



**Odiyo v Onganya Ombo Advocates LLP & another (Commercial Suit E186 of 2024)  
[2025] KEHC 12778 (KLR) (Commercial and Tax) (18 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12778 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL SUIT E186 OF 2024**

**BK NJOROGE, J**

**SEPTEMBER 18, 2025**

**IN THE MATTER OF THE ENFORCEMENT OF A PROFESSIONAL  
UNDERTAKING DATED 7TH FEBRUARY 2024 PURSUANT TO  
A SETTLEMENT AGREEMENT DATED 6TH FEBRUARY, 2024**

**AND**

**IN THE MATTER OF THE CONTRAVENTION OF SECTIONS 4 AND 5 OF THE  
LAW SOCIETY OF KENYA ACT AND CLAUSES 130 AND 133 OF THE CODE  
OF STANDARDS OF PROFESSIONAL PRACTICE AND ETHICAL CONDUCT**

**BETWEEN**

**BRIAN OPIYO ODIYO ..... PLAINTIFF**

**AND**

**ONGANYA OMBO ADVOCATES LLP ..... 1<sup>ST</sup> DEFENDANT**

**NIBAY LIFTS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This is a Ruling in respect of the Plaintiff’s application by way of a Chamber Summons dated 25<sup>th</sup> March, 2025. It is supported by the Affidavit of Brian Opiyo Odiyo the Plaintiff/Applicant, sworn on 1<sup>st</sup> April, 2025.
2. The Plaintiff/Applicant seeks the following orders.
  1. That the Plaintiff do and hereby wholly withdraws his suit against the 2<sup>nd</sup> Defendant with no orders as to costs.



2. That this Honourable Court thereafter be pleased to grant the Plaintiff/Applicant leave to amend his originating summons.
3. That the costs of this application be in the cause.
3. The application is opposed by Defendants who have files their written submissions.

### **Background facts**

4. The Plaintiff by a letter dated 17<sup>th</sup> March, 2025 gave notice that it had withdrawn its suit against the 2<sup>nd</sup> Defendant with no orders as to costs. The withdrawal was said to be effective from the date of the letter.
5. This Notice of withdrawal was vehemently opposed by the Defendants through their Counsel Mr. Ong'anya. The Court therefore directed the Plaintiff to file a formal application for the withdrawal of the suit against the 2<sup>nd</sup> Defendant. This has led to the filing of the Chamber summons before the Court. The Court subsequently directed that the Chamber Summons be disposed of by way of written submissions.

### **Issues for Determination**

6. Having considered the Chamber Summons, the Replying Affidavit sworn on 24/4/2025 and the oral submissions, the Court frames two issues for determination.
  - a. Whether the Plaintiff is allowed to withdraw his suit against the 2<sup>nd</sup> Defendant.
  - b. Whether the Plaintiff is granted leave to amend his Originating summons.

### **Analysis**

7. Withdrawal of suits is provided for under Order 25 of the *Civil Procedure Rules*.

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.

8. The Court refers to the decision of the Court of Appeal in *Rodrot v Salama Beach Hotel Ltd & 6 others* [2024] KECA 173 (KLR) where the Appellate Court stated as follows;

- “ 43. This Court in the case of *Beijing Industrial Designing & Research Institute v Lagoon Development Ltd* (2015) eKLR distilled the import of rule 1 of order 25 held:

“The above provision presents three clear scenarios regarding discontinuance of suits or withdrawal of claims. The first scenario arises where the suit has not been set down for hearing. In such an instance, the Plaintiff is at liberty, any time, to discontinue the suit or to withdraw the claim or any part thereof. All that is required of the Plaintiff is to give notice in writing to that effect and serve it upon all the parties. In that scenario, the Plaintiff has an absolute right to withdraw his suit, which we agree cannot be curtailed...”



