



Chiko v Agunga (Appeal E014 of 2023) [2025] KEELC 7506 (KLR) (4 November 2025) (Ruling)

Neutral citation: [2025] KEELC 7506 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
APPEAL E014 OF 2023
FM NJOROGE, J
NOVEMBER 4, 2025**

BETWEEN

KWANYA KIRONDA CHIKO APPELLANT

AND

ALFRED NYADIMO AGUNGA RESPONDENT

RULING

1. The Appellant's Notice of Motion application dated 9th May 2025 and the Respondent's Preliminary Objection dated 28th May 2025 have come up for determination before this Court.
2. Through the Notice of Motion, the Applicant seeks to set aside the Orders issued on the 30th April, 2025 where the court stood this matter over generally by dint of the Notice of withdrawal and/or notice to discontinue the Suit dated 28th April, 2025 purportedly filed by the Appellant/Applicant, and reinstate the Appeal so that it be heard and determined on merit, and costs of the application.
3. The Application is supported by the affidavit sworn by the Applicant on 9th May 2025, wherein he deposed that he is an 81-year-old illiterate resident of Kikambala; that on 28th April 2025 the Respondent went to his homestead with two pre-prepared documents which he misrepresented as relating only to time for payment of the balance of the purchase price forming the subject of the appeal, and procured the Applicant's thumbprints thereon. The Applicant averred that the said documents were, without his knowledge or consent, subsequently filed in this matter as a Notice to Act in Person and a Notice of Withdrawal of the Appeal through an email account not created or used by him, and with filing fees paid by a third-party unknown to him. Upon being notified by his advocate, he instructed counsel to take corrective steps, where after a Memorandum of Appearance and a withdrawal of the purported withdrawal were filed and served. He stated that he never intended to withdraw the appeal, dissociated himself from the impugned documents, and prayed for reinstatement, relying on annexures KKC1 to KKC4 in support.



4. To oppose the application, the Respondent filed a Notice of Preliminary Objection dated 28th May 2025 and a Replying Affidavit he personally swore on the even date. The grounds raised in the Notice of P.O. were listed as follows:
 1. That the Appeal herein was withdrawn by the Applicant/Respondent herein on 28th April, 2025 and upon withdrawal of this Appeal, it ceased to exist and as such no order can be made on that which does not exist;
 2. That the instant application for reinstatement of a withdrawn Appeal is a non-starter as it ought to have been filed as a miscellaneous application in a separate suit and not in the instant non-existent appeal. It is bad in law and an abuse of due process of law;
 3. That this Honourable Court has no jurisdiction to hear and determine the Application as it became functus officio upon the withdrawal of the Appeal;
 4. That the instant Application is void ab initio for want of compliance with the law on the sought prayers as they seek to reinstate a withdrawn Appeal thus invoking the bar of res-judicata and principle of finality of litigation.
5. In the Replying Affidavit, the Respondent deposed that the withdrawal of the Appeal in ELCA No. E014 of 2023 was initiated and undertaken voluntarily by the Applicant, Mzee Kwanza Kironda, without any coercion, inducement or involvement by the Respondent. He stated that he had not been in telecommunication contact with the Applicant until on 3rd March 2025 when the Applicant first called him and requested a meeting. Further calls followed on 20th March 2025 and on 23rd and 24th April 2025 (the latter through the Applicant's grandson, Cosmas Kambi). In those communications, the Applicant declared that he had become a born-again Christian, had forgiven the Respondent and desired to withdraw Appeal No. E014 of 2023. Thereafter, on 25th April 2025 the Respondent met the Applicant at Kikambala Post Office in the company of Cosmas Kambi and another man identified as William, the Applicant's son.
6. At that meeting, the Applicant prayed, repeated his intention to withdraw the Appeal, admitted that he had been misled and had resold the property forming the subject of the suit, and pleaded for assistance in meeting his advocate's demands, which he alleged were extortionate. Moved by the Applicant's remorse, the Respondent instructed his accountant to remit to the Applicant a sum of Kshs. 100,000/= to assist with the said demands, but denies that the said payment amounted to or constituted coercion.
7. The Respondent added that on 28th April 2025 the Applicant, through Cosmas Kambi via WhatsApp, transmitted a Notice to Act in Person dated 28th April 2025, a Notice of Withdrawal dated 28th April 2025 and a copy of the Applicant's national identity card, which were subsequently filed. He stated that on 1st May 2025, the Applicant informed the Respondent that his advocate had discovered the intended withdrawal and had reacted by demanding further sums, but the Respondent declined further involvement. The Respondent annexed evidence in support of his deposition comprising (i) screenshots of telephone communications between 24th April 2025 and 1st May 2025 between himself, the Applicant and Cosmas Kambi marked "ANA 1"; (ii) an M-Pesa confirmation of the transfer of Kshs. 100,000/= to the Applicant marked "ANA 2"; and (iii) screenshots of WhatsApp communication from Cosmas Kambi dated 28th April 2025 transmitting the Notice to Act in Person, the Notice of Withdrawal and the Applicant's identification card marked "ANA 3".
8. The Respondent maintained that the Application is a non-starter, frivolous, an abuse of the court process, unsupported by cogent evidence and that no prejudice has been demonstrated to warrant the orders sought. He consequently prayed that the Application be dismissed with costs.



