



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO. 239 OF 2018

ALEXANDER ANTHONY WAHIU.....1ST PLAINTIFF/REPOENDENT

SAMUEL MWAI.....2ND PLAINTIFF/RESPONDENT

NICHOLAS MUIRURI.....3RD PLAINTIFF/RESPONDENT

-VERSUS-

JOSEPH KARIHA WAHIU.....1ST DEFENDANT/RESPONDENT

THUMBI KAMAU.....2ND DEFENDANT/APPLICANT

RULING:

INTRODUCTION:

1. Vide Notice of Motion Application dated the 25th October 2021, the 2ND Defendant/ Applicant herein sought for the following Orders:

a.(Spent)

b. *That the Honourable Court be pleased to Review and/or Set aside its Ruling delivered on 9th August, 2021 with respect to its finding that the Court stays this suit until Nairobi Hcc No. 43 of 2010 (OS) and Nairobi High Court Miscellaneous Civil Application Number 10 of 2006 are heard and a determination is made by the Family Division of the High Court on the share of the Plaintiff's late Mother in the suit property and status quo prevailing as at the date of the Ruling be maintained.*

c. *That this Honourable Court be pleased to deliver Judgment on this matter.*

d. *The Costs of this Application be provided for.*

2. The Subject Application is premised and/or based on the grounds shown on the face thereof and same is further supported by the Affidavit of the 2nd Defendant/Applicant sworn on the 25th October 2021, to which the 2nd Defendant/Applicant has annexed three Documents, namely, a copy of the impugned Ruling of the court, a copy of a Notice of Withdrawal in respect of *Nairobi High Court Miscellaneous Civil Application Number 10 of 2006* and Notice of withdrawal of *Nairobi Hccc No. 43 of 2010 (OS)*, respectively.

3. Upon being served with the subject Application, the 1st Plaintiff/Respondent filed a Replying Affidavit sworn on the 21st November 2021 and in respect of which, same has made various averments, but essentially, same has contended that the orders that were made by the Honourable Judge on the 9th August 2021, over and in respect of the subject matter, ought not to be disturbed. For clarity, the said affidavit has been sworn for and on behalf of the rest of the Plaintiffs/Respondents.

4. On the other hand, it appears that the 1st Defendant/Respondent herein did not file any response to and in respect of the Notice of Motion Application dated the 25th October 2021. However, it is worth noting that the 1st Defendant/Respondent herein also filed own Application which was dated the 1st November 2021, which was seeking similar orders to the current Application.

5. Be that as it may, the Application dated the 1st November 2021, which was filed by and/or on behalf of the 1st Defendant/Respondent herein was marked as withdrawn vide orders of the court made on the 1st December 2021.

DEPOSITIONS BY THE PARTIES:

6. Vide Supporting Affidavit sworn on the 25th October 2021, the 2nd Defendant/Applicant herein has averred that the subject suit was heard and the hearing was concluded before Hon Lady Justice K Bor, Judge, on or about October 2019. For clarity, the deponent has pointed out that thereafter Parties filed their written submissions and the matter was initially scheduled for judgment on the 14th October 2019.

7. It is further averred that come the 14th October 2019, the Judgment was deferred to the 13th December 2019, when same was similarly not ready. However, on the 13th December 2019, the Parties herein were referred to mediation, but which mediation did not yield any fruit.

8. Be that as it may, the deponent has averred that when the matter was returned back to court, upon the unsuccessful mediation attempt, the Honourable court thereafter gave to the Parties a date for Judgment, but instead of rendering and/or delivering a Judgment, the Honourable Court returned and rendered a ruling on the 9th August 2021, whereupon the court suspended the delivery of the Judgment pending the hearing and conclusion of two other suits namely ***Nairobi Hcc No. 43 of 2010 (OS) and Nairobi High Court Miscellaneous Civil Application Number 10 of 2006.***

9. On the other hand, the deponent has also averred that other than the order suspending and/or staying proceedings in respect of the subject matter, the court also ordered that the Parties herein do proceed to maintain and preserve the status quo over and in respect to the suit property until the court determination and/or ascertainment of the share of the suit property which the Plaintiffs late mother was entitled to.

