



REPUBLIC OF KENYA



KENYA LAW
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**Mwangi v Mwangi (Civil Appeal E250 of 2013)
[2025] KEHC 14777 (KLR) (21 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14777 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL E250 OF 2013
TW OUYA, J
OCTOBER 21, 2025**

BETWEEN

EPHANTUS IRUNGU MWANGI APPELLANT

AND

HANIEL KIMANI MWANGI RESPONDENT

RULING

1. The instant application is by a litigant acting in person. Although he filed an application dated 18th February 2025 seeking stay of execution of the judgment given in Kagema SPMCC No. 26 of 2012 pending the hearing of the application and the appeal, the affidavit in support of the application sworn by Ephantus Irungu Mwangi deposed to grounds relating to restatement of an appeal and not stay of execution.
2. The Applicant deposed that he came to learn that his advocate had irregularly withdrawn the appeal without reference to him. As a result, he lodged a complaint at the Advocates Complaints Commission on the issue. Nevertheless, the Respondents were in the process of executing the decree of the court including evicting him from the land where he has been living with his family for over 40 years. He averred that he had an arguable appeal with very strong triable issues that ought to be reinstated.
3. The Respondent opposed the Application via his replying affidavit dated 24th March 2025 praying that the application be dismissed as it was misconceived, frivolous and vexatious as the applicant's appeal has no chances of success for it is ill motivated and the grounds are not convincing.
4. During oral hearing, the Applicant stated that he had been given the suit property by his father in 1966 and he was holding it in trust for himself and his brother.
5. The Respondent opposed the application for reinstatement of the appeal on the basis that the same was an old case and the appeal had been pending since 2013 and had been withdrawn in the same



year. He also stated that he had paid the surveyor for the subdivision after the determination in the Kangema court.

6. The appeal subject of this application had been lodged vide a memorandum of appeal dated 15th October 2013 on the grounds that:
 - a. The honourable magistrate erred in law by failing to consider the submissions of the parties to the suit
 - b. The honourable magistrate erred in law and fact in coming to conclusion that there existed a trust in favour of the respondent
 - c. The principal of equity quoted in the judgment is not applicable in the case
 - d. The respondent failed to in fact prove a case on balance of probabilities.
7. I have carefully perused the application, the replying affidavit and the submissions by the parties. The issue for determination is whether the application herein is merited.
8. The applicant's application seeks to reinstate this appeal as he is desirous of prosecuting the same. He alleges that his advocate withdrew the appeal without his knowledge.
9. There is nothing before the court to show that the Applicant's advocate did not have the instructions to withdraw the suit neither is there any evidence presented to this court to prove that the advocate who was representing the applicant did not have instructions to withdraw the appeal.
10. The provisions of Order 25 of the Civil Procedure Rules provide for withdrawal of suits as follows;
 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.
11. In the case of *Shadrack Silla Muthama v Kebaso Wycliffe Maengwe* [2021] eKLR it was held that:

“The right to withdraw a suit under Order 25 Rules 1 and 2(1) is not fettered by any conditions and a party who intends to withdraw their suit, has an absolute right to do so. However, under Order 25 Rule 2(2), withdrawal of a suit requires permission of the court and the withdrawal may be subject to terms that the court considers just, including payment of costs or filing of any other suit.”
12. There is no evidence that the court imposed any condition on the withdrawal of the appeal.
13. Given facts of this case, the only recourse to an individual who was a party to a withdrawn or discontinued suit is to file a fresh suit if the law permits him or her to do so. 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.”

14. The appellant herein has not shown that his advocate, who withdrew his appeal, did not have instructions to do so. Accordingly, the appeal having been marked as withdrawn there is no sound basis to consider its reinstatement. The withdrawal took effect immediately the court permitted it.
15. Unlike a dismissal by the court which is a court-initiated action, a withdrawal is an action of the party, initiated by it, without involvement of the court except at the point where the court is formally asked to record the withdrawal. A withdrawal amounts to a discontinuance which is an action that has finality. In the consequence, the suit dissipates and there is nothing left before the court to act upon.
16. Accordingly, the application for reinstatement is declined and is therefore dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 21ST DAY OF OCTOBER, 2025.

HON. T. W. OUYA

JUDGE

