



**Meenye & Kirima Advocates v Gathoni Limited; Kiburu Enterprises Limited & 2 others (Purchasers) (Environment and Land Miscellaneous Case 39 of 2016) [2025] KEELC 6549 (KLR) (30 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6549 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND MISCELLANEOUS CASE 39 OF 2016  
OA ANGOTE, J  
SEPTEMBER 30, 2025**

**BETWEEN**

**MEENYE & KIRIMA ADVOCATES ..... PLAINTIFF**

**AND**

**GATHONI LIMITED ..... DEFENDANT**

**AND**

**KIBURU ENTERPRISES LIMITED ..... PURCHASER**

**MINALOVE HOTEL & RESTAURANT LIMITED ..... PURCHASER**

**MICHAEL MURIITHI MUTHII ..... PURCHASER**

**RULING**

1. Vide a Notice of Motion application dated 26<sup>th</sup> June 2025, filed pursuant to Order 50 Rule 1 and Order 25 Rules (1) and (2) of the Civil Procedure Rules and Article 159(2)(d) of the *Constitution*, the Plaintiff has sought the following orders:
  - i. That the court do be pleased to re-open this suit and proceedings and vary the Consent Order recorded herein on 4.4.2024.
  - ii. That pursuant to No. 1 above, the court do be pleased to enter final judgement in favour of the Plaintiff against the Purchasers, jointly and severally, in the sum of Kshs. 2,985,000/= being the final and agreed balance of the purchase price payable by the Purchasers plus Kshs. 6,000/= being bank charges incurred by the Plaintiff on account of dishonoured cheques issued to them by the Purchasers.
  - iii. That a decree do issue in favour of the Plaintiffs against the Purchasers in the said sum and the Plaintiff do be at liberty to execute for the same against the Purchasers, jointly and severally.



- iv. That the Court do be pleased to make such other or further orders as shall be meet and just for the ends of justice.
2. The basis of this application, as deponed by GK Meenye Advocate, in his supporting affidavit, is that this suit was instituted against the Defendant, Gathoni Limited, for the recovery of professional fees, alleged to be due to the Plaintiffs. It was his deposition that at all material times, the Defendant was the registered owner of all that piece of land situate on Mombasa Road and known as LR No. 209/0704.
3. Mr. G.K. Meenye further averred that pursuant to a decree and order issued by this court, the said property was attached and subsequently sold by public auction for the recovery of the decretal sum, together with further costs, auctioneer's charges and other expenses.
4. It is the Plaintiff's case that a prohibitory order was registered against the said property and the warrants of sale were issued to Platinum Auctioneers, who proceeded to sell the property by public auction and that at the said auction, the Purchasers emerged as the highest bidders at a consideration Kshs. 70,000,000/-.
5. It was his further deposition that the Purchasers did not remit the purchase price in the manner set out in the Act but instead paid the bid price in piecemeal instalments. He deponed that the Purchasers persuaded the Plaintiff to allow the property to vest in them so that they could sell or otherwise deal with it, enabling them to raise the outstanding balance rather than setting the sale aside.
6. Mr. Meenye stated that following reconciliation of accounts between the Plaintiff and the Purchasers, the parties agreed that the Purchasers would pay a global sum of Kshs. 3,000,000 in full and final settlement, and that they would issue the Plaintiff with open, non-dated cheques to cover the agreed amount. In turn, it was deposed, the Plaintiff would withdraw the setting aside application which was filed before this court on 4<sup>th</sup> April 2024.
7. He averred that following this arrangement, the Purchasers commenced negotiations for the sale of the suit property to a third-party company, at an agreed purchase price in excess of Kshs. 120,000,000/- which transaction was partly financed by a financial institution.
8. Mr. G.K. Meenye further deponed that the Purchasers issued to him three undated and open cheques Numbers 000728, 000729 and 000730 all drawn on his Bank Account, Account Number 0000007057, Family Bank, BMS DIGO Branch, Mombasa.
9. The Plaintiff deposed that it was agreed between the Plaintiff and the Purchasers' Director, Michael Muriithi, that the said cheques would be deposited upon advice that the purchase price had been received and that he continued to hold the cheques on this understanding.
10. The Plaintiff averred that, however, on 14<sup>th</sup> March 2025, he was notified by the advocates acting for both the vendor and the Purchasers that the sale proceeds had been remitted directly to the Purchasers and that upon contacting the Director on his mobile phone to notify him of the intention to deposit the cheques, the said Director allegedly disconnected the call and proceeded to block his number.
11. Mr. Meenya averred that he subsequently dated and deposited the cheques on 19<sup>th</sup> March 2025 but all three were returned unpaid, bearing the remarks 'Refer to Drawer'.
12. Upon making further inquiries, Mr. Meenye stated, he discovered that the Purchasers had diverted the sale proceeds to an undisclosed bank account maintained at KCB Bank Ltd, rather than depositing the funds into the Family Bank account as previously represented.



