

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CIVIL APPEAL NO. E006 OF 2024

BONIFACE KAMAU KANGETHE.....

APPELLANT

VERSUS

SUSAN WAITHERA KIARIE.....

.....RESPONDENT

RULING

1. This Ruling is in respect of the Notice of Motion application dated 15th May, 2025 brought by Trident Insurance Company Limited under Order 10 Rule 11 and Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders;

- 1) Spent
- 2) That the stay of execution granted by this Honourable court be extended until the hearing and determination of this application.
- 3) That pending the hearing and determination of this application, there be stay of admission of the Notice to act in person and the resultant Notice of withdrawal of the appeal herein pending the hearing and determination of this application.
- 4) That in the event of admission of the Notice to act in person and the subsequent Notice to withdraw the suit herein, the

Appellant be condemned to settle the resultant decretal sum in the various primary suits, the resultant various declaratory suit and the appeal herein.

5) That the appellant be condemned to settle the cost incurred by Trident Insurance Company Limited in defending the various primary suits, declaratory suits and the appeal herein.

6) That cost of this application be provided for.

2. The application was supported by Trident Insurance company Ltd vide the affidavit of its legal officer, **Mr. James Onjoro** wherein he depones that the appellant took out an insurance for motor vehicle registration number KDJ 232S being policy number 120/080/1/615890/2023TOR(TPO) running from 25th March, 2023 to 24th April, 2023. That on the 13th of April, 2023, the motor vehicle was alleged to have been involved in an accident along Bura-Makutano road at Karkacha area.

3. That at the time of the accident, the motor vehicle was ferrying 47 passengers who were injured and the Respondent herein was one of the passengers. As a result of the accident, a series of 47 suits were filed against their insured at the magistrate's court sitting at Hola. That a consent judgment was recorded in the matter in favor of the Respondent and other plaintiffs in the primary suit as against the appellant for a sum of Kshs. 250,000/- plus costs per file for all the matters in the series.

4. He further deponed that the firm acting for the appellant filed an application dated 22nd March, 2024 to come on record post judgment and further set aside the consent judgment entered in Hola MCCC E034

of 2023. The application was dismissed which prompted the insurance company to file the appeal herein in the name of the Appellant under the principle of subrogation. The appellant subsequently filed a Notice to act in person and subsequently filed a Notice to withdraw the appeal. The insurance company then filed the application that is the subject of this ruling.

5. The deponent for the insurance company asserts that the effect of admitting the Notice to act in person and the Notice to withdraw the appeal is that the proceedings and the intended execution at the lower court will proceed to the detriment of the Appellant's insurer.

6. He further asserts that the appellant is bound by the terms of the doctrine of subrogation and cannot purport not to have issued instructions to the insurance company. He also deposed that once a party takes an insurance policy, they have surrendered their rights and duties to an insurance company under the said doctrine and the insured does not have a right to deny having given its insurer the instructions for representation.

7. The application was opposed by the Appellant, **Boniface Kamau Kangethe**, vide his Replying affidavit sworn on the 22nd day of May, 2025 wherein he deposed that the present appeal was filed without his instructions and that he did not instruct the firm of Wesonga, Wamalwa & Kariuki Associates Advocates to act for him. That the doctrine of subrogation cannot apply in the circumstances of this case. He asserted that the applicant is seeking to invite the court to make a determination on the validity of an insurance contract between him and Trident Insurance Company which matter is pending before the lower court.

8. The application was also opposed by the Respondent, **Susan Waithera Kiarie**, through the Replying affidavit of her counsel, Mr. Wambua Kilonzo, sworn on the 9th day of June, 2025. Counsel stated that the appeal was filed in the name of the Appellant. That the Appellant expressly informed the court that he did not issue instructions to the firm of Wesonga, Wamalwa Advocates and thereby proceeded to withdraw the appeal. Counsel argued that the appellant had the liberty to withdraw the appeal as he has a right to pursue justice as he deems fit. That the right of a party to discontinue a suit or withdraw his claim cannot be questioned. He further contended that the insurance company cannot rely on the doctrine of subrogation as the same is applicable only where the insurer has paid the victims.

