



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 243 OF 2014

(formally Mombasa HCCC No. 95 of 2011)

Consolidated with Petition NO. 15/12, 111/12 & HCCC No. 187/2012

TSANGAWA NGALA CHOME (*Suing through the administrator of the estate of the late Mumba Chome Ngala- Deceased*.....)PLAINTIFF

=VERSUS=

TOWN COUNCIL OF MARIAKANI.....1ST DEFENDANT

KETRACO COMPANY LIMITED.....2ND DEFENDANT

R U L I N G

Introduction

1. This Ruling is in respect to the Notice that was filed by the Plaintiff to withdraw and discontinue this suit under Order 25 of the Civil Procedure Rules dated 7th January 2016 and filed in this court on the same day.
2. The 2nd Defendant and the Interested Parties have objected to the withdrawal and discontinuance of the suit.

Submissions:

3. Mr. Omino, the Plaintiff's advocate, informed the court that the Plaintiff had instructed him to withdraw the suit against all the parties.
4. Counsel submitted that the Plaintiff cannot be held back; that the Plaintiff has no intention of stealing a match by withdrawing the suit and that the court cannot force a Plaintiff who wishes to withdraw his suit to litigate.
5. The Plaintiff's counsel submitted that the Court of Appeal in **Malindi Civil Appeal No. 1 of 2015, Beijing Industries Design & Research Institute Vs Lagoon Development Limited** gave the parameters within which a party can withdraw his suit and that his client falls within those parameters.
6. The Plaintiff's counsel submitted that the withdrawal of this suit will not prejudice the Defendants and the Interested Parties because the issues that have been raised in the current suit have also

been raised in Petition Number 15 of 2013.

7. On the issue of the pending orders of this court, the Plaintiff's advocate submitted that the people who allegedly forged the order of the court in this matter have since been arrested and charged in court; that this court cannot wait for the finalisation of the investigations and prosecution of the people who allegedly forged a court order or withdrew the Kshs.26,000,000 and that under the provisions of Order 25 of the Civil Procedure Rules, the Defendants and the Interested Parties are only entitled to costs.
8. Mr. Kiarie, the learned counsel for the 2nd Defendant, submitted that the Notice of withdrawal and discontinuance of the suit by the Plaintiff should be struck out.
9. The 2nd Defendant's counsel submitted that this matter having been set down for hearing, the consent of all the parties must be sought before the suit could be withdrawn.
10. Alternatively, it was submitted, the Plaintiff must have sought the leave of the court before withdrawing the suit pursuant to the provisions of Order 25 Rule 2 of the Civil Procedure Rules.
11. The 2nd Defendant's advocate submitted that the Plaintiff in this suit obtained the title deed in respect to the suit property during the pendency of the suit; that the said title subsumed his client's title and that unless the Plaintiff's title is cancelled and the Kshs.26,000,000 that was deposited with the District Commissioner awaiting the determination of this court, which amount has been withdrawn, is refunded, the Plaintiff should not be allowed to withdraw the suit.
12. The 2nd Defendant's counsel finally submitted that Chitembwe J directed that the the Plaintiff's advocate should explain why he misled the court on 1st December 2015 and that the Plaintiff's advocate has not given that explanation. Counsel relied on the case of **Malindi Civil Appeal No. 1 of 2015 (Supra)** to buttress his arguments.
13. Mr. Muchiri, counsel for the Interested Party, reiterated the submissions by the 2nd Defendant's advocate.
14. The Interested Party's counsel submitted that there is a pending dispute between the Plaintiff and the rule of law; that there are allegations that the Plaintiff forged a court order and took the Kshs.26,000,000 deposited by the 2nd Defendant with the Deputy County Commissioner and that these issues must be answered by the Plaintiff before he can be allowed to withdraw the suit.
15. The Interested Party's counsel submitted that the right of a party to withdraw his suit is not absolute; that to protect the supremacy of the law, the suit must be sustained and that the law cannot countenance a person from benefiting from his own wrong doing.
16. The learned state counsel, Mr. Onyiso, submitted that once a suit is set down for hearing, the leave of the court must be sought before the suit can be withdrawn; that there are serious issues of law which are pending in this matter including the illegal issuance of a title deed to the Plaintiff, withdrawal of Kshs.26,000,000 and the setting apart of Trust land which must be argued to their logical conclusion.
17. Counsel submitted that the Plaintiff can only be allowed to withdraw the suit on certain conditions.
18. Mr. Onyango, counsel for the Interested Parties submitted that his clients were enjoined in the suit by this court; that his clients have filed a counter claim and that a party should not be allowed to withdraw a suit to undermine the judicial process.
19. Counsel submitted that the suit property belonged to the community and that the pending investigations on how the Plaintiff acquired the title deed during the pendency of this suit should be finalised to uncover if indeed the Plaintiff has stolen a match.
20. Counsel submitted that if the Plaintiff wishes to withdraw the suit, he must agree to have the title deed in respect to the suit property revoked and also refund Kshs.26,000,000.
21. In any event, it was submitted, the Plaintiff will still be a party in the counterclaim filed by the Interested Parties.