13. He contended that the conduct of the Purchasers was indicative of an intention not to honour their obligations and that they had not only abused the Plaintiff's trust, but they had also acted in a manner that undermines the authority of the court. He urged that the court should intervene to ensure that such conduct does not go unpunished.
14. The application was opposed by the Purchasers through Grounds of Opposition dated 9<sup>th</sup> July 2025. The Purchasers contended that following the withdrawal of the suit, there was no pending cause capable of being re-instated or re-opened. It was their position that a party who elects to withdraw a suit cannot subsequently seek to reinstate the same, as provided under Order 25 Rule 4 of the Civil Procedure Rules 2010.
15. It was further stated that the withdrawal of the suit on 8<sup>th</sup> April 2024 was undertaken voluntarily by the Plaintiff and as such, he cannot backtrack and seek that the case be re-opened.
16. Additionally, the Purchasers contended that there existed no contractual relationship between themselves and the firm of Meenye & Kirima Advocates that would give rise to any legal obligation to remit payment to the said firm.

### **Submissions**

17. The Plaintiff's Counsel submitted that this court retains unlimited discretion to re-open a closed matter, provided that such discretion is exercised judiciously. It was submitted that the onus lies upon the Plaintiff to demonstrate good cause and sufficient grounds warranting such re-opening and that the Plaintiff acted expeditiously.
18. It was submitted that the court must also be satisfied that the exercise of its discretion will not occasion prejudice or embarrassment to the opposing party.
19. Counsel contended that the instant application was filed expeditiously following the dishonour of the cheques which had been issued in satisfaction of the Purchasers' obligation to the Plaintiff as the decree-holder. It was the Plaintiff's submission that the application does not embarrass the Purchasers as they are the parties in default.
20. It was further submitted that the Purchasers' assertion that they had no contractual obligation with the Plaintiff is misconceived. Counsel argued that the Purchasers acquired the property pursuant to a public auction initiated at the instance of the Plaintiff as the decree holder and thereby became subject to the consequences flowing from the sale.
21. In the Counsel's view, the Purchasers ought not to be permitted to misuse the court process to avoid compliance with obligations arising therefrom.
22. Counsel emphasized that following the sale of the attached property, the Plaintiff, as decree holder, was left without any other security for the balance of the decretal sum. It was submitted that the circumstances of the case justified the re-opening of the suit and proceedings so that the balance of the decretal sum is paid.
23. In support of these submissions, Counsel placed reliance on the decision in Joseph Ndungu Kamau vs John Njihia [2017] KEELC 802 (KLR) and Prime Mattress Limited vs National Youth Service & 3 Others [2024] KEHC 4661 (KLR).



## Analysis and Determination

24. The Plaintiff seeks, through the present application, orders for the reinstatement of this suit and the setting aside and amendment of the consent dated 4<sup>th</sup> April 2024. This Court notes from the record that the suit was marked as withdrawn on 8<sup>th</sup> April 2024, following an oral application made by the Plaintiff on that date.
25. The Purchasers have opposed the application on the ground that, pursuant to Order 25 Rule 4 of the Civil Procedure Rules, 2010, a party who elects to withdraw a suit cannot thereafter seek to reinstate it. Order 25 Rule 4, however, does not expressly prohibit the reinstatement of a withdrawn suit.
26. Rather, it empowers the court, where a subsequent suit is filed on the same or substantially the same cause of action before payment of the costs of a discontinued suit, to order a stay of the subsequent suit until such costs are paid.
27. It is necessary to set out the provisions of Order 25 Rule (1) and (2) of the Civil Procedure Rules which prescribe that:-

“(1) 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.

