



GA Insurance Limited v Dikus Trasporters Limited & 2 others; Economic Industries Limited (Interested Party) (Environment & Land Case E114 of 2021) [2023] KEELC 15797 (KLR) (23 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15797 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E114 OF 2021
LN MBUGUA, J
FEBRUARY 23, 2023**

BETWEEN

GA INSURANCE LIMITED APPLICANT

AND

DIKUS TRASPORTERS LIMITED 1ST DEFENDANT

STEPHEN JUMA NDEDA 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

AND

ECONOMIC INDUSTRIES LIMITED INTERESTED PARTY

RULING

1. This matter was listed before me for Pre Trial Directions (PTD) on January 25, 2023 when counsel for the plaintiff informed the court that they had filed a Notice of withdrawal on December 1, 2022 with no orders as to costs.
2. Counsel for the 1st defendant informed the court that he was only served 3 days earlier and he had not discussed the issue with his clients, while counsel for the 2nd defendant simply stated that he objected to the withdrawal of the suit. Counsel for the 3rd defendant stated that a party’s right to withdraw a suit was unfettered and any claim can only relate to the issue of costs. There was no appearance for the interested party.
3. The court gave a mention date of April 19, 2023 for directions on the issue of withdrawal of the suit.



4. Thereafter, counsel for the plaintiff moved this court through a letter to the Deputy Registrar requesting for a mention date on priority basis. The contents of the said letter dated 8.2.2023 are as follows:

“RE: ELC CAsE No. E114 Of 2021 Ga Insurance Limited – Vs- Dikus Trasporters Limited, Stephen Juma Ndeda, The Chief Land Registrar & Interested Party

Please refer to the above referenced in which we Act for the Plaintiff.

On 25th January 2023, we appeared before the Hon. Judge for the purpose of pretrial of the above matter. We however informed the Court that we did not intend to proceed with the matter and had filed a Notice of Withdrawal on 1st December 2022 and served it upon all the parties.

However, the 1st & 2nd Defendant’s objected to the withdrawal and requested for time to seek further instructions from their Clients which the Judge allowed and gave a mention date of 19.4.2023. Given that withdrawal of a suit is a matter of not a divine right but a right expressly conferred to a party by order 25 of the Civil Procedure Rules, the adjourning results to a delay in conclusion of suits resulting to waste of judicial time and resources as the 1st & 2nd Defendants cannot force the plaintiff to proceed with its suit.

As such we are requesting for a mention date on priority basis before the Trial Judge the Hon. Lady Justice L. Mbugua to fast track the conclusion of the matter as the time date given is not convenient given the urgency of having the matter concluded.

We undertake to pay requisite Court charges.”

5. The Deputy Registrar gave directions for the matter to be mentioned before this court on February 13, 2023. On February 13, 2023, I mentioned the matter in the virtual platform and Mr A Kamau happened to be present. I gave a mention date for Feruary 16, 2023 with directions for Mr Kamau to serve all the other parties. Thus all parties were present before me on February 16, 2023.

Proceedings of February 16, 2023

6. Counsel for 1st defendant contends that it was irregular for case to be mentioned when there was another date of April 19, 2023. That in principle, they would not object to withdrawal of the suit but the terms thereof were unreasonable in relation to the wording “No orders as to costs”. He proposed that the matter be dealt with on April 19, 2023.
7. Counsel for 2nd defendant indicated that they had not taken instructions on the matter, they were not served with the letter to the Deputy Registrar and that no cause has been shown as to why the matter should not be mentioned on April 19, 2023. Counsel added that the idea of withdrawing the suit was to discharge orders which are in place relating to the harassment and compromise of witnesses. He prayed that the matter be stayed.
8. Counsel for 3rd defendant reiterated that plaintiff had a right to withdrawal suit but that issue was to be dealt with on April 19, 2023, adding that he just saw the matter on February 13, 2023. He further added that the plaintiffs counsel should have informed them about the letter to the Deputy Registrar. Counsel cited the case of Nick Salat to buttress the point that the plaintiff cannot be stopped from withdrawing a suit.