10. It is the deponent's further averment, that up to and including the time when the court made the aforesaid Ruling, none of the Parties to the subject suit had made any such Application before the court. For clarity, there was no such Application pending before the court to warrant the said rendition and/or intervention.

11. Other than the foregoing, the deponent has similarly averred that even as the learned judge made the impugned ruling, same overlooked the contents of paragraph 11 of the 1st Defendant/Respondent's Statement of Defense dated the 27th February 2019, wherein the 1st Defendant/Respondent had clearly pointed out and/or otherwise admitted that ***Nairobi Hccc No. 43 of 2010 (OS)***, was no longer in existence.

12. Notwithstanding the foregoing, the deponent has further averred that following the delivery of the ruling by the court, same was constrained to undertake an investigation and thereby authenticate the status over and in respect of the two suits, which were referred and/or alluded to by the court and which formed the basis of the stay order.

13. Based on the foregoing, the deponent has averred that in the process of the investigation, same came across Notices of withdrawal of suit which were filed on various dates. First and foremost, the Notice of withdrawal of ***Nairobi High Court Miscellaneous Civil Application Number 10 of 2006*** was filed on the 28th January 2011.

14. On the other hand, the Notice of withdrawal over and in respect of ***Nairobi Hccc No. 43 of 2010 (OS)*** was filed in court on the 22nd January 2018. For clarity, the Notices of Withdrawal of suits, were duly annexed to the Supporting Affidavit in respect of the Subject Application.

15. Based on the foregoing, the deponent herein has averred that the order that was made by the learned judge was therefore made in error and/or mistake, essentially to the effect that the two suits, which the court referred to and premised its ruling, were indeed none-existent, at the time of delivery of the Ruling.

16. In the premises, the 2nd Defendant/Applicant has therefore contended that there exists an Error and/or Mistake apparent on the face of the court and that the Error and/or Mistake is discernable, without elaborate and/or long drawn reasoning.

RESPONSE BY THE PLAINTIFFS/RESPONDENTS:

17. Having been served with the subject Application, the 1st Plaintiff/Respondent herein, namely Alexander Anthony Wahiu, swore a Replying affidavit on the 24th November 2021, for and/or on behalf of the rest of the Plaintiffs/Respondents and to which the deponent has averred as hereunder;

18. That the subject suit herein was filed on the 23rd May 2018, when the two suits, namely ***Nairobi Hccc No. 43 of 2010 (OS) and Nairobi High Court Miscellaneous Civil Application Number 10 of 2006***, were pending and this was pleaded at paragraph 8 & 10 of the Plaint dated the 23rd May 2018.

19. It is further averred that the issues raised in the Plaintiffs/Respondents claim were that the Suit property, was at all times subject to the Doctrine of Lis pendence as pleaded at paragraph 10 b of the Plaint.

20. Besides, it has further been averred that the fact of the filing of the Notices of withdrawal of the two suits was addressed at paragraph 10 f of the Plaint that the Notices were not served upon our advocates until the 6th April 2018, which was well after the agreement of sale dated the 12th February 2018, and the issue of *mala-fides* has been raised against the Defendants/Applicants.

21. It has further been averred that over and above the matter raised herein before, it was always and still it is our (Plaintiffs'/Respondents') contention that the Notices of withdrawal dated the 22nd January 2018, were filed pursuant to the jurisdiction of the court and were therefore subject to the Courts approval.

