



Sangoro v Swaleh (Civil Appeal E088 of 2025) [2025] KEHC 10621 (KLR) (18 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10621 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E088 OF 2025**

**G MUTAI, J
JULY 18, 2025**

BETWEEN

MICHAEL SANGORO & 16 OTHERS APPELLANT

AND

HASSAN SWALEH & 2 OTHERS RESPONDENT

RULING

1. Before this court is a Notice of Motion application dated 24th March 2025, vide which the appellants/ applicants seek the following orders: -
 - a. Spent;
 - b. Spent;
 - c. Spent;
 - d. That this honourable court be pleased to issue a stay of the order issued by the lower court on the 20th March 2025, in the case of Mombasa CMCC No E283 of 2025 between *Hassan Swaleh & 2 Others vs Tom Muchura & 16 others* pending the hearing and determination of the appeal herein; and
 - e. That the costs of this application be provided for.
2. The application is premised on the supporting affidavit of Michael Sangoro, the chairman of the Mombasa Sports Club, sworn on 24th March 2025. Vide the said affidavit, Mr Sangoro stated that the respondents herein moved the lower court vide a plaint dated 5th March 2025, in Mombasa CMCC Suit No.283 of 2025, seeking to stop a special general meeting at the Mombasa Sports Club (hereafter “the Club”) scheduled for 11th March 2025. He deposed that the court below allowed the respondents’ prayers.



3. He further stated in his oath that, separately, the annual general meeting (hereafter “the AGM”) of the Club was scheduled to be held on 25th March 2025; however, by way of an application dated 19th March 2025, and without amendment of the plaint, the respondents sought orders to stop the AGM of the Club. The court below allowed the said application.
4. Mr Sangoro deposed that the orders issued on 20th March 2025, by the lower court stopping the annual general meeting were irregular, null and void ab initio, as the order stopping the AGM was not one of the prayers in the plaint, thus not forming the cause of action in the suit before the trial court. That the said orders were issued in vacuo and without affording the appellants an opportunity to be heard.
5. He averred that the Club is a private members’ club governed by its own by-laws, rules and regulations with its own dispute resolution mechanisms. Its objectives include promoting sporting activities, among others. It was stated in the said deposition that by-law 2(iv) of the Club’s by-laws states that the club is non-political and non-religious, and therefore, no political or religious considerations should inform any decision taken by the management. By-law 40, for its part, requires that an AGM must be held in March. Previously, the same has been held in March during Ramadan with members of the Muslim faith in attendance. Therefore, the orders of 20th March 2025 should be stayed as the appellants/applicants pursue the appeal.
6. He stated that the appeal raises arguable grounds and has an overwhelming chance of success. Mr Sangoro urged that it would be in the interest of justice that the application herein be allowed as prayed.
7. The respondents, through their advocates, Khatib & Company Advocates, filed grounds of opposition dated 7th April 2025, opposing the application on the grounds that the application was misconceived and bad in law. It was averred that the same seeks final orders at the interlocutory stage, and that the application is otherwise an abuse of the court process.
8. The respondents, in further response, filed an affidavit sworn by Mr Gikandi, newly appointed as counsel for the respondents, and sworn and filed on 30th April 2025. Mr Gikandi deposed that Mombasa CMCC No. 283 of 2025; *Hassan Swaleh & 2 Others vs. Tom Muchura & 18 others* was withdrawn on 7th April 2025, when the trial court adopted the notice of withdrawal by the respondents, marking the end of the existence of the said suit. It was denied that the application had merit. The counsel deposed that, as the suit had been withdrawn, the appeal and the application had been overtaken by events.
9. The application was canvassed through written submissions, which were highlighted on 21st May 2025. I shall give a précis of each party’s submissions below.
10. The appellants/applicants, through their advocates, Munyao Muthama & Kashindi Advocates, filed their written submissions dated 9th May 2025. Counsel submitted on one issue, namely, whether the appellants are entitled to the orders sought in their appeal and application herein.
11. Mr Amakobe, learned counsel for the appellants/applicants, relied on Order 42, Rule 6 of the [Civil Procedure Rules](#), in particular, the conditions to be satisfied by an applicant seeking the grant of the orders of stay of execution pending appeal. He submitted that the club is a private members’ club governed by its own by-laws, rules and regulations. He submitted that Rule 40 of the Club’s by-laws stipulates that AGM shall be held not later than the last day of March of every year. The AGM is not a mere formality, but the most important organ for club members and the only forum through which the most significant business of the Club, such as elections and the presentation of the books of account, is conducted. It is only through the AGM that club members get to exercise their rights as members. Therefore, failure to hold the AGM would result in a significant disruption to the day-to-day business