(2) Discontinuance [Order 25, rule 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.
- (3) The provisions of this rule and rule 1 shall apply to counterclaims.”

28. The Court of Appeal in *Beijing Industrial Designing & Researching Institute vs Lagoon Development Limited* [2015] KECA 365 (KLR) identified three scenarios regarding the withdrawal of claims as contemplated under Order 25 Rules 1 and 2 of the Civil Procedure Rules:

“The first scenario arises where the suit has not been set down for hearing. In such an instance, the plaintiff is at liberty, at 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 the all the parties. In that scenario, the plaintiff has an absolute right to withdraw his suit, which we agree cannot be curtailed. The second scenario arises where the suit has been set down for hearing. In such a case, the suit may be discontinued or the claim or any part thereof withdrawn by all the parties signing and filing a written consent. In this scenario, the right of the plaintiff is circumscribed by the requirement that he must obtain



the written consent of all the other parties. The last scenario arises where the suit has been set down for hearing but all the parties have not reached any consent on discontinuance of the suit or withdrawal of the claim or any part thereof. In such eventuality, the plaintiff must obtain leave of the court to discontinue the suit or to withdraw the claim or any part thereof, which is granted upon such terms as are just. In this scenario too, the plaintiff's right to discontinue his suit is circumscribed by the requirement that he must obtain the leave of the court. That such leave is granted on terms suggests that it is not a mere formality.”

29. The withdrawal of this suit fell within the third scenario, having been effected with the leave of this court. Once a matter is withdrawn under Order 25, there is no express statutory provision permitting its reinstatement.

30. In *Priscilla Nyambura Njue vs Geovhem Middle East Ltd; Kenya Bureau of Standards (Interested Party)* [2021] KEHC 13341 (KLR), the court held that the right to revoke a withdrawal is not inherent to the litigant, but is one that can only be exercised where the legislature has expressly provided for such a procedure in law:

“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. Certain consequences arise from the withdrawal which prevent a party from revoking the withdrawal. The withdrawal is complete or effective as soon as it takes place. The right to revoke the withdrawal can only be allowed by the legislature by expressly providing so in the rule and not by the courts. In the same vein, the rules do not confer the court with power to reinstate a suit once withdrawn. Order 25 Rule 1 provides that the withdrawal shall not be a defence to any subsequent action.”

31. This position was upheld in *Charles Kiptarbei Birech vs Paul Waweru Mbugua & another* [2021] KEELC 394 (KLR), where the court stated that once a suit has been withdrawn, it is no longer available for consideration or determination by the court. The court further held that a party desirous of pursuing the same cause of action must file a fresh suit:

“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 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.”

32. Similarly, in *George Mwangi Kinuthia vs Attorney General* [2019] KEHC 3728 (KLR), it was held that:

“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 which is similar to Rule 27 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013. The order and Rule referred 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 is withdrawn there is nothing that can be sought to be reinstated by the court.”

33. There are, however, exceptional instances where the interests of justice may require the reinstatement of a suit that has been withdrawn. Such circumstances include situations where the withdrawal was procured through fraud, misrepresentation, or was occasioned by a genuine and excusable mistake on the part of the party or their counsel. (See *Hassan & 2 others vs Mohamed & 5 Others* [2024] KEELC 4804 (KLR) and *Gisege & another (Suing as administrators of the Estate of Dorica Ondieki Gisege) vs Chairman School Management Committee Daraja Mbili Mixed Secondary School* [2024] KEELC 5412 (KLR).

34. The Plaintiff has neither alleged nor shown that the withdrawal of the suit was procured through fraud, misrepresentation, or inadvertent mistake. No exceptional circumstance has been advanced to justify the court’s discretion to reinstate a matter voluntarily withdrawn with leave.

35. Having been filed in 2016 and withdrawn without any vitiating factor, its revival nearly a decade later would prejudice the Defendants, who have legitimately proceeded on the basis that the dispute was conclusively resolved. Reinstatement would undermine the principle of finality in litigation and in the absence of any legal basis would be contrary to the interests of justice.

