REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 125 OF 2012

CHARLES KIPTARBEI BIRECH.....-PLAINTIFF

VERSUS

PAUL WAWERU MBUGUA.....-1ST DEFENDANT

MOSES KIPTANUI.....2ND DEFENDANT

RULING

(On Setting Aside a Consent of Withdrawal of Suit)

1. The Application for determination herein is a Notice of Motion dated **7/06/2021**, filed in court on **8/06/2021**. It was brought by **Charles Kiptarbei Birech,** who is the Plaintiff. He filed it under **Sections 1A, 1B, 3** of the **Civil Procedure Act** and **Order 40 Rules 1, 2, 3, 4, & 5** of the **Civil Procedure Rules 2010**. It is supported by his own Affidavit sworn on **7/06/2021**. He sought an order that:

(1) THAT the orders made herein withdrawing this suit be set aside and the matter be listed for hearing.

2. The grounds on which the Application was brought were that the withdrawal of the suit was made in good faith for the parties to settle out of Court in **Kitale High Court Succession Cause No. 15 of 2012** which was in the matter of the Estate of **Carolyne Jepkemoi** (deceased). The other ground is that the Respondent reneged on the agreement to settle the matter in the Succession Cause.

3. In his Affidavit he deponed that during the pendency of this suit, there existed **Kitale High Court Succession Cause No. 151** of **2011** in the matter of the estate of **Caroline Jepkemoi**. In the Cause, he was the Petitioner and the parcel of land herein was the only asset under consideration. Both that Cause and this matter were on Plot No. **31 Kachibora**. The parties agreed to settle the dispute in the Succession Cause. After the withdrawal, the Respondents changed their mind, thus necessitating the instant Application. He prayed that the suit be revived so that it be fixed for hearing and proceeds its final conclusion.

The Response

4. Upon the Applicant filing the Application, the Respondent being served with it and the file being placed before this Court the Respondent did not file a response thereto in time. The Court gave him leave to file it out of time. The orders were made on **13/10/2021** and **10/11/21**. None was filed. On **10/11/2021** learned counsel for the Respondent indicated that his client had not turned up in his offices to sign the response hence he left it to the Court to decide the matter as it was.

Submissions

5. The Court directed that the application be disposed by way of written submissions. On **10/11/2021** the Applicant was granted **3 days** do so. However, there were none on record as at the time I wrote this ruling. But as the law is, the filing of or failure to file submissions by a party to a matter does not prejudice him in any way as long as he has placed material before the Court to enable it make a finding on the issues he has placed before it. It is trite law that submissions are not evidence: they are only a marketing language of the parties to the Court to agree to their arguments. This was stated by the Court of Appeal in in **Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR,** where it was held:

> **"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "*marketing language*", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."**

6. Again, the same Court held in **Avenue Car Hire & Another vs. Slipha Wanjiru Muthegu Civil Appeal No. 302 of 1997** that no judgement should be written based on submissions since submissions are not a mode of receiving evidence. In case a court were to do so, such a judgement is a nullity. Therefore, in the instant Application, I proceed to determine the matter on the basis of the facts as brought out in the Application before me. In any event, submissions do not bind the Court and their presence or absence does not change the issues and facts before a Court.

The Background

7. A brief history of the proceedings in this case is of importance. This is because it will give the parties a precise understanding of why the Court arrives at the determination it shall make at the end of this ruling. On **10/10/2012**, the Plaintiff filed in the High Court at Kitale a Plaint dated **9/10/2012**. The prayers in the Plaint were for the eviction of the Respondent from **Plot No.31 Kachibora Trading Centre**, measuring **50** feet **X 100** feet. He filed it having obtained a Grant of Letters of Administration Intestate to the **Estate** of the late **Carolyne Jepkemoi** on **18/5/2012**. On the **5/11/2012**, the 2nd Defendant instructed learned counsel who filed a Memorandum of Appearance on **5/11/2012.** On **22/11/2012** the 2nd Defendant filed his Defence and a list of documents together with documents and witness statements. For a while, the suit was not fixed for hearing, and when it was, it did not proceed. Then, on **7/9/2017** the Court served the parties with a Notice to Show Cause why the suit should not be dismissed for want of prosecution pursuant to **Order 17 Rule (3) (1)** of the **Civil Procedure Rules, 2010**.