- and affairs of the Club, and would also place it in breach of its bylaws and regulations, potentially exposing it to legal consequences, bringing its operations to a standstill, and causing reputational damage. That would lead to a loss that cannot be reversed, even if the appeal eventually succeeds.
12. On the issue of delay, counsel submitted that the appellants filed the application herein four days after the issuance of the orders of the lower court. Therefore, there was no unreasonable delay in filing the application.
 13. On security, counsel submitted that the appellants are willing to provide security for the due performance of the orders herein as may ultimately be binding on them and as the honourable court may determine.
 14. Counsel submitted that the appeal is arguable with a chance of success and urged the court to allow the application as prayed.
 15. Mr Amakobe further submitted that at the time of the filing of the appeal and application, Mombasa CMCC E283 of 2025 was pending in the lower court. Further, the respondents filed Mombasa HCCC No. E034 of 2025 seeking a declaration that the AGM and the resolutions adopted thereon are null and void, when the lower court suit and the appeal were alive, and therefore the withdrawal of the said suit was an afterthought.
 16. Counsel submitted that the filing of a new suit on the same issues, between the same parties, over the same subject matter, constitutes an abuse of the court process. It also offends the doctrine of sub judice under Section 6 of the *Civil Procedure Act*.
 17. In conclusion, counsel urged the court to allow the application with costs.
 18. The submissions of Mr Amakobe were supported by Mr Muchiri of the firm of Jackson Muchiri & Co. Advocates, counsels for the 6th and 10th appellants/applicants. The said firm filed written submissions dated 13th May 2025. Mr Muchiri submitted the *constitution* and bylaws of the club, which required that an AGM must be held every year before the end of March. It was his submissions that the AGM of the Club was held in March of every year, even during Ramadan, with members of the Muslim faith in attendance in large numbers. The club is non-religious and non-political; therefore, no religious or political considerations should inform any decision made by the management. He urged that for that reason, the orders of 20th March 2025 ought to be stayed.
 19. Counsel submitted that a null and void order or decision has no legal effect and cannot form the basis for further legal action or orders.
 20. On the other hand, the respondents, through their advocates, Gikandi & Company Advocates, filed their written submissions dated 29th April 2025.
 21. Counsel submitted that it is not possible to grant the prayer pending in this matter since Mombasa CMCC No. E283 of 2025 is no longer in existence, and therefore, the order issued on 20th March 2025 is no longer in existence. The withdrawal of the said suit effectively vacated all orders issued in that suit.
 22. Counsel further submitted that the appellants have not satisfied the conditions for the grant of a stay pending appeal, as they have not demonstrated that they will suffer a substantial loss if a stay is not granted. To the contrary, it was the respondents who had suffered substantial loss as a result of the appellants' actions in proceeding with the AGM and passing resolutions expelling them from the club.
 23. Counsel invited the court to apply sections 1A, 1B and 3A of the *Civil Procedure Act* and direct that the appeal be struck out. That appeal cannot have any foundation as long as the said primary suit is no longer in existence. Mr Gikandi submitted that the issues raised in the withdrawn suit are the



subject of Mombasa HCC No. E034 of 2024 and therefore striking out the said appeal will not deny the appellants/applicants an opportunity to present their issues.

24. In conclusion, counsel urged the court to dismiss the application herein with costs.
25. Although this is an application for a stay of execution, this Court must first determine whether the appeal is valid. Since the lower court matter, upon which this appeal is based, was withdrawn, does an appeal exist upon which stay orders may be issued? Since the question is jurisdictional and foundational, I propose addressing it first. If I establish that there is, in fact, a valid appeal, I will then consider the question of whether to grant a stay.
26. Order 25, Rule (1) of the *Civil Procedure Rules* provides that:-

“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.”

