



U-Haul Vehicle Ltd v Kiambu Dandora Farmers Ltd (Environment and Land Miscellaneous Application 45 of 2016) [2024] KEELC 13841 (KLR) (9 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13841 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 45 OF 2016
AA OMOLLO, J
DECEMBER 9, 2024**

BETWEEN

U-HAUL VEHICLE LTD PLAINTIFF

AND

KIAMBU DANDORA FARMERS LTD DEFENDANT

RULING

1. The Defendant filed the present application dated 15th January 2024 and premised on the provisions of article 159 (2)(d) of *the Constitution*, sections 1A, 1B & 3A of the *Civil procedure Act* and order 1 rule 10 of the CPR. The Applicant prays that the Court does re-open/re-instate the suit for purposes of addressing issues of costs pursuant to the notice of withdrawal dated 29th May 2019 and filed on even date.
2. The application is premised on the grounds stated on its face inter alia that the Applicant has always been eager to proceed with the case to its logical end. That the Applicant or its counsel was never served with the notice of withdrawing the suit which they are not opposing but they want the issues of costs to be addressed. The application was further supported by the affidavit sworn by Joseph Mwangi Karanja on the 15th January, 2024. He deposed that they have accrued huge costs since they have been defending the suit since 2016. That they were never served with the notice of withdrawal.
3. The application was opposed through the replying affidavit sworn by Kevin Wakwaya, learned counsel for the Plaintiff/Respondent. He deposed that the subject matter in this suit was overtaken by events following the amendment in ELC 39 of 2019 between the same parties. He deposes that the Applicants were served with the notice of withdrawal on 13th June 2019 and the Applicant has brought this application after inordinate delay of 5 years.
4. The Respondent avers that the costs is a discretion of the court and the Applicant has approached the court with unclean hands. That whereas the Applicant purports that it was never served with the



- notice yet it annexes a copy of the same received by their advocate. He urged the court to dismiss the application with costs.
5. The applicant filed a further affidavit which the Respondent has submitted has brought new issues and correctly so because it brings in new documents not related to facts contained in the replying affidavit. Mr Mwangi deposes on behalf of the Applicant that the application (Misc 45) was filed to transfer Mcc 534 of 2016 to the Environment and Land Court. That they vehemently opposed the application for the transfer of the suit since 2016 and they incurred huge legal costs by filing various pleadings, submissions and lists of authorities. He admits being served with notice of withdrawal but added that they were never served with mention notices in respect to the withdrawal.
 6. He avers that the notice of withdrawal was endorsed by the court on 29th January 2020 in the absence of parties. That they were unaware of this date and although they are not opposed to the withdrawal, they are entitled to an opportunity to address the court on the issue of costs. The Applicant urges that their application be allowed.
 7. Parties filed respective submissions to argue the motion, with both the submissions dated 23rd October 2024. The Applicant is breathing hot and cold on the issue of service of the notice of withdrawal. However, the issue of service is settled by their own annexure to the supporting affidavit which is a notice of withdrawal dated 29th May 2019 bearing receiving stamp of Murunga & Associates confirming service on 13th June, 2019. The Applicant stated that it had no issue with the withdrawal but wanted to address the court on the issue of costs.
 8. It is without a doubt that the Applicant would not have a right to costs if the notice of withdrawal is set aside. The application as framed is seeking to “re-open/re-instate” the suit for purposes of addressing the subject of costs and it is brought under order 1 rule 10 of the Civil Procedure rules which deals with Substitution/addition of parties. At paragraph 9 of its submissions, the Applicant submits that it is contesting the withdrawal on the ground that they were unaware of the date the matter came up and as such they were not afforded the opportunity to oppose the withdrawal. It is incomprehensible what the Applicant wants, either it is opposed to the withdrawal or does it want costs of the withdrawn application?
 9. The Applicant proceeded to submit that it is entitled to costs by virtue of order 25 rule 3 of the Civil Procedure Rules and section 27 of the *Civil Procedure Act*. It also relied on the case of Morgan Air Cargo Limited v Evrest Enterprises Limited (2014)eKLR which set the governing principles when awarding costs. These include:
 - a. the conduct of the parties
 - b. the subject of litigation
 - c. the circumstances which led to the institution of the proceedings
 - d. the events which eventually led to their termination
 - e. the stage at which the proceedings were terminated
 - f. the manner in which they were terminated
 - g. the relationship between the parties and
 10. In this case, the Applicant deposed that the withdrawn miscellaneous application was filed seeking orders to transfer a suit from the Magistrate’s court case number 534 of 2016 to this court. The Plaintiff/respondent explained that they withdrew the said application after an amendment of ELC 39



of 2016 between the same parties. The Respondent also submitted on the reasons which necessitated the filing of this application as a result of the decision made in *Malindi Law Society vs A.G & 4 Others* (2016) Eklr which held that Magistrates Courts did not have jurisdiction to hear land cases. That means what was withdrawn was an application to transfer a suit and, in my view, the subject matter (seeking an order to transfer) does not require incurring huge legal costs as deposited by the applicant. The reason for filing was also justiciable.

11. The Respondent accused the Applicant of wanting this court to exercise discretion in their favour yet they brought the application after undue delay. The notice of withdrawal was filed on 30th May 2019 and served on 13th June 2019. As early as 25th August 2021, the Applicant expressed intention to oppose the notice of withdrawal for not complying with the provisions of order 25 rule 1 and 2. The expressions is contained in the two letters annexed to the further affidavit sworn by the Applicant addressed to the Deputy Registrar ELC and to the Plaintiff's counsel.
12. In the letter to the Deputy Registrar of the court the Applicant requested to be accorded a mention date for directions. It appears nothing happened and the Applicant did not move the court until this application was filed some two and a half years later. There is no explanation for the delay and as rightly pointed out by the Respondent, the exercise of discretion must be exercised in favour of a party who is diligent.
13. Having reviewed the pleadings and the submissions rendered, I am not satisfied that the application is merited because the nature of the application did not require much toiling and the reasons for its filing were necessitated by circumstances not occasioned by the Respondent. Secondly, the current application has been brought after inordinate delay without any explanation. The outcome is that the application is dismissed with an order that each party bears their respective costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF DECEMBER, 2024.

Via email to parties' advocates.

A. OMOLLO

JUDGE