8. From the copy of the Notice returned to Court, both counsel for the parties received the Notice on **13/9/2017**. The parties were to show cause on **9/10/2017**. On the date, learned counsel for the Plaintiff showed cause as follows: "*An objection was filed in H.C. Succession 151 of 2011. The subject matter therein is the same as this. We have been mentioning that matter at the High Court. We could not proceed. The Succession matter has been concluded. We pray for a hearing date."* Then the Court noted that since the Summons for Revocation of the Grant had been shown to the Court sufficient cause had been shown and the suit was fixed for hearing on **13/02/2018**.

9. On that date, Counsel for the Applicant herein informed the Court that although the Plaintiff was in Court, he had realized that the title had changed hands to a Third Party hence there was need to file another statement and further documents. The Court granted the Plaintiff an adjournment and directed parties to comply with the request and file and serve the documents within **14 days**. No document was filed ever since, despite the Court giving the parties reminders and extending time.

10. After the matter did not proceed on two occasions, on **24/07/2018**, Mr. Wanyama, learned counsel for the Defendants brought it to the attention of the Court that on **3/12/2013**, the parties herein entered into and paid for a consent agreement to withdraw the matter. The consent read:

> **"Kindly record the following consent orders: By consent the Plaintiff to be and is hereby granted leave to wholly withdraw his claim against the Defendants with no orders as to costs"**

11. The Court's attention having been drawn to the consent directed that the suit be mentioned on **25/7/2018** in the presence of Counsel for the Plaintiff/Applicant herein. On the material date counsel did not attend Court. The Court adopted as its order the consent as filed. Even then, it appears from the record that on **3/12/2013** - the same date the consent was filed - it was recorded and adopted as the order of the Court. That means that the suit was withdrawn then but learned counsel for the Applicant either ignored the order or did not bother to confirm the record, yet she was the signatory of the consent, and fixed the suit for hearing on **9/10/2017**. This is the date she pointed to the Court of the existence of **H.C. Succession Cause No**. **151 of 2011**.

12. On **11/12/2020**, the Plaintiff filed an application seeking to set aside orders of dismissal of the suit said to have been issued on **17/1/2017**. A perusal of the court record shows that there were neither proceedings nor Court order of that nature on that date. For some reason, the Plaintiff neither prosecuted the Application nor abandoned it expressly. What followed is the filing of the instant Application.

13. It is clear that this Application was filed **eight (8) years** later after the plaintiff withdrew this suit. That notwithstanding, this Court is to determine the merits or otherwise of the Application.

Analysis, Issues and Determination.

14. This court is a court of law and justice. In determining the matters before it, it is guided by the Constitution of Kenya, the provisions of law and equity and the principles of natural justice. Given these, the Court is enjoined to give effect to the overriding objective both **Sections 3(1)** of the **Environment** and **Land Act** and **1A (1)** of the **Civil Procedure Act**, that it to say, to facilitate "… *the just, expeditious, proportionate and accessible resolution of disputes*". That has to be done without procedural technicalities, as contemplated in **Article 159 (2) (d)** of the **Constitution of Kenya 2010**.

15. I have carefully considered the instant Application, the supporting affidavit and the law. The following issues commend to me for determination:

> ***(a) Whether the withdrawal of a suit has any import and what that is.***
>
> ***(b) Whether the applicant has satisfied the threshold for setting aside a consent order***
>
> ***(c) What orders should issue?***

