



REPUBLIC OF KENYA



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**Washe & another v Kaduka & 13 others (Environment and Land Case
155 of 2015) [2025] KEELC 6497 (KLR) (1 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 6497 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND CASE 155 OF 2015
FM NJOROGE, J
OCTOBER 1, 2025**

BETWEEN

JAPHETH KALAMA WASHE 1ST PLAINTIFF

PATRICK MONO MBURA 2ND PLAINTIFF

AND

CHRISPUS DECHE KADUKA & 13 OTHERS DEFENDANT

RULING

1. For determination is the Defendants' Notice of Motion application dated 31/5/2025 brought under Section 1A, 1B and 63 of the *Civil Procedure Act*, and Order 25 rule 4 of the Civil Procedure Rules. The Defendants seek the following orders: -
 - a.Spent;
 - b. That there be a stay of any further proceedings in the suit pending the plaintiff's payment of costs of Kshs. 139, 612/- as decided in the case of Japheth Kalama Washe v Chrispus Deche Kaduka & 4 Others, Kilifi Civil Suit No. 61 of 2015;
 - c. That the court do grant the Plaintiffs a period of 30 days from the date of stay wherein failure of payment of costs, this suit should be dismissed;
 - d. Costs.
2. The application is supported by the affidavit of Chrispus Deche Kaduka sworn on even date and is premised on the grounds that the Plaintiffs herein had previously instituted a similar cause of action in Kilifi Chief Magistrates' Court, being Japheth Kalama Washe v Chrispus Deche Kaduka & 4 Others, Civil Suit No. 61 of 2015. It is averred that the Plaintiffs withdrew the said suit on 8th April 2015 and thereafter instituted the present proceedings. That following the withdrawal, costs in the sum of Kshs. 139,612 were assessed in favour of the Defendants, but the Plaintiffs have refused, failed, or neglected



to settle the same, despite a warrant of arrest and committal to civil jail having been issued. It is the Applicant's position that pursuant to the applicable rules, the Plaintiffs are precluded from instituting or proceeding with the current suit unless and until the previously decreed costs are settled.

3. The Plaintiffs/Respondents, Japheth Kalama Washe and Patrick Mono Mbura, opposed the application through a Replying Affidavit sworn jointly on 10/6/2025. They contend that the present suit has been pending since 2015 and that its delay in conclusion is attributable to numerous interlocutory applications filed by the Defendants/Applicants, including the current one.
4. They concede that a prior suit, Kilifi Civil Suit No. 61 of 2015, was withdrawn but argue that the present suit is materially distinct, involving additional parties, broader issues of law and fact, particularly concerning land ownership and boundary encroachment, and is filed before a court with proper and exclusive jurisdiction under Article 162(2)(b) of *the Constitution*.
5. The Plaintiffs assert that the costs awarded in the withdrawn suit cannot lawfully bar or delay proceedings in the current suit, which is separate and properly before this court. They further contend that the Applicants have not taken any formal steps to enforce the said costs over the past ten years, and the current application is being made at the judgment stage purely to frustrate the conclusion of the case.
6. They argue that the prayer for stay or dismissal is legally untenable, prejudicial, and contrary to the constitutional right to be heard. They urge the court to dismiss the application with costs.
7. With leave of the court, the Defendants filed a further affidavit sworn by Chrispus Deche Kaduka on 18/6/2025. He reiterated the contents of the supporting affidavit and annexed a copy of the pleadings of the withdrawn suit.
8. The application was canvassed by way of written submissions.

Defendants' Submissions

9. Counsel for the Defendant/Applicant submits that the withdrawal of the earlier suit does not extinguish its legal effect, and that the mere addition of parties in the present suit does not alter the identity of the subject matter or the Plaintiffs. It is argued that the present claim remains substantially the same as the one previously withdrawn, and that the principle underlying res judicata is applicable in that regard. In support, reliance is placed on the decision in Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (intended plaintiff) [2022] eKLR.
10. On the merits of the application, counsel contends that Order 25 Rule 4 of the Civil Procedure Rules mandates that costs arising from a withdrawn suit must first be paid before a subsequent suit on the same subject matter can proceed. It is further submitted that the court has discretion to stay or discontinue such subsequent proceedings pending payment of those costs. The decision in PIL Kenya Limited v Joseph Oppong, Court of Appeal at Mombasa Civil Appeal No. 102 of 2007, is cited in support of this proposition.

Plaintiffs' Submissions

11. The Plaintiffs/Respondents submit that the Defendant's application dated 31st May 2025 lacks merit and is intended solely to delay the delivery of judgment in a matter that has been pending since 2015 and is already fully heard with submissions filed. They identify four issues for determination: whether the Plaintiffs are barred from prosecuting the suit due to unpaid costs; whether the threshold for stay of proceedings has been met; whether the prayer for dismissal is tenable; and who should bear the costs of the application.