Analysis and findings:

22. This suit was filed by the Plaintiff on 14th April 2011 vide a Plaint of the same date. Initially, the Plaintiff sued the Town Council of Mariakani and Ketraco, the 1st and 2nd Defendant. In the Plaint, the Plaintiff has described himself as the administrator of the estate of Mumba Chome Ngala, the legal owner of a piece of land measuring 2328 Ha situated in Mariakani-Mitangoni.
23. The Plaintiff has averred in the Plaint that before Mumba Chome Ngala passed on, the whole land had been awarded to him by the court in the District Magistrate court Case No 26 of 1977; that the 1st Defendant went ahead to allocate to the 2nd Defendant 200 acres of the suit property and that the Defendants are likely to compensate the wrong people for said 200 acres.
24. The Plaintiff has sought in the Plaint for a declaration that the suit land is the property of Mumba Chome Ngala and the same should be registered in his name to hold it trust for the benefit of the family of the late Mumba Chome Ngala. The Plaintiff is also seeking for a permanent injunction.
25. After the suit was filed, numerous Applications were filed, including Applications for joinder by the Interested Parties. The Interested Parties were subsequently joined in the suit.
26. The documents filed in this court shows that after the suit was filed, the Plaintiff managed to obtain a title deed in the year 2014. The record shows that the Plaintiff managed to get a title deed for the entire land, the very order that he was seeking from the court in his Plaint, after a consent was entered into between the his advocate and the then advocate for the 1st Defendant on 7th May, 2012.
27. The consent between the Plaintiff and the 1st Defendant of 7th May, 2012 stated as follows:-

“1. The clan of Mumba Chome Ngala is entitled to and possessed of all unregistered land property known and composed in Mariakani Mitangoni Kitsimani measuring 2,861 Hectares or thereabouts subject to the process of setting apart under the Trust Land Act.

2. The clan of Mumba Chome Ngala has no objection to the planned setting apart process of 200 acres in favour of M/S KETRACO COMPANY LTD.”

28. The Above consent order was adopted by Muriithi J on 11th May, 2012 with the Deputy Registrar signing the order on 11th May 2012.
29. Prior to the signing of the consent, the Plaintiff had withdrawn the suit as against the 2nd Defendant.
30. In the meantime, the 1st Interested Party joined in the proceedings and objected to the issuance of the title deed to the Plaintiff.
31. The 2nd Defendant also objected to the withdrawal of the suit against it principally because the title issued to the Plaintiff encompassed the 200 acres which the 2nd Defendant was claiming. The 2nd Defendant managed to get an injunction order which was registered against the Plaintiff's title.
32. There is on the file an extracted order purportedly issued by Hon. R. Odenyo, Deputy Registrar, in this mater in which it was ordered as follows:

“1. The District Land Adjudication Officer, Kilifi is hereby directed to adjudicate within seven (7) days from the date hereof, in favour of the Plaintiff TSANGAWA NGALA CHOME all that property known and compromised in MARIAKANI MITANGONI KITISMANI measuring 2861 Hectares.