(a) Whether the withdrawal of a suit has any import and what that is

16. From the court record it is not in dispute that the suit herein was withdrawn by consent of both counsel on record for the parties herein. A discussion on the law relating to withdrawal of suits is apt so as to analyze its import and that of the consent that withdrew the suit herein. But before delving into the analysis, the Court noted that the ground in support of the Application referred to **H.C. Succession Cause No. 15 of 2012** while the Supporting Affidavit referred to **H.C. Succession Cause No. 151 of 2011**. This Court wished to understand who the parties mentioned in both Succession causes were. It perused the Court file for **Succession Cause 15 of 2012** and the Grant of Letters of Administration annexed to the Plaintiff's list of documents filed on **10/12/2012** and found out that the matter in **H.C. Succession Cause No. 15 of 2012** was in respect of the Estate of the late **Kuria Njuguna Kiongo** (deceased on **28/11/2009**) while **H.C. Succession Cause No. 151 of 2011** was for the Estate of **Caroline Jepkemboi** (deceased on **18/02/1996**).

17. The law and procedure governing withdrawal or discontinuance of suits, in Superior and Subordinate Courts is found in **Order 25** of the **Civil Procedure Rules**. The **Order** is headed "Withdrawal, Discontinuance and Adjustment of Suits". **Rule 1** thereof provides discontinuance of the whole or any part of the Claim where a suit has not been set down for hearing. The procedure thereto has been explained elaborately by the Court of Appeal in ***Beijing Industrial Designing & Research Institute Vs. Lagoon Development Ltd (2015) eKLR***. In the instant matter the relevant **Rule** is **2** since the suit was set down for hearing for the first time on **14/02/2013**, way before the consent was signed and filed.

18. Rule 2 (1) is the relevant one. It provides that **"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."** The parties herein entered into a written consent dated **3/12/2013** and filed it the same date. It was adopted the same date although the Court recorded the same once more on **25/7/2018**. I will not go into the niceties or nuances on validity or otherwise of the recording of the consent once again. Suffice it to say that since the Application herein did not specify which of the two dates of recording or adoption it aimed at setting aside, I will direct my mind to both.

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 it not the continuation of the one that went out: it is new.

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."***

22. The Learned Judge explained in that case that if there is no suit there cannot be a Plaintiff. That means further that if there is not Plaintiff, the person purporting to act as such has no capacity to do so. Therefore, to take the matter straight to the realm of the Applicant herein, once he withdrew the suit herein, he ceased to be a Plaintiff. The law does not permit him to take any step in this matter after that withdrawal. He could have only defended the quantum of costs if sought by the defendants but luckily they agreed that there be no orders for such.

23. To make it clearer than as I have put it, I need to consider case law on this issue. The legal effect of the withdrawal therefore is discontinuance of the claim which was levelled against the Defendants, or a Plaintiff in the case of a counterclaim withdrawn or discontinued. In the case of ***Nicholas Kiptoo Arap Korir Salat V. IEBC & 7 Others, SC App. No. 16 of 2014*** the court was of the view that a party has the right to withdraw a claim or part thereof against another party and *that right cannot* ***be taken way from him.*** In the instant case, the court granted the plaintiff the opportunity to exercise his right of withdrawal of the claim against the defendants.

24. As regards the withdrawal, under **Order 25,** 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."***

25. In arriving at the finding above, the learned Judge relied on the excerpt by **Stuart Sime** in his book **"A Practical Approach to Civil**

Procedure", 9th Edition 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'.***

26. In instant case, the **Plaintiff** and the **2nd Defendan**t entered into a consent withdrawing the suit and filed it and it was recorded as such. The same **terminated** the **suit forever**. By their act, the suit ceased to exist. Put in simple language, the suit came to an end. It does not matter the means by which the suit was withdrawn, that is to say, whether by notice of withdrawal, leave of court or consent of the parties. Each of these three has one and the same effect: the suit, if withdrawn wholly as was in the instant case, ceased to be in existence. A suit is not matter which science teaches that it cannot be created not destroyed. A suit is "destroyed forever" by its withdrawal.