22. On the other hand, the deponent has further averred that at the time of filing of the Notices of withdrawal, the Defendant in **Nairobi Hccc No. 43 of 2010 (OS) – Eunice Wamboi Kariha**, was deceased, having died on the 28th December 2014. In this regard, the Plaintiff/Respondent, in the said suit, was bound by the provision of Order 25 of the Civil Procedure Rules, which regulate due process where a Party to a suit is deceased.

23. Other than the foregoing, the Plaintiffs have further averred that to the extent that **Nairobi Hccc No. 43 of 2010 (OS)** had been fixed for hearing prior to the 22nd January 2018, same therefore could not be withdrawn vide Notice of withdrawal without leave of the court having been sought and/or granted.

24. Nevertheless, the Plaintiffs have contended that up to and including to date, no such leave has ever been granted by the court and hence the Notice of Withdrawal of suit alluded to, has never been endorsed and/or adopted.

25. As concerns the Notice of Withdrawal in respect of **Nairobi High Court Miscellaneous Civil Application Number 10 of 2006**, the deponent has averred that though same was filed on the 28th January 2011, same has similarly not been endorsed and/or adopted by the court. For clarity, it is the deponent's view and/or position, that endorsement of the Court is essential prior to and/or before a Notice of withdrawal takes effect.

26. All in all, the Plaintiffs'/Respondents herein contend that the ruling by the learned Judge (differently constituted) was legally sound and/or well grounded and therefore same ought not to be reviewed.

RESPONSE BY THE 1ST DEFENDANT/APPLICANT:

27. As pointed out herein before, the 1st Defendant/Respondent herein filed an Application, which was dated the 1st November 2021, whereby same sought similar Reliefs and/or orders like the ones beforehand. However, the said Application was marked as withdrawn on the 1st December 2021.

28. Nevertheless, as pertains to the subject Application, the 1st Defendant, has neither filed a Replying Affidavit nor Grounds of Opposition.

SUBMISSIONS:

29. The Application dated the 25th October 2021, came up for hearing on the 1st December 2021 on which date the Parties agreed that same be canvased and/or disposed of by way of written submissions. Consequently, the court proceeded to and directed that the Parties do file and exchange written submissions within set timelines.

30. Pursuant to the directions of the court, the 2ND Defendant/Applicant proceeded to and indeed filed his written submissions on the 17th January 2022, and those by the Plaintiffs/Respondents were also filed on the same date.

31. For clarity, the two sets of written submissions are on record and same have been duly appraised, considered and taken into account.

32. On the part of the 2nd Defendant/Applicant, it has been submitted that the two suits, namely, **Nairobi Hccc No. 43 of 2010 (OS) and Nairobi High Court Miscellaneous Civil Application Number 10 of 2006**, ceased to exist by virtue or Operation of the law.

33. Firstly, **Nairobi High Court Miscellaneous Civil Application Number 10 of 2006** ceased to exist when Eunice Wamboi Kariha passed on and or died on the 28th December 2014, and there was no substitution thereof, within the statutory 12 months. In this regard, the suit abated.

34. Secondly, **Nairobi Hccc No. 43 of 2010 (OS)**, also ceased to exist in the eyes of the law, within 12 months from the 28th December 2014, after the death of the Defendant, who was never substituted. In this regard, there having been no substitution, the suit similarly abated.

35. Other than the cessation on the basis of operation of the law, it was also the submissions of counsel for the 2nd Defendant/Applicant that the two suits herein had also been withdrawn by the very person who had filed them namely, the current 1st Defendant/Respondent herein. In this regard, counsel alluded to the two notices of withdrawal, which have not been contested by the Plaintiffs.

36. On their part, the Plaintiffs though admitting that the withdrawal Notices were duly filed, same however, contend that the Notices of withdrawal have neither received the sanction nor endorsement by the court and hence the two suits referred to in the impugned Ruling of the learned judge remain alive and in existence.

37. It is the Plaintiffs' further submission that the Notices of withdrawal can only take effect if and when the court has formally endorsed them and to the extent that same have not been formally endorsed and/or ratified, it cannot be said that the Notice of withdrawal had become effective, in whatever manner.

