



**Mulondo & Company Advocates v Landmark Freight Services
Limited & another (Miscellaneous Application (OS) E025 of 2024)
[2025] KEHC 11014 (KLR) (Commercial and Tax) (24 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11014 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION (OS) E025 OF 2024**

PM MULWA, J

JULY 24, 2025

BETWEEN

MULONDO & COMPANY ADVOCATES APPLICANT

AND

LANDMARK FREIGHT SERVICES LIMITED 1ST RESPONDENT

KENYA BUREAU OF SERVICES 2ND RESPONDENT

RULING

1. Before this Court for determination is the Notice of Motion dated 2nd September 2024, brought by the 1st Respondent seeking an order for costs arising from the withdrawal of the suit by the Plaintiff. The application is expressed to be made pursuant to the provisions of Order 25 Rules 1 and 2(2) of the Civil Procedure Rules and is supported by the affidavit of Mbugua Antony, learned counsel for the 1st Respondent, sworn on even date.
2. In response, the Plaintiff filed a Notice of Preliminary Objection dated 13th November 2024, contending that the application is res judicata in view of the Court's earlier ruling rendered on 6th May 2024, which permitted the withdrawal of the suit without any order as to costs. It is further contended that the application is in substance one for review, but fails to satisfy the conditions under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. It is the Plaintiff's position that the issues raised ought properly to be ventilated through an appeal rather than by way of the present application.
3. Pursuant to directions of this Court, both the Preliminary Objection and the substantive application were heard together, with parties making oral arguments in support of their respective positions.



4. Counsel for the 1st Respondent, Mr. Mbugua, submitted that the suit was withdrawn unilaterally by the Plaintiff without notice and in the absence of counsel for the 1st and 2nd Respondents. He urged the Court to find that there was no adjudication on costs and therefore, no bar under Section 7 of the *Civil Procedure Act*. He placed reliance on Order 25 Rules 1 and 2(2) of the Civil Procedure Rules which obligate the Court, upon withdrawal of a suit, to determine the issue of costs. Mr. Mbugua contended that the matter had already been set down for hearing through directions of the Court and pleadings had been filed by all parties, as such, the Respondents were entitled to costs.
5. In response, Mr. Morare, appearing for the Plaintiff, supported the Preliminary Objection. He submitted that the issue of withdrawal and costs was already conclusively determined by this Court in its ruling of 6th May 2024, wherein the Court allowed the withdrawal and made no orders as to costs. He further argued that the 1st Respondent has not offered any explanation for his absence on that date and that the appropriate remedy, if dissatisfied, lies in review or appeal. Citing the overriding objective principle under Sections 1A and 1B of the *Civil Procedure Act*, counsel urged that the Plaintiff should not be penalized with costs where the court, in its discretion, has already declined to issue such an order.

Analysis and determination

6. Having carefully considered the application, the preliminary objection, the oral submissions by counsel, and the applicable law, the following issues arise for determination:
 - i. Whether the application is barred by the doctrine of res judicata; and
 - ii. Whether the Court can award costs.

On Res Judicata

7. Section 7 of the *Civil Procedure Act* bars a court from trying any suit or issue that has already been determined by a court of competent jurisdiction. The Section provides that:

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties...and has been heard and finally decided by such Court.”
7. For res judicata to apply, the elements outlined in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR must be satisfied that the matter in issue must be directly and substantially the same. It must have been previously determined in a former suit, the parties must be the same or litigating under the same title, the court that decided the former matter must have been competent, and the issue must have been finally determined.
8. In the present case, while it is not disputed that on 6th May 2024, the Court allowed the withdrawal of the suit, from the record it is evident that no determination was made on the issue of costs. The order of 6th May 2024, as read into the record, was silent on costs. Therefore, this Court finds that the issue of costs was not adjudicated upon and hence cannot be said to be res judicata.

Whether the application amounts to a review

10. The Plaintiff argues that the application is, in essence, a review disguised as a motion under Order 25. This Court disagrees. The 1st Respondent has not sought to vary or set aside the orders of 6th May 2024. Rather, the present motion seeks a consequential relief on a matter that was not addressed in that ruling. Accordingly, the application does not fall within the scope of Section 80 of the *Civil Procedure*



Act or Order 45 of the Civil Procedure Rules, and is properly brought under Order 25 Rule 2(2) which provides:

“Where a suit has been set down for hearing, the court may grant the Plaintiff leave to discontinue the suit or withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise as are just.”

10. Section 27(1) of the Civil Procedure Act provides that:

“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...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.”

11. The general rule, as stated above, is that costs follow the event unless there is good reason to depart from that principle (See *Party of Independent Candidates of Kenya v Mutula Kilonzo & 2 Others* [2013] eKLR).

12. In the instant case, the 1st Respondent had participated in the proceedings, filed responses, and was awaiting the hearing of the suit, which had been scheduled by the Court. The Plaintiff then unilaterally withdrew the suit without serving notice of withdrawal or affording the Respondents an opportunity to respond to the application for withdrawal.

13. While the “oxygen principle” under Sections 1A and 1B of the Civil Procedure Act enjoins courts to facilitate expeditious and cost-effective resolution of disputes, it does not override express statutory provisions nor justify denying costs where no sufficient cause has been shown.

10. This Court is not persuaded that there exists any exceptional or compelling reason to depart from Section 27 of the Civil Procedure Act, the general rule that costs follow the event. The Respondents, having been drawn into the litigation and expended time and resources, are entitled to costs. The absence of a specific order on costs in the ruling of 6th May 2024 does not bar the Court from making such an order now, especially where the issue was not previously addressed.

11. Given the foregoing, I make the following orders:

- i. The Notice of Preliminary Objection dated 13th November 2024 is without merit and is hereby dismissed.
- ii. The Notice of Motion dated 2nd September 2024 is allowed.
- iii. Costs of the withdrawn suit are hereby awarded to the 1st Respondent.
- iv. The costs of this application shall also be borne by the Plaintiff.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI.

This 24th day of July 2025.

PETER M. MULWA

JUDGE

In the presence of:



N/A for Plaintiff

Mr. Mbugua Antony for 1st Respondent/Applicant

Court Assistant: Carlos