27. A prayer for an order to set aside the consent that leads to the withdrawal of the suit has the same import and meaning as a prayer for revocation of a notice of withdrawal. The reason why a consent has to be signed by parties before withdrawal of a suit is because the suit has been set down for hearing, and, in the wisdom of the Rules Committee, once that occurs the parties are bound to proceed to with the hearing hence the need for the all of them to consent to the withdrawal. Filing of a consent to that effect does not change the import of the withdrawal which is that the suit ceases to be anywhere in the legal realm. Therefore, the order seeking its revival as deponed in paragraph 6 of the Supporting Affidavit by Charles K. Birech cannot issue.

28. I am 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."***

29. I am persuaded further by the case of **Priscilla Nyambura Njue v Geovhem Middle East Ltd; Kenya Bureau of Standards (Interested Party) [2021] eKLR** which cited the case of ***Smt. Rais Sultana Begam v Abdul Qadir & Others*** where the court held:

> ***"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 an for revoking the withdrawal can be made in the suit or by the Plaintiff."***

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.

31. As to whether a withdrawn part of a suit can find its way back (through backdoor) into being part of the remaining suit in a case where only part is withdrawn and a fresh suit is filed it is a matter of discussion in Civil Procedure classes in Law schools. The upshot is and as it stands, after the withdrawal the suit herein on **3/12/2013,** there was and is no suit whose determination of an order for setting aside or revival by this court can be given.

32. Moreover, the plaintiff's counsel had knowledge that the suit was withdrawn and proceeded to move the court by not only this application but also the application dated 11/12/2020 which was never heard and determined. Again, by **09/10/2017,** the Plaintiff had knowledge of the conclusion of the **Succession Cause No. 151 of 2011.** That is why he stated through learned counsel: ***"we could not proceed. The succession matter is concluded. We pray for a hearing date."*** From then on, the Plaintiff never moved the court to challenge the consent as he is doing now. Even assuming that he could have successfully challenged it, but contrary to the analysis above, he has not explained the delay in bringing this Application from then. It is **four (4**) years since he knew of the conclusion of the succession matter which he alleges the Plaintiff reneged an agreement about. This delay is nothing but pure inaction, a depiction of the best example of an indolent applicant who thinks that the court can be moved at the whims of a party, even when he has a right to move it, irrespective of the passage of time. It has been said by the sages of old that time heals. In matters of indolence time seals. A party who delays in making his move seals his fate.

33. The Plaintiff is not only testing the waters but also groping in darkness over what to do, reality having dawned on him that his suit has drowned and is not in existence. His learned counsel misled the court on **09/19/2017** about its existence while she knew well that both parties had entered into a consent which was duly signed, filed and adopted as an order of the Court way earlier. With due respect it is worth repeating in this determination that advocates are officers of the court and duty bound not to mislead the court. By the act of misleading it, the Court was led to record the consent twice, which was not to supposed to have been since there was no suit in existence since **3/12/2013.** By that date and order this court became *functus officio* and thus ceased to have jurisdiction to entertain further proceedings in this file except in a situation was this where its life must be applied to remind the parties of the finality of the consent of withdrawal of the suit. The consent recorded on 3/12/2013 still stands to date. It has never been challenged, set aside, varied and or appealed against by any party before the

court of appeal.

(b) <u>Whether the application has satisfied the threshold for setting aside a consent order</u>?

34. The import of the Application before me is that the Applicant sought to challenge the consent entered into on the 3/12/2013. The law on setting aside a consent entered into by parties is now not in doubt. A consent can only be set aside in clear cases of fraud, misrepresentation, coercion and the related vitiating factors of contracts**.** In the case of **James Muchori Maina vs. Kenya Power & Lighting Company Ltd [2005] eKLR** the court, approving the case of **Flora Wasike** observed as follows:

> ***"Consent is in the form of a contract. It binds the parties. Since the time that consent was entered in court in 1999, it has not been challenged, nor has any of the parties applied to set it aside. The legal validity of a consent and principles on which it can be set aside were considered by the Court of Appeal in the case of Kenya Commercial Bank Ltd -vs- Benjoh Amalgamated Ltd. - Nairobi Civil Appeal No. 276 of 1997, wherein the Court of Appeal applied the reasoning in the case of Flora Wasike vs- Destimo Wamboke (1988) 1 KAR 625 at page 626 where Hancox JA (as he then was) stated-***
>
> ***" It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out". That consent was binding on the parties, and can only be set aside as enunciated above by the Court of Appeal. That consent still being intact on record cannot be challenged in this appeal."***