9. The counsel for the Interested Party stated that he was not aware of the mention date, but on the issue of withdrawal of suit, that is within the discretion of the plaintiff subject to payment of costs, adding that the issue of withdrawal of suit doesn't need to await the date of April 19, 2023.
10. Counsel for the plaintiff in rejoinder stated that they moved the court through the Deputy Registrar because it was a waste of time to wait for the date of April 19, 2023, and that as submitted by 3rd defendant and the Interested Party, the only issue which can remain outstanding is on costs of which; the costs can be agreed upon or the court can give orders on costs for the Deputy Registrar to proceed with taxation. He further stated that they were not aware of the issues raised by counsel for the 2nd defendant.

Determination

11. The substantive issue for consideration is on the Notice of Withdrawal of the suit without any orders as to costs. To this end the counsels for the respective defendants contend that the said issue should be dealt with on April 19, 2023 as earlier scheduled.
12. I have gone through the letter to the Deputy Registrar dated February 8, 2023, of which the court has captured the contents there in. The plaintiffs side desired to have an earlier date other than the one of April 19, 2023. All the parties were represented before this court on February 16, 2023 and none of them indicated the nature and extent of the prejudice which would befall them if the matter was dealt with before April 19, 2023.
13. The provisions of Section 1B of the *Civil Procedure Act* stipulate the duties of the court as follows:
 - a. “The just determination of the proceedings;
 - (b) The efficient disposal of the business of the Court;
 - (c) The efficient use of the available judicial and administrative resources;
 - (d) The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
 - (e) The use of suitable technology”.
14. The advocates have already expressed their sentiments on the issue of withdrawal of the suit. It would therefore fly against the aforementioned provisions of law if this court was to retain the date of April 19, 2023. In that regard the date of April 19, 2023 given by this court is hereby vacated and the court will proceed to determine the question of withdrawal of the suit at once.
15. On the said issue of withdrawal of the suit, it is the 1st and 2nd defendants who are objecting to the withdrawal, with the objection by the 1st defendant only relating to the issue of costs, while for the 2nd defendant, it is averred that the purpose of the withdrawal is to discharge some orders relating to harassment and compromise of witnesses.
16. In the case of *Priscilla Nyambura Njue v. Georhem Middle East Ltd Kenya Bureau of Standards (Interested Party)* 2021 eKLR, the court stated as follows:

“The right provided under Order 25 Rules 1 & 2 (1) is not fettered by any conditions; it is an absolute right which a plaintiff can exercise at his sweet will at any time before the judgment is delivered.....”



17. In the case of *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & T Others* (2014) eKLR, the Supreme Court of Kenya rendered itself on the issue in the following terms;
- “ A party’s right to withdraw a matter before 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.”
18. This suit had not been set down for hearing, hence the applicable proviso is Order 25(1) of the *Civil Procedure Rules* to the effect that all that the plaintiff was required to do was to serve the Notice of withdrawal. This has duly been done. What more, even the plaintiffs cannot bring such a suit back to life.
19. The 2nd defendant has not indicated that he has a Counter-claim, thus the issue of objecting to withdrawal of the suit on the basis that this will lead to discharge of orders given should not arise. After all, the withdrawal of the suit is itself on “end”, hence any orders which had subsisted during the lifespan of the suit also come to an end.
20. In the final analysis, I do hereby mark the case as withdrawn.
21. On costs I make reference to the case of *Samson K.A. v D.M Machage* [2019] eKLR where the court stated that:
- “ 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 the withdrawal of the suit is whole, the suiter must as a general rule pay to the defendant the costs of the suit. I do not to see a good reason in this suit to depart from this general rule.”
22. Similarly, I find no reason to depart from this general rule. Thus the defendants and Interested Parties are awarded costs of the suit. The same to be taxed by the Deputy Registrar.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:

Paul Mwangi for Plaintiff

M/s Mati holding brief for Kairaria for 1st Defendant

Muganda for 2nd Defendant

Allan Kamau for 3rd Defendant

M/s Watitu holding brief for Mahinda for the Interested Party

Court assistant: Eddel