2. That the District Land Registrar, Kilifi is hereby directed to issue title in favour of the Plaintiff within (7) days from the date hereof.”

33. It is that purported order that gave rise to the issuance of the Title Deed to the Plaintiff.
34. It has been alleged by the 2nd Defendant and the Interested Parties that that order is a forgery because it did not emanate from this court.

35. While the purported consent and orders were being issued in this matter, the Objector herein, Nyamai Rumba Wewa, had sued KETRACO in Petition No. 15 of 2013.
36. In the Petition, the Petitioner is seeking for an order for prompt, full and just compensation of the 200 acres of land that had been compulsorily acquired.
37. In the Petition, the Petitioner alleged that the suit property herein, including the 200 acres belonged to the Mbabeja clan. It is instructive to note that when the Petition was filed, the Plaintiff had not obtained a title deed for the suit property.
38. The Petitioner further alluded in the Petition to the many suits that had been filed by the Plaintiff in respect to the suit property which included: Mombasa HCCC No. 95/2011 (this matter), Mombasa Constitutional Petition Number 58 of 2012 and Mombasa Petition Number 111 of 2012.
39. The record in Petition Number 15 of 2013 shows that the Attorney General raised a Preliminary Objection on whether the court had jurisdiction to deal with the Petition. The court then reserved its Ruling on the Preliminary Objection for 22nd October 2014.
40. However, the said Ruling was never delivered by Mukunya J. Instead, the Judge ordered as follows:-

“Having heard what the advocates have said I will with profound respect still think the ruling on jurisdiction should not be made before:-

1. The investigations are done to find out who forged the court orders when the court file was pending with the Judge for a Ruling.

2.Thereafter parties can always have the case fixed for hearing and/or Ruling on jurisdiction before my sister, Hon. Lady Justice Anna Omollo.

41. This file, together with Petition number 15 of 2013, Petition Number 111 of 2012 and Petition Number 187 of 2012 were forwarded to this court by Omollo J on the ground that the land in question falls within the jurisdiction of this court.
42. The chronology of events in this matter clearly shows that the orders that were purportedly issued by the Deputy Registrar allowing the District Land Registrar to issue to the Plaintiff the title deed in 2014 are said to have been forged. The court has ordered for investigations into those allegations.
43. This court has not been shown the investigation report that was prepared pursuant to the order of the court in Petition Number 15 of 2013, which order has a direct link to this particular matter.
44. Other than the allegations that the order that gave rise to the issuance of the Title Deed to the Plaintiff was forged, there is also an order by Odero J of 15th October 2013 in Petition Number 15 of 2013 in which she ordered as follows:-

“2. THAT a temporary injunction do issue against the first Respondent, (the 2nd Defendant herein), the District Commissioner, Kaloleni from releasing the Kshs.26 million he is currently holding as compensation for the applicant's 200 acres of land compulsorily acquired at Mariakani pending the hearing and determination of this application.”

45. The Application that gave rise to the above order has never been heard interpartes to date.
46. It would appear that despite the above order, the Kshs.26,000,000 that had been deposited with the District Commissioner was released to some unknown parties.
47. I say so because on 20th April 2015, the Objector (Interested Party) in this matter filed an Application in which he sought for the following orders:

“2. That this court do order that the Director of Criminal Investigations Department do investigate the circumstances that led to the release of Kshs.26 Million from the office of the Deputy County Commissioner, Kaloleni against the order of this court and that the culpable persons be brought to justice.

3. That TSANGAWA NGALA CHOME or his proxies and/or attorneys be hereby ordered to return the amount of Kshs.26 million that he wrongfully received from the office of the Deputy County Commissioner, Kaloleni before getting any audience in this court.....”