9. The application was canvassed by way of written Submissions.

Appellant's submissions

10. The firm of Wesonga, Wamalwa & Kariuki Advocates filed submissions dated 2nd July, 2025 in which they argued that the striking similarities between the replying affidavit filed by the Appellant and the Respondent demonstrates that the Appellant and the Respondent's advocates are working in coalition to have Trident Insurance Company settle the decretal sum despite the glaring inconsistencies in the annexures attached to the application and the history of the matter.

11. On whether the application is merited, counsel submitted that whereas every person has a right to appoint his own advocate of choice, the appellant surrendered this right the moment he allowed the insurance company to appoint an advocate on his behalf under the doctrine of subrogation. Accordingly, Trident Insurance Company appointed the firm of Urabanus K. Associates to represent the

appellant when the suits were filed which firm entered into a consent with the Respondent's advocates without the approval of the insurance company. Subsequently, the insurer sought to engage the present firm of M/S Wesonga Wamalwa & Kariuki Advocates to set aside the consent judgment.

12. It was submitted that by asserting that Trident Insurance Company Limited did not have instructions to represent him, the appellant is admitting that the consent judgments of the lower court which is the subject of the appeal herein is erroneous as it was entered into without instructions. He submitted that the insurance company has been involved in the matter through the doctrine of subrogation. He relied on the cases of **Kenya Power & Lighting Company Limited v Julius Wambale & Another (2019) eKLR** and that of **Egypt Air Corporation v Suffish International Food Processors (U) Ltd and Another (1999) 1 EA 69.**

13. It was submitted that having paid the requisite excess upon demand, the Appellant consented to Trident Insurance taking over the matters at primary suit level and defend the appellant's interests. It was further submitted that the Appellant is not keen to protect the interest of the insurance company because in the event that the Appellant is allowed to withdraw the appeal herein, the insurer stands exposed which will have the effect of any interim orders being vacated allowing the Respondent to proceed to execute against the insurance in total regard of the fact that the policy issued to the appellant is highly contested.

14. Counsel for the Respondent, Mr. Wambua Kilonzo, on the other hand filed submissions dated 9th July, 2025. He submitted that the

present appeal filed by Boniface Kamau Kangethe has been withdrawn and as such, there is no appeal and there are no issues that parties can litigate upon. He relied on the provisions of **Rule 69 of the LSK Code of Standards of Professional Practice and Ethical Conduct (June 2016)** and the case of **Ohaga and Akiba Bank (2008) 1 E. A** in submitting that instructions to an advocate ought to be by way of an instruction letter and that neither of the parties has been served with such instructing the firm of Wesonga, Wamalwa & Kariuki Advocates to lodge the appeal on his behalf.

15. Counsel submitted that the Appellant has the liberty to withdraw the appeal and that he has a right to discontinue a suit or withdraw his claim. He relied on the cases of **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others, SC App. No. 16 of 2014** and the decision in **John Ochanda vs Telkom Kenya Limited (2014) eKLR**.

16. On whether the doctrine of subrogation is applicable, counsel submitted that the insurance company cannot rely on the said doctrine as the same is applicable only when the insurer pays the victims. That in this present case, no payment has been made and as such the insurer cannot rely on the doctrine. He relied on the case of **Kenya Power & Lighting Company Limited vs Julius Wambale & Another (2019) eKLR**.

17. The Appellant, Boniface Kamau Kang`ethe filed submissions dated 7th July, 2025 through the firm of Daniel Henry & Co. Advocates. Counsel submitted that Trident Insurance Company had not compensated the Appellant so as to step into his shoes to exercise rights and remedies he may have. He also submitted that the insurance company cannot apply the doctrine of subrogation while

challenging the validity of the insurance contract between it and its insured.

