



Musa & 6 others v Kassam & 4 others (Enviromental and Land Originating Summons 133 of 2015) [2024] KEELC 13839 (KLR) (11 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13839 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 133 OF 2015
LL NAIKUNI, J
DECEMBER 11, 2024**

BETWEEN

**ALI MOHAMED MUSA 1ST PLAINTIFF
ALEX MASA GWEDE 2ND PLAINTIFF
GEORGE OKUMU WANYAMA 3RD PLAINTIFF
TUKO KADZOYO TUKU 4TH PLAINTIFF
CHARLES RAMA AMOS 5TH PLAINTIFF
RASHID NASORO GANZORI 6TH PLAINTIFF
MOHAMED MVOO MUSA 7TH PLAINTIFF**

AND

**MAHMOOD KASSAM 1ST DEFENDANT
JAFFER KASSAM 2ND DEFENDANT
ESMAIL KASSAM 3RD DEFENDANT
MUSA KASAM 4TH DEFENDANT
ESSAK KASSAM 5TH DEFENDANT**

RULING

I. Introduction

1. Before the Honorable Court for its determination is the Chamber Summons application dated 6th November, 2024. It was brought by the 2nd and 7th Plaintiffs/Applicants under the provisions of



Sections 1A, 1B and 3A of the Civil Procedure Act Cap. 21, Article 159 of Constitution of Kenya 2010, Order 21 Rule 6 and Order 45 and 51 of the Civil Procedure Rules 2010.

2. Despite of the application having been served upon all parties, it never elicited any responses. This notwithstanding, the Honorable Court still proceeded to deal with it to its own merit whatsoever.

II. The 2nd & 7th Plaintiffs/Applicants case.

1. The 2nd & 7th Plaintiffs/Applicants herein sought for the following orders:-
 - a. That the Notice of Withdrawal of the suit dated 24th October, 2024 be and is hereby set aside/ vacated for being defective.
 - b. That the Notice of Withdrawal dated 24th October, 2024 be expunged from the court records.
 - c. Costs of the application.
4. The application was premised on the grounds, testimonial facts and averments made out from the 15 Paragraphed Supporting Affidavit of Mr. MARK WAZIRI OMOLO, an Advocate of High Court of Kenya. He averred as follows:-
 - a. He was an Advocate of the High Court of Kenya and on record for the 2nd and 7th Plaintiffs/Applicants herein
 - b. He filed a Notice of Withdrawal of the suit dated 24th October, 2024 – annexed and marked as “MWO – 1” was the copy of the Notice.
 - c. He was working under the instruction of all the Plaintiffs in the suit and therefore the said Notice was couched under the mistake apparent on the face of record. Therefore, the same ought to be reviewed, vacated, set aside and/or expunged from record.
 - d. He had since had various Advocates come on record for the Plaintiffs in the suit from the filed Notice of Appointment and Notice of Change of Advocates filed in Court.
 - e. He now had instruction from the 2nd and the 7th Plaintiffs. To that effect the said Notice of Withdrawal was erroneous, defective and was not the intention of the Plaintiffs.
 - f. If the said Notice of Withdrawal of the suit was not withdrawn and expunged from the Court record, it would amount to miscarriage of Justice.
 - g. It was trite law that the mistake of an Advocate should not be visited on an innocent litigant who was interested in prosecuting their suit.
 - h. He was apprehensive that unless the orders were granted the Plaintiffs would suffer irreparable damages.
 - i. It was in the interest of Justice that all parties were allowed to canvass their case in the full hearing.
 - j. This application had been made immediately and without any delay.
 - k. The Defendant would not suffer any prejudices if the orders were granted.
 - l. The suit was meritorious and hence it was in the interest of justice that the orders were granted.



III. Directions

1. Being such a straight forward matter, and in order to effectively expedite it, the Honourable Court provided the following directions:-
 - a. That the Chamber Summons application dated 6th November 2024 to be disposed off by way of written submissions as follows:
 - i. The Plaintiffs/Respondents and the Defendants granted 3 days to file and serve Replies and submissions.
 - ii. The Applicant granted 3 days to file and serve Submissions
 - b. That the Honourable Court to deliver its Ruling on 27th November, 2024.
 - c. That in essence the hearing date of 12th November 2024 to be vacated to 11th December, 2024

IV. Analysis & Determination

1. I have keenly considered the said application, the replies, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
2. In order to reach an informed, reasonable and fair decision, the Honourable Court has crafted the following four (4) issues for its consideration. These were:-
 - a. What is the effect of withdrawal and/or discontinuation of a suit by a party filing a Notice of Withdrawal under Order 25 Rules 1 and 2 of Civil Procedure Rules 2010?
 - b. Whether the Notice of Motion application dated 6th November, 2024 by the Plaintiff has any merit.
 - c. What happens to the filed Counter Claim by the Defendants?
 - d. Who bears the costs?