35. Similarly, in ***John Waruinge Kamau vs Phoenix Aviation Limited [2015] eKLR*** the court considered the circumstances in which a consent order can be set aside and stated:-

> ***"The circumstances under which a consent order may be set aside are grounds which would justify the setting aside of a contract, or if the conditions required to be fulfilled by the agreement have not been fulfilled. The grounds for setting aside contracts are fraud, coercion, mistake or misrepresentation.***

36. In **M & E. Consulting Engineers Limited vs Lake Basin Development Authority & Another [2015] eKLR** the Court of Appeal stated as follows:

> ***"We re-affirm the dicta in the High Court case of Kenya Commercial Bank Ltd. -v-Specialized Engineering Company Ltd., 1982 KLR 485 as was upheld by this Court in Civil Appeal No. 43 of 1980 thereof where it was stated as follows:***
>
> ***1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.***
>
> ***2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.***
>
> ***3. An advocate has general authority to compromise on behalf of his client, as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding.***
>
> ***4. The fact that a material fact within the knowledge of the client was not communicated to the advocate when he gave his consent to a court order is not sufficient ground for the client withdrawing his consent to the order before it is passed and entered even if the advocate concedes he would not have given his consent had he known these facts.***
>
> ***5. The making by the court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates and when made, such an order is not lightly to be set aside or varied save by consent or on one or either of the recognized grounds."***

37. In the instant application, the applicant's contention is that the suit was withdrawn in good faith for the parties to settle the matter in the **Succession Cause No. 15 of 2012** and that the defendant reneged on the agreement to settle the matter in the succession suit. First, the Applicant states that he entered into the agreement in good faith. It implies that he entered into the agreement voluntarily, without force or coercion, under duress and/or undue influence. No one threatened or forced him to withdraw the suit. I cannot help but find that the applicant has not proved the elements for setting aside a consent.

38. Second, the consent does not in any way refer to the existence or otherwise of the said Succession Case. These allegations have never been proved on a balance of probabilities by the applicant. Moreover, there is no evidence whatsoever as to how the Succession Cause ended. All the learned counsel informed the Court on **9/10/2017** was that "*the succession matter has been concluded*." The applicant has not told this court what the outcome of the Succession Cause was. Secondly, he has not explained the manner in which the Respondent reneged the settlement of the suit. It was not only enough for the applicant to say that the respondent reneged to settle the matter in the Succession Cause. Without any evidence by way of Court record that the Defendants reneged their agreement or did not settle the matter, how can one believe the Applicant that there was fraud or misrepresentation over the consent of **3/12/2013**? Not in the circumstances where learned counsel uses a *<u>'soft language'</u>* to represent the conclusion of the Succession Cause. At any rate, reneging on an agreement does not constitute fraud, mistake or misrepresentation as known in the law of contracts. The Applicant can only have recourse elsewhere if it is true that an agreement reached between the parties voluntarily as it is said was reneged by one of the parties.

39. *In conclusion, the Applicant brought an application completely devoid of merits. The orders that commend for such an application so dismissal with costs to the Respondents and I hereby issue an order accordingly.*

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 15TH DAY OF DECEMBER, 2021.

DR. *IUR* FRED NYAGAKA

JUDGE, ELC, KITALE.

Further Note and Order

This Ruling is delivered by electronic means in view of the restrictions regarding court operations due to the **COVID-19 Pandemic**. More so, the step is pursuant to the directions issued by His Lordship, the Chief Justice on **15th March, 2020** and those of **21st April 2020**, that judgments and rulings shall be delivered through video conferencing or via email. Parties having been duly notified of the same waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules**.

DR. *IUR* FRED NYAGAKA

JUDGE, ELC, KITALE.