38. Based on the foregoing, the Plaintiffs have therefore implored the court that the Ruling and Decision of the court, which was made on the

9th August 2021, ought to be maintained.

ISSUES FOR DETERMINATION:

39. Having reviewed the Notice of Motion Application dated the 25th October 2021, the Supporting Affidavit thereto, the Replying affidavit filed in Opposition thereto and having considered the written submissions filed and/or on behalf of the Parties, the following issues Do arise and are germane for Determination;

- a. *Whether Nairobi Hcc No. 43 of 2010 (OS) and Nairobi High Court Miscellaneous Civil Application Number 10 of 2006 are still legally in existence.*
- b. *Whether the Notice of Withdrawal which were filed and/or lodged in respect of the said two suits took effect and/or became effective upon their filing or otherwise.*
- c. *Whether there is an Error or Mistake apparent on the Face of Record.*

:ANALYSIS AND DETERMINATION

ISSUE NUMBER 1

Whether Nairobi Hcc No. 43 of 2010 (OS) and Nairobi High Court Miscellaneous Civil Application Number 10 of 2006 are still legally in existence:

40. It is apparent that the 1st Defendant/ Respondent herein had filed and/or lodged various suits before the High Court between himself and one Eunice Wamboi Kariha, now Deceased. For clarity, the suits which were lodged are as hereunder;

- i. *Nairobi High Court Miscellaneous Civil Application Number 10 of 2006.*
- ii. *Nairobi Hccc No. 43 of 2010 (OS)*

41. Nevertheless, following the lodgment of the said Proceedings, it appears that the matters proceeded for hearing and/or mention, up to some point. But however, the proceedings thereafter terminated and/or aborted following the death of the Respondent, Eunice Wamboi Kariha.

42. It is also common ground that the said Eunice Wamboi Kariha died on the 28th December 2014, which fact is admitted in terms of paragraph 4 of the 1st Plaintiff's/ Respondent's Replying Affidavit, but which is similarly corroborated by the death certificate supplied to court by the 1ST Defendant/ Respondent and issued on the 30th January 2015.

43. To the extent that Eunice Wamboi Kariha died on the 28th December 2014, it was incumbent upon her heirs and/or beneficiaries, where appropriate to take out Grant of Letters of Administration and/or commence Succession Proceedings and thereafter apply for substitution to proceeded with both the Suits, which were pending at the time of her Death.

44. Nevertheless, it must also be noted that the only instance where the duly appointed Administrators and/ or Legal Representatives of the estate of the deceased can proceed with any pending Litigation left by the deceased, is where the Cause of action survives the Deceased and not otherwise.

45. Consequently and at all times, it is imperative and/or appropriate to ascertain whether a particular cause of action has survived the Deceased. For clarity, certain actions are Actions in Personam and hence do not survive the Deceased.

46. On the other hand, it is also important to note that even when the cause of action has survived the death of the deceased, the Administrators or the Legal Representatives of the estate of the deceased are enjoined under the law to make the requisite application for such joinder and/or substitution within 12 months from the date of death.

47. In respect to the subject matter, it is worthy to note that up to and including the 9th August 2021, when the impugned ruling by the court was made, no Grant of letters of Administration appear to have been taken out by the Plaintiffs herein, but most importantly, no Application for substitution appear to have been made, if at all in respect of the said matters.

48. In my humble view, the two suits, which the learned judge alluded and/or referred to appear to have been long abated and are therefore legally none-existent. For clarity, where a suit abates, same ceases to exist in eyes of the law and hence no legal action can be taken in respect of the same.

