penalize the Defendants with costs since they had been sued as Administrators to the Estate of Jacob Lukonyi the original owner of the suit land. And their appointment as Administrators having been revoked, they no longer have the capacity to be penalized to pay costs.
5. Mr Were counsel for the Defendants submitted that by the time this suit was filed, the Defendants all had capacity as Administrators to the Estate of the said Jacob Lukhonyi and are now liable to pay costs. Counsel added that the Defendants have all along been attending this Court and are therefore entitled to costs of the withdrawn suit.
6. That oral application is the subject of this ruling.
7. I have considered the oral submissions by Mr Wanyama counsel for the Plaintiff and by Mr Were counsel for the Defendants. I wish to put it on record that although on July 22, 2024 the Court was informed that Mr Were was only appearing for the 1st, 2nd and 3rd Defendants and that the 4th Defendant was appearing in person, the record shows that by a Notice of Appointment dated September 17, 2020 and filed on September 22, 2020, the firm of Gabriel Fwaya & Company Advocates in which Mr Were practices entered appearance for all the Defendants 4 years earlier on July 8, 2016, the 4th Defendant had filed a memorandum of appearance in his own name. This Court will therefore treat Mr Were as appearing for all the Defendants.
8. Order 25 Rule 2 (2) of the *Civil Procedure Rules* provides that:

“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.
9. Costs of a suit follow the event but are at the discretion of the Court. Section 27 (1) of the *Civil Procedure Act* reads:

“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.” Emphasis mine.



The right of a party to withdraw a suit cannot be questioned. In the case of [*Nicholas Kiptoo Arap Korir Salat -v- IEBC*](#) & Others Supreme Court Application No 16 of 2014, the Court held that:

“A party’s right to withdraw a matter before the Court cannot be taken away. A Court cannot deny 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.” Emphasis mine.

Finally, in the case of [*Pil Kenya Ltd -v- Joseph Opong*](#) C.A. Civil Case No 102 of 2007 [2009 eKLR], the Court of Appeal said:

“The effect of a notice of withdrawal is to terminate the suit of course subject to costs to the opposite party.”

My understanding of all the above is that once the Plaintiff decided to withdraw this suit, costs thereof are payable to the Defendants as a matter of course unless “for good reason” the Court decides otherwise. The *onus* was therefore on the Defendants to persuade this Court that there is a “good reason” why they should not be penalized with an order to pay costs. The apparent “good reason” put forward by their counsel Mr Wanyama is that at the time when the Defendants were sued, they were Administrators to the Estate of Jacob Lukonyi although that appointment has since been revoked. I do not see why that alone should deny the Defendants their costs. As their counsel Mr Were has submitted, the Defendants have all along been attending this Court to defend the suit against them and are therefore entitled to costs of the withdrawn suit. I am not persuaded that it will be a proper exercise of this Court’s discretion to deny the Defendants their costs.

10. The up-shot of all the above is that the costs of the withdrawn suit be met by the Plaintiff.

RULING DATED, SIGNED AND DELIVERED ON THIS 7TH DAY OF NOVEMBER 2024 BY WAY OF ELECTRONIC MAIL.

BOAZ N. OLAO

JUDGE