9. The Applicant filed a Supplementary Affidavit sworn on 10th June 2025 in response, wherein he expressly denied and traversed all the averments made by the Respondent.
10. Both the application and the preliminary objection were canvassed by way of written submissions.

Applicant's Submissions

11. In support of his application, the Applicant relied on the submissions dated 10th June 2025, wherein counsel identified three issues for determination, namely-
 - (i) Whether the Appellant's/Applicant's Application as filed is merited
 - (ii) Whether the Respondent's Replying Affidavit and its attendant annexures as filed has any probative value, and
 - (iii) Who bears the costs?
12. With regard to the first issue, counsel reiterated what was stated in the supporting affidavit and submitted that although the Respondent denied involvement, he admitted using a third party, Mr. Cosmas Kambi, to facilitate the withdrawal, without demonstrating any authority from the Applicant. Counsel argued that these circumstances entitled him to invoke the doctrine of non est factum, he having been misled into signing documents fundamentally different from what he intended. He relied on *Josephine Mwikali Kikenye v Omar Abdalla Kombo & Another* (2018) eKLR, where the Court of Appeal held that a document signed under fundamental misrepresentation is a nullity.
13. On the law, the Applicant submitted that the Respondent's reliance on Order 25 Rule 1 of the Civil Procedure Rules was misplaced as the matter had already been set down for disposal by written submissions and was pending judgment directions when the withdrawal was filed. He maintained that the applicable provision was Order 25 Rule 2(1)– (2), which required either a consent signed by all parties or leave of Court once a matter had been set down for hearing. Since neither requirement was satisfied, the Applicant urged the Court to find that the withdrawal documents were improperly on record and to allow the application as prayed.
14. In relation to the second issue, counsel submitted that the Respondent's Replying Affidavit and its annexures had no probative value as it was substantially anchored on hearsay evidence attributed to third parties (Mr. Cosmas Kambi, Mr. James Baya, Mr. William and Mr. Elly Onyango) none of whom had sworn affidavits to verify the averments. He therefore urged that the affidavit ought to have been disregarded in its entirety. Counsel further submitted that the electronic documents annexed as "ANA 1–3" were inadmissible for want of compliance with Section 106B (1), (2) and (4) of the *Evidence Act*, Cap 80, since no certificate of electronic evidence accompanied the same to authenticate their origin or integrity. Reliance was placed on *Jack & Jill Supermarket Ltd v Viktor Maina Ngunjiri* (2016) eKLR, where the Court affirmed that electronic evidence is only admissible when the statutory conditions under Section 106B are satisfied and a certificate compliant with Section 106B (4) is furnished.
15. He added that the annexures lacked probative value as they were not sworn before a Commissioner for Oaths contrary to the *Oaths and Statutory Declarations Act*, Cap 15 Laws of Kenya. Counsel urged the Court to find that the Respondent's Replying Affidavit together with its annexures had no probative value and to disregard them. It was counsel's argument that costs should be awarded to the Applicant.
16. In relation to the P.O., the Applicant relied on the submissions dated 1st September 2025, wherein his counsel submitted that the PO was unmerited, an afterthought and intended merely to delay the matter. He argued that the Respondent was on a "fishing expedition" by alleging, and inconsistently so, that the application ought to have been filed as a miscellaneous cause while simultaneously alleging