49. In support of the foregoing legal statement, I quickly adopt and restate the position in the case **Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 others [2015] eKLR**, where the Court Of Appeal stated as hereunder;

There are three stages according to these provisions. As a general rule the death of a plaintiff does not cause the suit to abate if

the cause of action survives. But within one year of the death of the plaintiff or within such time as the court may in its discretion for "good reason" determine, an application must be made for the legal representative of the deceased plaintiff to be made a party. The "good reason" therefore relates to application for extension of time to join the plaintiff's legal representative to the suit.

Secondly, if no such application is made within one year or within the time extended by leave of the court, the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action.

Thirdly, the legal representative of the deceased plaintiff may apply for the abated suit to be revived after satisfying the court he was prevented by "sufficient cause" from continuing with the suit. The effect of an abated suit is that it ceases to exist in the eye of the law.

The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased plaintiff. There have been arguments, as to whether or not a formal order is necessary to confirm the fact of abatement. See M'mboroki M'arangacha v Land Adjudication Officer, Nyambene and 2 others, Meru H.C.C. Application No.45 of 1997 where the High Court held that an order to record the abatement of a suit was not necessary. See a similar holding in KFC Union v Charles Murgor (Deceased) NBI HCCC No.1671 of 1994.

From the language of Order 24 Rule 3(2) aforesaid, earlier reproduced and highlighted, the fact of abatement has to be brought to the notice of the court, proved and accordingly recorded in order for the defendant to apply for costs. It means that even though the legal effect of abatement may have already taken place, for convenience an order of the court is necessary for a final and effectual disposal of the suit.

ISSUE NUMBER 2

Whether the Notices of Withdrawal which were filed and/or lodged in respect of the said two suits took effect and/or became effective upon their filing or otherwise.

50. Other than the issue of abatement of the two suits, premised on the death of the Respondent, namely Eunice Wamboi Kariha, the court was also shown various Notices of withdrawal, one of which was indeed filed long before the death of the said Eunice Wamboi Kariha. For clarity, the Notice of withdrawal in respect of Nairobi HCCC Misc. No 10 of 2006, was filed on the 28th January 2011.

51. It is worthy to note that the filing of the two sets of Notices of withdrawal herein are not disputed by the Plaintiffs, who have essentially acknowledged and admitted same in terms of paragraph 3, 5 and 7 of the Replying affidavit sworn on the 24th November 2021.

52. However, the only point which has been raised by the Plaintiffs/ Respondents herein, as concerns the Notice of withdrawal is that though filed, same has not attracted the requisite endorsement, approval and/or sanction of the court. Consequently it is the Plaintiffs' submissions that the Notices of withdrawal have therefore not taken any effect and therefore the two (2) suits, which were alluded to are still in existence.

53. On his part, the 2nd Defendant/Applicant contends that having been duly filed and lodged with the court, the Notice of withdrawal took effect when the same were lodged and paid for. Consequently, the two suits which were alluded to at the foot of the Notices of the withdrawal, effectively remain withdrawn. In this regard, the 2ND Defendant/ Applicant states that the suits are no longer in existence.

54. Before resolving the legal stalemate paused by the rivalling submissions, it is worthy to reproduce the provision of Order 25 Rules 1 & 2 of the Civil Procedure Rules 2010, which provides as hereunder;

1. **Withdrawal by plaintiff [Order 25, rule 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 discontinuance or withdrawal shall not be a defence to any subsequent action.

2. **Discontinuance [Order 25, rule 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 the 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 1 shall apply to counterclaims.

55. In respect of Nairobi HCCC Misc No 10 of 2006, no Evidence has been availed by the Plaintiffs herein that by the time the Notice of withdrawal was filed and/or lodged on the 28th January 2011, same was having a hearing date, to warrant the Leave of the court being sought for and/or obtained in line with Order 25 Rule 2 of the Civil Procedure Rules, 2010.

56. On the other hand, as pertains to Nairobi HCC 43 of 2010 (OS), it is worthy to note that by the 22nd January 2018, when the Notice of

withdrawal was filed and/or lodged, the Defendant to the said suit, namely, Eunice Wamboi Kariha was long dead and therefore there was no Defendant, against whom a hearing date could have been fixed and/or set down.