44. The above is clear that, where a suit had not been set down for hearing, as is the position in the instant suit, only a plaintiff has the prerogative to withdraw the suit. In this case, it is the 1st respondent, Salama Beach Hotel Ltd, that instituted the suit being Mombasa Civil Case No 8 of 2018 on 23rd February 2018 through its director Hans Juergen Langer against the respondents, Ventaglio International Sa, Dr. Arcuri Ignazio, D.Ssa Dal Morro Magdalena, Avv.De Cesari Patrizia, Stefano Uccelli and the appellant. In the plaint, the 1st respondent pleaded fraud on the part of the appellant, and claimed he had illegally transferred its money to various third parties. Simultaneously with the suit, the 1st respondent sought an injunction against the appellant, an employee of the 1st respondent Hotel, to restrain him from purporting to be its representatives and shareholder. The trial Judge granted a temporary injunction against the appellant and co-respondents in the terms prayed.”

**a) Whether the Plaintiff is allowed to withdraw this suit against the 2<sup>nd</sup> Defendant.**

9. The Plaintiff avers and submits that the suit is yet to be set down for hearing. Therefore, he argues and maintains that he has the right to withdrawal the claim. He no longer wishes to proceed against the 2<sup>nd</sup> Defendant. That if the 1<sup>st</sup> Defendant wishes to maintain the 2<sup>nd</sup> Defendant as a party, this can be done through third party proceedings.
10. The Defendants on the other hand maintain that the 2<sup>nd</sup> Defendant is a necessary and crucial party. That a defence of a conditional professional undertaking has been raised in this suit. That which ever way the 2<sup>nd</sup> Defendant will feature in the suit.
11. That it beats logic to have the 2<sup>nd</sup> Defendant removed and only later on to be joined as a Third Party. This would be akin to playing a game of musical chairs with precious judicial time.
12. The Defendants vehemently oppose the withdrawal saying the suit has progressed. That their consent was not sought for the withdrawal. In any event they are opposed.
13. This Court notes that this matter has not been set down for hearing. What has been set down are several interlocutory applications. The Originating Summons dated 15<sup>th</sup> April, 2024 is yet to be listed for hearing.
14. That being the care and borrowing from the wisdom of the Court of Appeal in *Rodrot v Salama Beach Hotel Ltd & 6 others* [2024] KECA 173 (KLR) it is the Plaintiff/Applicant who has the prerogative to withdraw the suit. The Court takes note that a Notice of withdrawal of suit against the 2<sup>nd</sup> Defendant dated 17<sup>th</sup> March, 2025 is already in the Court record.
15. The Court notes that the 2<sup>nd</sup> Defendant had opposed the suit and hence it is only fair that it be awarded costs of the suit withdraw against it.

**b. Whether the Plaintiff is granted leave to amend his originating summons.**

16. The Court notes that parties are yet to be heard. The 1<sup>st</sup> Defendant has not opposed the issue of amendments of the pleadings. The guiding principle is that parties should be allowed to freely amend their pleadings. This allows them to bring their entire case before the Court, warts and all. In absence of any compelling reasons to deny the leave to amend, the same is granted.
17. As to cost of the application, the same will be in the cause.



## **Determination**

18. The Plaintiff's application way of a Notice of Motion dated 25<sup>th</sup> March, 2025 is allowed in the following terms.
- a. That the Plaintiff do and hereby wholly withdraws his suit against the 2<sup>nd</sup> Defendant. The costs of the withdrawn suit are awarded to the 2<sup>nd</sup> Defendant.
  - b. That the Plaintiff is granted leave to amend his Originating Summons. The amended Originating Summons to be filed and served within fourteen (14) days. The Defendant is granted leave to file a Relying Affidavit to the amended Originating Summons within fourteen (14) days after service.
  - c. The costs of the application be in the cause.
19. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2025**

**NJOROGE BENJAMIN K**

**JUDGE**

In the presence of

Mr. Asembo for the Plaintiff/Applicant.

Mr. Ong'anya for the Defendants/Respondents

Mr. Wabwire - Court Assistant

