



**Republic v County Government of Nyeri & 5 others; Ndegea & 30 others as
Members of Kamuhiuria Community (Exparte) (Judicial Review Application
E003 of 2023) [2025] KEHC 4228 (KLR) (20 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 4228 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
JUDICIAL REVIEW APPLICATION E003 OF 2023
DKN MAGARE, J
MARCH 20, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY GOVERNMENT OF NYERI 1ST RESPONDENT

**KENYA CLIMATE SMART AGRICULTURAL PROJECT (KCSAP) 2ND
RESPONDENT**

**CHIEF OFFICER - AGRICULTURAL LIVESTOCK & FISHERIES 3RD
RESPONDENT**

ENDS INTERNATIONAL COMPANY LIMITED 4TH RESPONDENT

DOMINICA NGUNJIRI 5TH RESPONDENT

JACOB GITHINJI 6TH RESPONDENT

AND

**WASHINGTON NDEGEA & 30 OTHERS AS MEMBERS OF KAMUHIURIA
COMMUNITY EXPARTE**

RULING

1. This is a Ruling in respect of the Application dated 14.8.2023. The Applicant is seeking for orders as follows:
 - a. Spent



- b. The court be pleaded to vacate the notice of intention to withdraw the Judicial Review suit dated 2.5.2023.
 - c. The Court be pleased to grant the prayers in the Judicial Review Application dated 29.3.2023.
 - d. Alternatively, a formal proof date do issue or directions for the Application to proceed as undefended.
 - e. Costs
2. The Application is premised on the grounds on its face and is supported by the affidavit of the even date, as well as the supplementary affidavit sworn by Ashington Ndegea on 8.6.2023. It is deposed in material as follows:
- a. The Respondents were served with pleadings and hearing notice but failed to enter appearance of file any defence.
 - b. The judicial review Application is unopposed and the cause should be heard as undefended.
 - c. The ex parte Applicants and the representatives of the Respondents reached an agreement intended to compromise the cause and have it withdrawn.
 - d. Following the said agreement, the Applicants filed a notice of withdrawal.
3. The 1st Respondent filed a Replying Affidavit sworn by Wilson Kiiru Maringa, the County Chief Officer on 12.10.2023 on grounds inter alia that:
- i. The Application was an attempt to deny the Respondents the right to be heard.
 - ii. The Applicant also attended the meeting that discussed the withdrawal of the suit.
 - iii. It was agreed that the suit was withdrawn by 2.5.2023.
 - iv. The Application was brought in bad faith.
 - v. Alternative dispute resolution was encouraged under Article 159 of *the Constitution*.
 - vi. The Respondents did not file a Replying Affidavit as they were of the view that the matter was settled.
 - vii. The Respondents seek time to file a reply to the Application.
4. The Applicants took upon themselves to file submissions on 16.10.2023 in support of the Judicial Review Application dated 29.3.2023. This was in oblivion to and suppression of the court process. The court has to give directions on what parties do for orderliness in the proceedings. That is the purpose of Order 11 of the Civil Procedure Rules for if no such procedural aspects of justice were inculcated in the law, substantive judicial process would fall to the hands of the mighty and powerful who could only dictate what was right to them. Parties have equal arms before the court and have corresponding equal space as anticipated by law. The Submissions as filed are not relevant as they do not relate to the Application dated 14.8.2023 which is before the court for determination through this Ruling.
5. The Respondents on their part did not file submissions.

Analysis

6. The issue for determination is whether the Notice to withdraw suit dated should be withdrawn and the Judicial Review Application heard on merits.



7. Order 25 of the Civil Procedure Rules provides for withdrawal of suits 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 discontinuance 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 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.
8. The Applicant herein had the right to withdraw their Judicial Review suit even without entering into any agreements with the Respondents. In the case of *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 Others*, Supreme Court Application No. 16 of 2014, the Supreme Court stated as follows;
- “ 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.
9. It did not matter that the Respondents influenced the Applicant to withdraw the Judicial Review suit. Once a Notice of withdrawal was filed, the suit was considered withdrawn with the consequence that no suit existed. In the case of *Beijing Industrial Designing & Researching Institute vs. Lagoon Development Limited* [2015] eKLR, the Court of appeal stated as follows;
- “ As a general proposition, the right of party to discontinue a suit or withdraw his claim cannot be questioned. There are many circumstances when a Plaintiff may legitimately wish to discontinue his suit or withdraw his claim. The Supreme Court of Nigeria in *Abayomi Babatunde vs. Pan Atlantic Shipping & Transport Agencies Ltd & Others* SC 154/2002 identified those circumstances to include where;
- (i) A Plaintiff realizes the weakness of his claim in the light of the defence put up by the Defendant.
 - (ii) A Plaintiff’s vital witnesses are not available at the material time and will not be so at any certain future date,
 - (iii) Where by abandoning the prosecution of the case, the Plaintiff could substantially reduce the high costs that would have otherwise followed after a full-scale but unsuccessful litigation, or
 - (iv) A Plaintiff may possibly retain the right to relitigate the claim at a more auspicious time if necessary.
10. From Order 25 of the Civil Procedure Rules to the authorities of decided cases, the Respondents herein did not need to play a part in the withdrawal of the suit. In law, withdrawal was an initiate of the Applicant and once done, as it was, the only available remedy to sustain was to file a fresh suit.