48. When the Application was placed before the court on 10th April 2015, the court allowed the first limb of the Application and directed that the investigation report in respect to the release of Kshs.26,000,000 be filed in court.
49. The Plaintiff now wants to withdraw the suit pursuant to the provisions of Order 25 Rule 1.
50. Order 25 Rule 1 of the Civil Procedure Rules allows a party to wholly discontinue his suit by notice in writing.
51. Order 25 Rule 2 on the other hand provides that where a suit has been set down for hearing, it may be discontinued upon the filing of a written consent signed by all the parties or with the leave of the court.
52. As was held by the Court of Appeal in **Malindi Civil Appeal No. 1 of 2015, Beijing Industrial Designing & Research Institute Vs Lagoon Development Limited**, the right of a party to discontinue a suit or withdraw his claim cannot be questioned, where the matter has not been set down for hearing.
53. However, the leave of the court is required where the matter has been set down for hearing. As was held in the **Beijing case (Supra)**, such leave is not a merely formality.
54. The setting down of a suit for hearing, in my view, does not entail the hearing of Applications, but of the substantive suit. What the Respondents needed to show is that at some particular point in time, the suit was set down for hearing. Whether the matter proceeded for hearing or not is inconsequential. One must obtain the leave of the court to withdraw such a suit.
55. I have perused the proceedings and noted that on 4th March 2014, Mukunya J fixed the matter for hearing on 22nd and 23rd July 2014. Indeed, the Judge directed that "all parties must attend with all their witnesses without fail".
56. Of course, the matter did not proceed on the said dates. However, for the purposes of Order 25 Rule 2 of the Civil Procedure Rules, the matter had been set down for hearing.
57. The Plaintiff therefore cannot purport to withdraw the suit without the leave of the court pursuant to the provisions of Order 25 Rule 2 of the Civil Procedure Rules.
58. The other issue that I should determine is whether the Plaintiff's withdrawal of the suit in view of the allegation that the title deed that he is now holding was procured during the pendency of this suit and using an order that was forged should be allowed by the court.
59. As I have already stated above, Mukunya J directed that the alleged forged court order must be investigated with a view of establishing the truth.
60. Other than the investigations that were to be conducted by the Director of Criminal Investigations in respect to the alleged forgery of a court order, another investigation on how Kshs.26,000,000 was released by the District Commissioner contrary to an order of the court was also supposed to be conducted.
61. Indeed, the outcome of those investigations have serious ramifications viz a viz the punishment that should be meted out on the people that disobeyed those orders, if the investigations shows so.
62. If at the end of the investigations it is found that the two orders of this court were forged and disobeyed respectively, the court will not hesitate to take a stern action against the perpetrators of the forgery and or disobedience of the court orders.

63. In the **Beijing case (supra)**, the Court of Appeal held that criminal or quasi criminal proceedings ought not to be terminated at the exclusive instance or discretion of the party alleged to be a perpetrator of a criminal or quasi-criminal act.
64. The Court of Appeal in the **Beijing case (Supra)**, quoting **Johnson Vs Grant (1923) SC 789 at 790**, went further to hold that *the purpose of the law of contempt of court is not to protect the personal dignity of the judiciary or the private rights of parties or litigants, nor is it intended to assuage the offended dignity of the court. Rather it is intended to uphold and protect the supremacy of the law.*
65. It is in light of the above pronouncement of the law by the Court of Appeal that I find and hold that the current suit cannot be withdrawn by the Plaintiff until the issue of whether the order of this court was forged for the purpose of facilitating the registration of the title deed in favour of the Plaintiff during the pendency of the suit and whether the Kshs.26,000,000 that was paid by KETRACO to the District Commissioner was released to the Plaintiff or his nominees contrary to the order of this court is dealt with.
66. I say so because courts do not issue orders in vain, and the Plaintiff would be stealing a match if he is allowed to withdraw the suit before the question of how he obtained the Title Deed and who benefited from the Kshs.26,000,000 is dealt with. That is the only way the dignity of this court can be upheld.
67. For those reasons, I strike out the Plaintiff's Notice of Withdrawal and Discontinuance of the suit dated 7th January 2016 with costs.

Dated and delivered in Malindi this **11th** day of **March**, 2016.

O. A. Angote

Judge



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