18. Counsel submitted that the jurisdiction of the Honourable Court has been prematurely invoked as the exhaustion of the applicable remedies has not happened. It was his submission that the Insurance company has filed suit before the lower court purportedly in fulfillment of the provisions of Section 5 to 10 of the Insurance Act (Third Party) Cap 405 which matter is still alive. He relied heavily on the decision in **Secretary, County Public Service Board & another v Hulbhai Gedi Abdile (2017) KECA 643 (KLR)**.

19. It was submitted that the issue raised in the application touching on the validity of the insurance contract between Boniface Kamau and Trident Insurance Company cannot be an issue for determination by this court because the subject matter of the appeal herein is not the same as what is sought in the application herein. That Trident does not deny that there exists a matter before the lower court on the issue. Mr Kangethe urged the court to dismiss the application.

Analysis and determination

20. I have considered the application and the grounds in support of the same, the grounds in opposition thereto and the submissions by the respective counsels for the parties.

21. The appeal herein was filed by Trident insurance company purportedly in the name of the Appellant, Boniface Kamau Kangethe under the doctrine of subrogation. The Appellant subsequently filed a Notice to appear in person and thereafter filed a Notice of withdrawal of the appeal while contending that he had not given instructions to the insurance company to file the appeal. This prompted the insurance

company to file the application dated 15th May 2025 which is the subject of this ruling.

The issues for determination are:

(1) Whether the appeal herein stands withdrawn by virtue of Mr. Kangethe having filed Notice of withdrawal of the appeal.

(2) Whether, in the event of a finding that the appeal stands withdrawn, the court should order Boniface Kangethe, to settle the resultant decretal sum in the various primary suits, the resultant various declaratory suits and costs of defending the said suits.

22. On the first issue on whether the appeal stands withdrawn, the Counsel for the insurance company, Mr. Wamalwa, did not touch on the issue in his submissions. Mr. Wambua Kilonzo for the Respondent on the other hand submitted that the Appellant had the right to withdraw the appeal and that the appeal stood withdrawn upon the appellant filing Notice to withdraw the appeal. Counsel placed reliance on the case of **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others, SC App. No. 16 of 2014** where it was held that:

“a party’s right to withdraw a matter before the court cannot be taken away. A court cannot bar a party from withdrawing his matter. All that the court can do is to make an order as to costs where it is deemed appropriate.”

23. Further reliance was placed in the case of **John Ochanda vs Telkom Kenya Limited (2014) eKLR** where the court held that:

I do hold the view that a prospective Appellant is at liberty to withdrawal a Notice of Appeal at any time before the Appeal has

been lodged and any further steps taken. No proceedings have commenced strictly. I am also of the view that just like under the Civil Procedure Rules or Court of Appeal Rules, the right to withdraw or discontinue proceedings or withdraw a Notice of Appeal respectively ought to be allowed as a matter of right subject to any issue of costs which can be claimed by the respondents, if any.

24. In addition, the Court of Appeal in **Beijing Industrial Designing & Researching Institute V Lagoon Development Limited (2015) eKLR** stated as follows:

“As a general proposition, the right of a party to discontinue a suit or withdraw his claim cannot be questioned. There are many circumstances when a plaintiff may legitimately wish to discontinue his suit or withdraw his claim...”

24. It is clear from these authorities that a party has the right to withdraw a suit including an appeal. This is a right that cannot be taken away from a party.

26. There are however instances where the court can decline to allow a party to discontinue or withdraw a suit. This is for instance where the withdrawal is geared towards defeating the ends of justice or is an abuse of the process of the court. It is for the party opposing the withdrawal to show that there is bad faith in withdrawing the suit/appeal. In **Beijing Industrial Designing & Researching Institute v Lagoon Development Limited, 2015 eKLR** the court said as follows:

“...Where a party uses the right to discontinue a suit in manner that amounts to abuse of process of court or to defeat the ends of justice, the court has power to stop such abuse or undermining of justice.”