The withdrawal does not activate the bar of res judicata. In *Antony Kayaya Juma v Humprey Ekesa Khaunya & Another* [2004] e KLR, 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.”

11. The Applicant having withdrawn the Judicial Review Application by way of the Notice of Intention to Withdrawal dated 2.5.2023 and filed on 3.5.2023. In *Priscilla Nyambura Njue v Geovhem Middle East Ltd; Kenya Bureau of Standards (Interested Party)* [2021] eKLR, Justice Mativo observed:

“Withdrawal of a suit is itself its end. The right of a plaintiff to withdraw his suit is not a divine right but a right expressly conferred upon him by Order 25 and no right is similarly conferred upon him to revoke or rescind the withdrawal. So long as he remains the plaintiff, he may do any act which he may do in that capacity; he cannot, after withdrawal of the suit resulting in the loss of the capacity, do an act which can be done only in that capacity. Put differently, there is no provision conferring the right to revoke the withdrawal and there is no justification for saying that the right to withdraw includes in itself a right to revoke the withdrawal. The withdrawal took effect immediately the court permitted it and as observed earlier, Order 25 has no provision permitting reinstatement of a suit once the withdrawal has taken effect.”

“The consequence of an act of withdrawal is that the Plaintiff ceases to be a Plaintiff before the Court. If he is the only plaintiff and withdraws the whole of the suit, the suit comes to an end and nothing remains pending before the Court, if he withdraws only a part of the suit that part goes out of the jurisdiction of the court and it is left with only the other part. This is a natural consequence of the act; a further consequence imposed by sub rule (3) is that he cannot institute a fresh suit in respect of the subject-matter. He becomes a subject to this bar as soon as he withdraws the suit. It follows as a corollary that he cannot revoke or withdraw the act of withdrawal. If he absolutely barred from instituting a fresh suit, it means that he is absolutely barred from reviving his status as a Plaintiff before the Court.

It stands reason that when on withdrawal the Plaintiff ceased to be a party and the Court ceased to have jurisdiction over the suit and thus became functus officio nothing but a fresh suit can again invest the Court with jurisdiction over it. As far as the withdrawn suit is concerned the suit is at an end and no further proceedings can be taken in it; the suit and the Plaintiff do not exist and no application such as and for revoking the withdrawal can be made in the suit or by the Plaintiff.”

12. Effective 3.5.2023 upon filing the notice to withdraw, the Judicial Review Application was extinguished. In *Charles Kiptarbei Birech v Paul Waweru Mbugua & another* [2021] eKLR, the Court stated as follows:

19. 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 the either the light or the bulb cease 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.

- ... 30. In conclusion, I am of the view that the import of a withdrawal of a suit, by whichever of the three options mentioned in paragraph 26 above seals the fate of that suit or the part of that suit that is withdrawn forever in so far as that suit is concerned. Its life goes into oblivion: a bottomless pit from where it can never be recalled into existence in that very withdrawn suit. Only a fresh one can be instituted if the law permits it.
13. I am also persuaded by the case of *George Mwangi Kinuthia v Attorney General* [2019] eKLR which held:
- “It follows a party who withdraws his suit cannot seek to reinstate the same but a party withdrawing a suit has an option of instituting a fresh action as per provisions of Order 25 Rule 4 of the Civil Procedure Rules, 200. The order and rule herein above do not envisage a litigant who has withdrawn the suit to seek a reinstatement; as a withdrawal means there is no suit pending anymore. In view of the above it is my view once a suit has been withdrawn there is nothing that can be sought to be reinstated.”
14. There is nothing to be withdrawal as the suit is non-existent. The Court held in *Bahati Shee Mwafundi v. Elijah Wambua* [2015] eKLR, as follows:
- “I have considered the Appellants’ Application. ... Order 25 envisages that once a party withdraws or discontinues a suit such a party may file another suit and such withdrawal or discontinuation cannot be raised as a defence in a subsequent suit.
- It follows that Order 25 does not permit a party to withdraw a notice to withdraw or discontinue a suit. The filing of such a notice to withdraw or discontinue a suit terminates the suit and there cannot be, thereafter, a setting aside of the notice to withdraw or discontinue a suit.
15. The excerpt by Stuart Sime in his book “A Practical Approach to Civil Procedure”, 9th Edition also resounds the effect of filing a notice to withdraw suit where the learned author stated:
- ‘Notice to discontinue takes effect and brings the proceedings to an end as against each defendant, on the date it is served upon the defendant’.
16. With the above guides, the Application is devoid of merit.
17. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:
- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
 - (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.



18. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

“It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

19. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs— that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

20. The respondents did not file submissions, in the circumstances, each party will bear their own costs.

Determination

21. The upshot is that I make the following orders: -

- a. The Notice of Motion Application dated 14.8.2023 is dismissed in limine.
- b. For the avoidance of doubt, the Judicial Review suit herein stands withdrawn
- c. Each party to bear own costs.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 20TH DAY OF MARCH, 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:

Mr. Wambugu for the Applicant

Mr. Irungu for the 1st, 2nd, 3rd and 4th Respondents

No Appearance for 5th and 6th Respondents