27. The court in the case of *Charles Kiptarbei Birech v Paul Waweru Mbugua & another* [2021] KEELC 394 (KLR) stated: -

“20. In regard to the Procedure relevant to the facts of this case, then, the only recourse an individual who was a party to a withdrawn or discontinued suit has is to file a fresh suit if the law permits him or her. 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.”

21. 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.”



28. At paragraph 30 of the [Charles Kiptarbei Birech](#) decision, the learned judge went on to state as follows: -

“ 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.”

29. There is no dispute that the lower court matter was withdrawn and a fresh cause filed by the respondents herein. Further parties are also in agreement that the issues raised in the lower court matter and this matter are similar to, or the same as, those raised in the other matter, being Mombasa HCCC No. E034 of 2024, which is between substantially the same parties.

30. It would seem to be the case that the lower court matter is dead for all eternity. The plaintiffs in the said cause have exercised their right to file a separate cause before this Court. Whatever orders existed in the case before the court below no longer exist.

31. Could this court issue any orders herein? It is my view that I cannot issue orders to stay the execution of the orders that are no longer in existence. The court, in the hackneyed phrase, cannot issue orders in vacuo. appellants/applicants will, if they want, present their case in Mombasa HCCC No. E034 of 2024 for adjudication.

32. Ordinarily, costs follow the event and are awarded at the discretion of the court. I am, however, inclined to depart from the usual practice. Although the appellants/applicants have not succeeded, that was largely due to the fact that the respondents, in a manner of speaking, stole a match from them.

33. The principles that courts use when exercising their discretion on costs were discussed in the case of [Cecilia Karuru Ngayu v Barclays Bank of Kenya & another](#) [2016] KEHC 7064 (KLR). Mativo, J, as he then was stated as follows: -

“To my mind, in determining the issue of costs, the court is entitled to look at inter alia (i) the conduct of the parties, (ii) the subject of litigation, (iii) the circumstances which led to the institution of the proceedings, (iv) the events which eventually led to their termination, (v) the stage at which the proceedings were terminated, (vi) the manner in which they were terminated, (vii) the relationship between the parties and (viii) the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of [the Constitution](#).^[11] In other words, the court may not only consider the conduct of the party in the actual litigation, but the matters which led to the litigation, the eventual termination thereof and the likely consequences of the order for costs.”

34. In the said matter, the learned judge quoted with approval the decision of the Supreme Court of Uganda in *Impressa Ing Fortunato Federice vs Nabwire* {2001} 2 EA 383, where the court stated: -

“The effect of section 27 of the [Civil Procedure Act](#) is that the Judge or court dealing with the issue of costs in any suit, action, cause or matter has absolute discretion to determine by whom and to what extent such costs are to be paid; of course like all judicial discretions, the discretion on costs must be exercised judiciously and how a court or judge exercises such discretion depends on the facts of each case. If there were mathematical formula, it would no longer be discretion... while it is true that ordinarily, costs should follow the event unless for some good reason the court orders otherwise, the principles to be applied are- (i) under



section 27 (1) of the Civil Procedure Act, costs should follow the event unless the court orders otherwise. This provision gives the judge discretion in awarding costs but that discretion has to be exercised judicially. (ii), A successful party can be denied costs if it is proved that but for his conduct the action would not have been brought... It is trite law that where judgement is given on the basis of consent of parties, a court may not inquire into what motivated the parties to consent or to admit liability.....”

35. Applying the above principles to the circumstances of this case, it would appear to me fair and just to order that the parties herein bear their costs of the application.

36. I therefore: -

1. Dismiss the application dated 24th March 2025; and
2. Order that parties bear their own costs of the application.

37. It is so ordered.

DATED AND SIGNED IN MOMBASA THIS 18TH DAY OF JULY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Mr Amakobe, for the Appellant/Applicant;

Mr Gikandi, for the Respondent; and

Arthur - Court Assistant.