57. In the premises, the lodgment of the Notices to withdraw the suit, which were mounted by the originator of the suit, namely the current 1st Defendant/Respondent, took effect, from the date when the said Notices were filed and/or lodged with the court. For clarity, the court was not called upon to sanction and/or approve the Notice of withdrawal of the suit.

58. Perhaps, I need to add that the endorsement of the Notices of withdrawal on the court record is an administrative matter and meant for good order, but the failure and/or neglect to endorse the Notice of withdrawal, does not resuscitate a suit that has been withdrawn by the owner and/or originator thereof.

59. If any authority for the foregoing statement is required, then I adopt and reiterate the decision by the Court of Appeal in the case of **PIL KENYA LIMITED v JOSEPH OPPONG [2009] eKLR**, where hon Justice Bosire JA; held as hereunder;

‘As regards High Court Civil Case No. 260 of 200, the plaintiff was Jeneby Taita with the appellant as defendant. The respondent herein was not named as a party. I earlier stated that a notice of withdrawal of suit was filed on 13th November, 2000. By that date the respondent had not been made a party. It was on or about 15th November, 2000 that the respondent brought an application seeking to be enjoined as a defendant on the ground that he had an interest in the subject matter of that suit.

.. The application was heard on 15th November, 2000, by a Commissioner of Assize, Mrs. Tutui, who granted it and directed that an amended plaint be filed. There is no evidence before this Court that it was ever filed. If, however, the notice of withdrawal was valid such an amendment did not arise as there was no suit in existence respecting which an amended plaint or amended defence could be filed. The order was made ex parte, and later, a Mr. Obura for the plaintiff lamented that he should have been but was not served with the order enjoining the respondent herein as defendant and directing the amendment of the plaint.

.. A plaint could not properly be amended at the instance of a party who was not the plaintiff. The said advocate also asserted that the suit had not been withdrawn and any notice to that effect was a forgery. It later transpired, however, that the plaintiff disappeared. He was not answering his advocate’s letters nor did he ever visit him thereafter.

.. The notice of withdrawal was home made and I infer that it was indeed filed by the plaintiff personally. I say so advisedly. By his conduct he had no interest in the suit, with the result that his advocates had to formally apply for leave to cease acting for him. The plaintiff in that suit did not need the leave of the court to withdraw his suit nor was a court order necessary to give effect to the withdrawal. All that was necessary was for the plaintiff to file a notice of withdrawal before judgment. After judgment, however, the leave of the court was necessary’.

60. Other than the foregoing decision, the Supreme Court also added her voice in respect of situations where a Party wishes to withdraw his/her case or appeal and it has been underlined that in such instances, the Party is liberty so to do and same cannot be fettered, in any way whatsoever.

61. In this regard, I must point out that the 1st Defendant herein, who was the originator of the suits, that have been alluded to and who filed the Notices of withdrawal was indeed at liberty to withdraw same.

62. Effectively, the said suits, which were withdrawn by the originator therefore, stood withdrawn and therefore cannot be prosecuted in any way. Clearly, the person who originated same has already thrown-in the towel and cannot be forced to go back and resuscitate the suits. Simply put, there are no more Suits pending before the High Court, over and in respect of the Subject Property, which are capable of being heard in the manner decreed vide the Impugned Ruling.

63. In a nutshell, it is befitting to invoke the decision in the case **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR**, where the Supreme Court observed as hereunder;

*A party’s right to withdraw a matter before the 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. Recently, a single judge of this Court in **John O. Ochanda vs Telkom Kenya Limited**, Motion No. 25 of 2014, in granting an application for withdrawal of a Notice of Appeal, stated inter alia:*

“I do hold the view that a prospective Appellant is at liberty to withdrawal a Notice of Appeal at any time before the Appeal has been lodged and any further steps taken. No proceedings have commenced strictly. I am also of the view that just like under the Civil Procedure Rules or Court of Appeal Rules, the right to withdraw or discontinue proceedings or withdraw a Notice of Appeal respectively ought to be allowed as a matter of right subject to any issue of costs which can be claimed by the respondents if any.”(Emphasis provided)

ISSUE NUMBER 3

Whether there is an Error or Mistake apparent on the Face of Record.