ISSUE No. a). What is the effect of withdrawal and/or discontinuation of a suit by a party filing a Notice of Withdrawal under Order 25 Rules 1 and 2 of Civil Procedure Rules 2010?

7. Under this Sub – heading, the main Substrata in the application is the effect of filing of notice of withdrawal of a suit. Further, whether the said notice can be set aside or varied whatsoever. Withdrawal of suits is governed under the provision of Order 25 (1) and (2) of the Civil Procedure Rules, 2010 provides 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 discontinue 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 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 I shall apply to counterclaims.
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."
8. This provisions of the law in as far as the withdrawal of the suit is concerned are graphically clear. Indeed, the Courts have extensively deliberated on the issue. Thus there will be no need to re – invent the wheel. I will rely on two cases to that effect. The case of “Charles Kiptarbei – Versus - Paul Waweru Mbugua & another (2021) eKLR, where the court held:-
- “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 either the light or the bulb ceases 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.”
8. Similarly, in the case of:- “Antony Kayaya Juma – Versus - Humprey Ekesa Khaunya & another [2004] eKLR” 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.”
9. In other words, the Court was of the view that that the Civil Procedure Rules do not provide for a revocation of a notice of withdrawal or discontinuance of a suit. Hence, once it is on record, the concerned suit ceases to exist and that not even a consent setting aside can bring it back to life. With the above, authority, I hold that the court has got its work cut out and state that the court lacked jurisdiction to revive the suit.
10. Flowing from above, I reiterate that the Notice of Withdrawal of the suit dated 24th October, 2024 signaled the end of the suit by the Plaintiffs. The suit was now comparable to a dead horse. Thus, no matter how hard one kept flogging it no life would be breathed back to it. It was a waste of time. In nutshell, I stress that the effect of the Notice of Withdrawal of suit dated 24th October, 2024 simply meant that no suit existed anymore.

ISSUE No. b). Whether the Chamber Summons application dated 6th November, 2024 by the Plaintiff has any merit.



11. As indicated the land matter in Kenya is extremely sensitive and emotive. It's a source of livelihood. This particular one is not an exception. Although there is great need to expedite the hearing but there is need to consider substantive justice by balancing the interest of all parties in this matter who have approached the Temple of Justice to be served. From the records this suit was filed by the Plaintiffs/Applicants against the Defendants/Respondents in the year 2015, which is close to 11 years now while the matter has been pending before this court. The Plaintiffs claim the ownership of property number CR 345 by way of Land Adverse possession. The suit was brought through an Originating Summons and an affidavit sworn by Alex Masa Gwede – the 2nd Plaintiff herein. Their claim was that they had lived on the suit land for over forty (40) years and had established homes on it where they lived peacefully with their families. They accrued out agricultural activities on it without any interruption from the year 2014. It was then that the Defendant caused demolition of their structures and urged them to be evicted from the land. They reported the matter to the police and decided to institute this suit accordingly.
12. Subsequently, upon being served with Summons to enter appearance, the Defendants filed an Amended Statement of Defence and Counter - Claim dated 18th April, 2024. They sought for the following reliefs:
 - a. The Plaintiffs suit to be struck out and/or dismissed with costs and Judgement entered for the Defendants in the Counter Claim as against the Plaintiffs as follows:-
 - b. A declaration that the suit property is CR No. 30411 (Sub – division No. 817 (Original Numbers 324/2)
 - c. A declaration that the Defendants were not the legal and bona - fide owners of parcel no. CR No. 30411 (Sub – division No. 817 (original No. 324/2 having transferred it to Bandari Investment Company Limited on 8th October, 2012.
 - d. A declaration that the Defendant were the owners of known as Plot No. 819/MN.
 - e. Vacant possession of the suit land.
 - f. Eviction orders of the Plaintiffs from the suit land.
 - g. Permanent Injunction orders against the Plaintiffs.
 - h. General damages & costs.
13. Taking that there is still full trial of the case scheduled for 11th December, 2024, immediately after delivery of this Ruling, the Court would not want to appear to be descending to the arena of adjudicating it. That would be Pre – mature and unnecessary at this stage in time. I dare say no more. Fortunately, after conducting a Pre – Trial session pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010, on 14th October, 2022 the Plaintiff's Case was heard partially. It was slated to proceed on further towards its conclusion until this application the Notice of Withdrawal of the Suit dated 24th October, 2024 as filed by the Plaintiffs. The Records will bear me right that the matter has been marred with a myriad of procedural issues and which the Honorable Court need to take cognizance of and deal with in the Interest of Justice, Equity and Conscience. There has been several adjournments by the Plaintiff's on 24th June, 2024 the Honorable Court fixed this matter for hearing on the 14th October, 2024 and 12th November, 2024 and it be marked as the last adjournment. Indeed, in order to expedite the matter, the Honourable Court even reserved a Judgment date on 23rd January, 2025 in anticipation.