functus officio and res judicata without identifying any breached provision of law. Counsel contended that a proper preliminary objection lay only on pure points of law as stated in the celebrated Mukisa Biscuits case, which threshold had not been met.

17. Counsel submitted that there was no express procedural route for approaching the Court in the circumstances, and that Order 51 of the Civil Procedure Rules properly applied. Order 51 Rule 15 was cited to justify the form of the application. Counsel additionally invoked Article 159(2)(d) of *the Constitution* and submitted that the Respondent was improperly urging this Court to elevate procedural technicalities above substantive justice.
18. On the allegation of citing the wrong provisions of law, the Applicant submitted that such omission was not fatal where the Court and parties understood the nature of the relief sought. Reliance was placed on *Hermanus Philipus Steyn v Giovanni Gneccchi-Ruscione* (2013) eKLR and *Faustina Njeru Njoka v Kimunye Tea Factory Ltd* (2022) eKLR, where the Courts held that wrong citation of provisions did not render an application defective.
19. Counsel further submitted that striking out was a draconian remedy to be exercised sparingly and only in the clearest of cases. Reliance was placed on *Safaricom PLC v Kinuthia & 2 Others* (2025) KEHC 389 (KLR), where the Court reiterated that striking out pleadings under Order 6 Rule 13 is discretionary and reserved for plain and hopeless cases, which this was not.
20. Lastly, counsel submitted that the Respondent had, on his own affidavit, admitted to having used illegal means through a third party to procure the withdrawal, rendering that process unenforceable under the doctrine *ex turpi causa non oritur actio*. Counsel referred to *Haile Menkerios v Mureithi & Another; Wina Trading Co. Ltd (Third Party)* (2024) KESC 13993 (KLR), where the Court restated that no Court ought to lend its aid to an illegality once brought to its notice.
21. Counsel therefore urged the Court to find the Notice of Preliminary Objection without legal basis and dismiss it with costs.

Respondent's Submissions

22. In his submissions dated 28th October 2025, counsel for the Respondent submitted in brief. He submitted that the Preliminary Objection raised issues on the validity of reinstating a suit that had already been withdrawn. Counsel argued that a suit which has been withdrawn cannot be reinstated; that once a suit is withdrawn the Court becomes functus officio and thus cannot entertain its reinstatement. To counsel, the Appellant having withdrawn the case this Honourable Court became functus officio, and as such does not have jurisdiction to reinstate a suit that has been withdrawn.
23. Counsel relied on the cases of *Shadrack Silla Muthama -v- Kebaso Wycliffe Maengwe* [2021] eKLR; and *Priscilla Nyambura Njue -vs- Geovhem Middle East Ltd; Kenya Bureau of Standards (Interested Party)* [2021] eKLR.

Analysis And Determination

24. The following issues arise for determination-
 - i. Whether the Notice of Preliminary Objection is merited;
 - ii. Whether the Court should set aside the Orders issued on the 30th April, 2025;
 - iii. Who should bear the costs of the application?



25. As to whether a preliminary objection is one of merit, there exists precedents on the threshold to be met. This Court has on numerous occasions endorsed the principle in *Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors* [1969] EA 696, where it was held that:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion’.”