12. On the first issue, the Plaintiffs contend that Order 25 Rule 4 of the Civil Procedure Rules applies only where the same cause of action is refiled and prior costs remain unpaid. They argue that the present suit is not identical to the earlier Kilifi CMCC No. 61 of 2015 as it involves more parties, raises broader issues including land ownership and trespass, and is filed before a court with proper jurisdiction. Accordingly, the current suit is not res judicata and does not fall within the ambit of Order 25 Rule 4.
13. On the second issue, the Plaintiffs argue that the Defendants have not demonstrated any substantial loss or prejudice that would warrant a stay of proceedings. They further note that the application has been brought nearly ten years after the costs were awarded and only on the date scheduled for judgment, indicating a lack of promptness and good faith.
14. Regarding the prayer for dismissal in default of payment of costs, the Plaintiffs submit that such relief is draconian, unconstitutional, and unsupported by law. They argue that the proper recourse for enforcing costs is through execution under Section 38 of the *Civil Procedure Act*, not by seeking to stay or dismiss separate proceedings. The Plaintiffs maintain that the application is an abuse of process and pray that it be dismissed with costs.

Analysis And Determination

15. The core issue for determination is whether the Plaintiffs' failure to settle costs arising from a previously withdrawn suit justifies a stay or dismissal of the present proceedings. Resolving this issue necessitates an examination of the applicable procedural rules, the nature and scope of the two suits, constitutional considerations, and the timing of the present application.
16. The Defendants anchor their application on Order 25 Rule 4 of the Civil Procedure Rules, which permits the court to stay a subsequent suit brought on the same or substantially the same cause of action as a previously withdrawn suit, where the costs of the earlier suit remain unpaid. The rule provides:
 4. Stay of subsequent suit [Order 25, rule 4]
If any subsequent suit shall be brought before payment of the costs of a discontinued suit, upon the same, or substantially the same cause of action, the court may order a stay of such subsequent suit until such costs shall have been paid.
17. The Plaintiffs oppose the application, contending that the current suit is materially distinct, involves additional defendants, and raises broader legal and factual questions, specifically, ownership of land and boundary encroachment. They assert that the suit falls within the exclusive jurisdiction of the Environment and Land Court (ELC) as contemplated under Article 162(2)(b) of *the Constitution*.
18. Upon examination, it is evident that the withdrawn suit Kilifi Civil Suit No. 61 of 2015, was primarily founded on a claim for trespass and sought a permanent injunction. In contrast, the current suit not only seeks injunctive relief but also a declaration of ownership over the suit property. The declaratory relief implicates substantive questions of title and falls squarely within the mandate of the ELC.
19. Admittedly, while there is some factual connection between the withdrawn Kilifi suit and the present suit, both involving allegations of trespass over the same parcel of land, the two suits are not substantially the same within the meaning of Order 25 Rule 4. The earlier suit was limited to claims for trespass and injunctive relief, whereas the current suit seeks, in addition, a declaration of ownership, thereby invoking complex issues of title to land. In my view, the claim for ownership introduces a new and distinct legal cause of action. To me, the present suit is not a mere refile of the previous one; it is



- a broader, more substantive claim properly instituted before a court vested with the constitutional and statutory mandate to adjudicate land ownership disputes. Consequently, the Court finds that the suits are not substantially the same in law or in substance, and the bar under Order 25 Rule 4 does not apply.
20. To the extent that the Defendants seek to invoke the doctrine of res judicata, the court finds the argument misconceived. A suit that has been withdrawn does not culminate in a determination on the merits and cannot form the basis of a res judicata bar.
 21. Notably, the Defendants have delayed for nearly 10 years in raising the issue of unpaid costs and have only done so at the very stage when the matter is ready for judgment. This delay, viewed alongside the procedural history, strongly suggests an ulterior motive to derail the proceedings. Such conduct offends the overriding objective enshrined in Sections 1A and 1B of the Civil Procedure Act, which obliges the court to facilitate the just, expeditious, and proportionate resolution of civil disputes.
 22. Furthermore, the Plaintiffs' constitutional right to a fair hearing, protected under Article 50(1), includes the right to timely adjudication. To dismiss or stay a fully-heard matter at its final stage on account of historical costs, especially where there is a method provided for the enforcement of the order of costs in law which the party seeking stay has failed to utilize, would amount to a draconian sanction and an unjustifiable curtailment of the Plaintiffs' access to justice under Article 48 of the Constitution.
 23. For completeness, the court notes that the Civil Procedure Act, under Section 38, provides adequate mechanisms for the enforcement of decrees, including costs. These include attachment and sale of property and, in limited cases, arrest and detention. The Defendants remain at liberty to enforce the decree for costs in the appropriate forum, and this court finds the current application to be an inappropriate and an afterthought route for such recovery.
 24. The court is thus satisfied that the present suit is not "substantially the same" as the earlier one and that the Defendants' delay in seeking the orders now prayed for constitutes an abuse of process. Granting a stay or dismissal would not only contravene the overriding objective of the Civil Procedure Act but would also offend the Plaintiffs' constitutional rights. The application is, therefore, devoid of merit.
 25. Accordingly, the Notice of Motion application dated 31/5/2025 is hereby dismissed with costs to the Plaintiffs. The matter shall be mentioned on 19/11/2025 for issuance of a hearing date.

DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 1ST DAY OF OCTOBER, 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