14. On 15th March, 2024 the Honorable Court conducted a successful site visit (“Locus in Quo”) at the request of the parties and a report was prepared. Indeed the Honorable Court in order to preserve the suit property ordered that the Status Quo be maintained meaning no transaction – alienation, wastage, construction evictions sub-division or in any way interfering with the suit land.
15. On 24th October, 2024 the Learned Counsel Mr. Waziri acting for the 2nd to 7th Plaintiffs and acting on the strength of the authority of plead dated 12th June, 2015 informed court that he had filed a Notice to withdraw the suit on the grounds that there was not proper cause of action as the suit land known as LR. No. 819/II/MN pleaded from the pleadings was erroneously done. According to him, it was not the proper suit parcel. He claimed the Notice of withdrawal the suit was under the Provisions of Order 25 Rule 1 of the Civil Procedure Rules 2010. He urged court to grant him leave to file Defence to the Counter - Claim which he claimed raised weighty issues. Taking the court had seen the said Notice to Withdraw the suit, and the sensitivity of the matter court directed that Mr. Waziri moves court appropriately and the matter was to be mentioned on 6th November, 2024.
16. On 6th November, 2024 – Mr. Waziri Advocate appeared in Court and indicated he had intentions to cease acting as the matter was taking a wrong twist including formal complaint against him before the Advocates A.D.C. and his life. Further there were two Notices of appointment of Advocates for the Plaintiff – by the Law firm of Adhoch & Company Advocates and Obara & Obara Advocates dated 6th November, 2024. He pleaded the mistake of an Advocate and the fact that it was opposed by many Advocates who had now come on record on behalf of the Plaintiffs/Applicants. As graphically stated above, upon filing the Notice of Withdrawal of the suit, the case ceased from existing apart from the Counter – Claim in law. However, taking that the parties in their own wisdom decided to enter and duly executed a consent dated 3rd December, 2024 with the following stipulated terms and conditions:-
 - a. That the application dated 6th November, 2024 be allowed with no orders to costs.
 - b. That the Notice of Withdrawal of the suit dated 24th October, 2024 be and is hereby revoked and/or set aside.
 - c. That the matter proceeds for hearing on 11th December, 2024 as scheduled”
17. Therefore, based on this development and in the interest of natural Justice, Conscience and Equity under the provision of Section 3 & 13 of the Environment & Land Court [Act, No. 19 of 2011](#); Sections 101 of the [Land Registration Act](#), No. 3 of 2012, Section 150 of the [Land Act](#), No. 6 of 2012 and Article 159 (1) and (2) of [the Constitution](#) of Kenya, 2010 the Honorable Court has decided to accord the Plaintiffs an opportunity to be heard by allowing the Chamber Summons application dated 6th November, 2024 hereof.

ISSUE No. c). What happens to the filed Counter - Claim by the Defendants?

18. Based on the legal position taken herein, upon the Case of the Plaintiffs being withdrawn, the Counter – Claim would have to proceed accordingly. However, taking that the Honorable Court has already made a pronouncement with regards to the Chamber Summons application dated 6th November, 2024, I need not say more under this sub – heading.

ISSUE No. d). Who will bear the Costs of the application.

19. It is now established that the issue of costs is at the discretion of the Court. Costs is the award that is granted to a party at the conclusion of the legal action and/or proceedings in any litigation. The proviso of Section 27 of the [Civil Procedure Act](#), Cap. 21 holds that the costs follow the events. By events it mean the outcome of the legal action.



20. In the instant case, based on the Consent entered by parties, its just fair and reasonable that each party bear their own costs herein.

Conclusion & Disposition

21. Ultimately, after conducting an indepth analysis of the framed issues herein, the Honorable Court has arrived at the conclusion and specifically grant the following orders:-

- a. THAT in the interest of natural Justice, Equity and Conscience and by the terms and conditions stipulated in the duly executed Consent of parties dated 3rd December, 2024 the Chamber Summons application dated 6th November, 2024 be and is hereby allowed.
- b. THAT the matter to proceed with the Plaintiffs case then the Defence case on 11th December, 2024.
- c. THAT each party to bear their own costs of the application.

IT IS SO ORDERED ACCORDINGLY.

RULING DELIVERED VIA THE MICROSOFT TEAMS VIRTUAL MEANS SIGNED AND DATED AT MOMBASA THIS11THDAY OFDECEMBER.....2024.

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**HON. MR. JUSTICE LL. NAIKUNI
ENVIRONMENT AND LAND COURT AT
MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Firdaus, Court Assistant.
- b. Mr. Waziri for the 2nd & 7th Plaintiffs/Applicants.
- c. Mr. Obara Advocates for the 3rd, 4th, 5th & 6th Plaintiffs
- d. Mr. Mutugi Advocate for the Defendants.