64. It is common ground that the matter herein proceeded for hearing and all the Parties had tendered their evidence as well as rendered their submissions. Thereafter, the Honorable Judge retired to craft and deliver the Judgment.

65. Nevertheless, in the course of preparing the judgment, the Honorable Judge came across aspects of the matter, which alluded to the existence of some other suit, which appeared to have been previously filed between the 1st Defendant/Respondent and one Eunice Wamboi Kariha, now deceased, who was the mother of the Plaintiffs herein.

66. Having come across aspects of the said previous cases, which appeared to have been subsisting and/or otherwise pending, the learned Judge, *Suo motto*, decided to abandon the crafting of the Judgment and instead crafted a Ruling whereby same ordered and/or directed that the suit herein shall be stayed pending the hearing and determination of ***Nairobi Hccc No. 43 of 2010 (OS) and Nairobi High Court Miscellaneous Civil Application Number 10 of 2006***, by the Family division.

67. On the other hand, the learned Judge also proceeded to and/or ordered that there shall be maintained of the status quo over and in respect of the suit property pending the determination of the two suits, namely ***Nairobi Hccc No. 43 of 2010 (OS) and Nairobi High Court Miscellaneous Civil Application Number 10 of 2006***.

68. In the mind of the learned Judge, the two suits, namely ***Nairobi Hccc No. 43 of 2010 (OS) and Nairobi High Court Miscellaneous Civil Application Number 10 of 2006***, were still pending and/or otherwise outstanding and same were therefore awaiting hearing and determination.

69. However, from what I have discussed in respect of issues of number 1 and 2 hereof, it is obvious that the Suits herein, namely ***Nairobi Hccc No. 43 of 2010 (OS) and Nairobi High Court Miscellaneous Civil Application Number 10 of 2006***, ceased to exist in the eyes of the law, both on account of abatement, as well as on the basis of withdrawal.

70. In the premises, as at the 9th August 2021, the two suits that the learned Judge was referring to and which formed the basis of her Ruling, were certainly none-existent and in this regard, and with due deference, the ruling was made in Error and/or is premised on Mistake, which is conspicuous, discernable and evident.

71. In my humble view, the Error and/or Mistake belying the impugned Ruling is one that is notable without a long and/or drawn out legal argument and therefore same is amenable to Review.

72. In support of the foregoing observation, I take refuge in the Decision in the case of ***National Bank Of Kenya Limited v Ndungu Njau [1997] eKLR***, where the Court of Appeal stated as hereunder:

A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

FINAL DISPOSITION:

73. Having reviewed the Notice of Motion Application dated the 25th October 2021, and taking into account the pertinent issues raised thereunder, coupled with the Notices of withdrawal, which were duly admitted by the Plaintiffs, I come to the conclusion that the Application is merited.

74. Consequently and in the premises, the Application dated the 25th October 2021, be and is hereby Allowed. In this regard, the Orders of the court made on the 9th August 2021, are hereby reviewed and set aside.

75. Based on the foregoing, the Parties shall now be at liberty to chose whether the matter shall be referred to Hon. Lady Justice K Bor, Judge, who heard and concluded the hearing of the subject matter, for purposes of crafting the requisite judgment and in which case, directions shall be given upon the delivery of the subject Ruling.

76. As the subject matter is still pending for determination, I direct that costs shall abide the outcome of the case.

77. It so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28th DAY OF MARCH 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

June Nafula Court Assistant

Mr. King'ara for the Plaintiffs/Respondents