27. In this case the Appellant. Mr. Kangethe filed a notice dated 22nd April 2025 withdrawing the appeal in its entirety. The reason he gave for the withdrawal is that he did not instruct the firm of Wesonga, Wamalwa and Kariuki Advocates to file the appeal. That the contention that the insurance company filed the appeal on the basis of the doctrine of subrogation does not hold water because the doctrine only applies where the insurance company has compensated the insured which has not happened in this case.

28. For the doctrine of subrogation to be invoked properly, there are conditions precedent. First, there must be in existence a contract of insurance, secondly the risk must have crystallized and thirdly there must be actual payments made in order to indemnify the insured. The doctrine was explained in the case of **Kenya Power & Lighting Company Limited v Julius Wambale & another (2019) eKLR** as follows:

The parameters within which the principle of subrogation applies are now well settled. The doctrine applies where there is a contract of insurance and following crystallization of the risk insured, the insurer had compensated its insured for financial loss occasioned thereby usually by a third party. Under this doctrine, the insurer is in law entitled to step into the shoes of the insured and enjoy all the rights, privileges

and remedies accruing to the insured including the right to seek indemnity from a third party. The action must however be instituted in the name of the insured with his consent and must relate to the subject of the contract of insurance.

29. The Court of Appeal in **Africa Merchant Assurance Company v Kenya Power & Lighting Company Limited (2018) eKLR** held as follows with regards to the doctrine:

“The essence of the doctrine of subrogation is not in contention. It allows an insurer after compensating an insured for any loss under the insurance contract to step into the shoes of the insured. In that, the insurer is entitled to all the rights and remedies the insured might have against a third party in respect of the loss compensated. As it stands, the law in that respect is settled, that is, that an insurer cannot under the doctrine of subrogation institute a suit in its own name against a third party.”

30. It is not in dispute that the insurance company has not compensated the insured, Mr. Kangethe, in this matter. The doctrine of subrogation is thereby not applicable in the case. It would appear that Mr. Kangethe was justified in withdrawing the appeal. The insurance company has not shown that there was any abuse of the court process in withdrawing the appeal. To the contrary it is the insurance company which is in abuse of the court process in suing under guise of the doctrine of subrogation when the parameters of the doctrine have not been met.

31. I therefore find that the withdrawal of the appeal was proper and the appeal stands withdrawn. The law is that withdrawal of a suit brings the suit to an end. In this regard the court in the case of **Bahati Shee Mwafundi vs Elijah Wambua (2015)eKLR** quoted an excerpt by Stuart Sime in his book **“A Practical Approach to Civil Procedure”**, 9th Edition where the learned author states that:

“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.”

32. The appeal having been withdrawn via the Notice of Withdrawal, I find there is no appeal pending before this court.

33. On the second issue whether the court should order Boniface Kangethe to settle the resultant decretal sum in the various primary suits and the resultant various declaratory suits as well as to settle the cost incurred by Trident Insurance Company Limited in defending the various primary suits, declaratory suits and the appeal herein, the insurance company has not shown the basis of this court making such orders as there is no such an issue before this court. It is trite that parties in a suit are bound by their pleadings and a party cannot seek for orders not sought in the pleadings unless there is an amendment to the pleadings. The orders sought are thereby declined.

34. In the end, I do not find any merit in the application herein and the same is dismissed with costs to the Appellant, Mr. Boniface Kangethe and the Respondent, Susan Waithera Kiarie.

Delivered, dated and signed at GARSEN this 2nd day of October, 2025

**J. N. NJAGI
JUDGE**

In the presence of;

Mr. Gacau for Appellant, Mr. Boniface Kangethe

Mr. Wamalwa for Trident Insurance Company

Mr. Kilonzo for Respondent, Susan W. Kiarie

Mr. Ojwang for garnishee at lower court for

Court Assistant: Ms Rahm