36. With respect to the consent, the record shows that on 8<sup>th</sup> April 2024, when this suit was withdrawn, the Plaintiff informed the court that the matter had been settled by consent of the parties. That consent, however, was neither filed in court for adoption nor was its content placed on record through oral confirmation by the parties.

37. It is trite that a consent can only become an order of the court once it is formally adopted. This position was affirmed in *Edward Acholla vs Sogea Satom Kenya Branch & 2 Others* [2014] eKLR where the court held that: -

“Consent becomes a judgment or order of the court once adopted as such. Once consent is adopted by the court, it automatically changes character and becomes a consent judgment



or order with contractual effect and can only be set aside on grounds which would justify setting aside, or if certain conditions remain unfulfilled, which are not carried out.”

38. The process of adoption of a consent by the court entails an evaluation of the clarity of its terms and the issuance of directions on the manner of its adoption. This position was settled by the Supreme Court in *Asanyo & 3 others vs Attorney-General* [2020] KESC 62 (KLR) where it held:

“Adoption of a consent by a court is a process, in the course of which a court discharges the duty of evaluating the clarity of the consent placed before it by parties, and giving directions on the manner of adoption. This circumvents the risk of an unlawful order, and validates the mode of adoption and compliance. Thus, a consent by parties becomes an Order of the Court only once it has been formally adopted by the court. It is only from that stage, that the court becomes *functus officio*.”

39. Such evaluation may be undertaken where the parties file an executed written agreement for adoption by the court, or where they orally address the court and confirm the terms of the consent on record. In *Simon Ayiimba vs Kenya Industrial Estates Ltd Civil Appeal No. 5 of 2001* as quoted in *PASP & another vs EPCP (Acting as Next Friend of SAP - Minor* [2023] KEELC 18136 (KLR), *Sergon J* persuasively stated that:

“There are only two ways in which a Consent can be legally accepted by the Court; the first instance is when the parties file in Court a fully executed written contract which becomes a Court Order the moment it is domesticated and approved by Court and the second instance is when one of the parties orally addresses the Court on the contents of the proposed Consent thereafter the adversary as called upon to confirm the contents. The names of the parties orally addressing the Court must be recorded and the Court receiving the Consent must then approve and subsequently adopt the terms of the Consent as an Order ...”

40. In this case, no written consent was placed before the court for adoption, nor did the parties orally address the court on the adoption of the consent dated 4<sup>th</sup> April 2024. The consent, therefore, remained no more than a private agreement between the Plaintiffs and the Defendants. While binding upon the parties in contract, it lacked the procedural and coercive force of an adopted consent judgment.

41. The breach of such an unadopted consent cannot be enforced by way of contempt or execution proceedings, as would be the case with an adopted consent order. Its enforcement lies within the sphere of contract law, by way of a separate action for breach, subject to proof of the contractual elements of formation and breach.

42. It is now settled that a written contract, being self-contained, can only be construed and interpreted on the basis of the contents therein. This was affirmed by the Court of Appeal in *Fidelity Commercial Bank Limited vs Kenya Grange Vehicle Industries Limited* [2017] eKLR where the court stated that:

“This is what sometimes is called the principle of four corners of an instrument, which insists that a document’s meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it...”



43. Equally, the Court of Appeal in the case of Pius Kimaiyo Langat vs Co-operative Bank of Kenya Ltd (2017) eKLR stated thus:

“We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”

44. It was incumbent upon the Plaintiffs to place the consent agreement before the court to enable an assessment of its terms and the scope of the parties’ obligations thereunder. In its absence, the court cannot ascertain, whether it was complete, whether it was conditional, or whether the alleged breach occurred.

45. In these circumstances, the consent has no procedural bearing on the question of reinstatement. Its non-adoption means it did not alter the legal consequences of the voluntary withdrawal of the suit. If the Plaintiffs wish to enforce any rights purportedly arising under it, their remedy lies in a separate contractual claim, not in the revival of a withdrawn matter.

46. Accordingly, this court finds that the application is wholly unmerited and is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2025.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Mr. Meenye for Applicant

Mr. Bwire for 2<sup>nd</sup> Respondent

Court Assistant: Tracy