26. It therefore follows that a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.

27. The P.O. as raised herein is four-fold. Firstly, the Respondent contested that upon withdrawal of the appeal, it ceased to exist, as such, no order can be made on that which does not exist; secondly, that the application ought to have been filed as a miscellaneous application as a separate suit; that the court lacks jurisdiction for being *functus officio*; and lastly, for its attempt to reinstate a withdrawn appeal, the application is *res judicata*. In his submissions, counsel for the Respondent condensed these grounds to one issue discussing whether the court became *functus officio* when the Applicant withdrew his case.

28. There is statutory recognition for a party’s right to withdraw or discontinue its case, see: Order 25 of the Civil Procedure Rules, 2010. This provision reads:

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.

29. A Notice of Withdrawal is usually filed by the party who commenced the litigation. The consequences of that filing are predicated on what is reflected in the record as at the time of its filing. When it has been filed while the suit has not been set down for hearing and the withdrawal notice is served on all other parties, the consequences are that the suit is effectively withdrawn and ceases to pend before court. If it has been filed and served after the suit has been set down for hearing, the suit is effectively withdrawn once the Court endorses the withdrawal, and henceforth there is no longer an active case.

30. On 5th May 2025 when this matter came up in court, Mr Mwawasi stated that he had filed submissions. It is noteworthy that the matter was being mentioned on that date for the purpose of issuing it with a judgment date, the parties having been ordered to file and serve each other with submissions earlier on 25/2/2025.



31. In this matter, it is common ground that on 28th April 2025 a document titled “Notice of Withdrawal” was filed under the Applicant’s name. It is also evident that on 5th May 2025 this Court stood the matter over generally by dint of that Notice of withdrawal having been brought to its attention. Whether the Applicant later changed his mind, or whether there was fraud or misunderstanding, are all matters that would require evidence. The Applicant’s complaints about fraud, misrepresentation and electronic evidence all require a full hearing on facts. Such questions can only be examined by a Court that still has jurisdiction to deal with the case. The court on that date directed Mr Mwawasi to file an application for reinstatement which is the present application.
32. The Respondent’s objection is premised on the *functus officio* rule and jurisdictional finality. The doctrine of *functus officio* is anchored in the principle of finality of judicial acts and prevents a Court, once it has conclusively disposed of a matter, from reopening it save as expressly permitted by law.
33. This court must address the propriety of the notice of preliminary objection in this matter by stating expressly that it is one that can not be determined without a perusal of other documents to establish what went on in this matter. Of the greatest importance is the court record which will help interpret first, which provision between Order 25 (1) and Order 25(2) are applicable in this matter, and second, whether the requirements of the applicable provision have or have not been fulfilled in order to enable this rule on whether the appeal has been effectively withdrawn or not. Consequently, as this court does not find any limb of the preliminary objection to be arguable without reference to other extraneous documents, the Preliminary Objection is hereby struck-out.
34. On the merits of the application now, it is noteworthy that Order 25 Rule 2 relates to suits but by extrapolation, it applies to appeals as there is no express provision in the Civil Procedure Rules of such nature that relates to appeals.
35. The question that arises herein is whether the appeal had or had not been set down for hearing by the time the notice of withdrawal was filed.
36. Appeals are usually disposed of by way of written submissions.
37. On 25/2/2025, this court ordered parties to file submissions. What remained was for the parties to confirm that such submissions had been filed so that the court could issue a judgment date in the matter. Often, submissions in most appeals are not highlighted. The parties simply rely on them by either adopting them expressly or by implication, and the court scrutinizes them and considers them while making a judgment. Where the court has not ordered *suo moto* that highlighting be done, when parties ask for leave of court to highlight submissions, they may be allocated a time frame for highlighting. Often, whether there is oral highlighting or not, the Judge’s analysis of parties’ submissions is usually found in the judgment.
38. Since there is usually no calling of oral evidence in an appeal, this court is of the view that in contrast with the calling of witnesses in suits, in appeals the court’s order to the parties to file submissions acts as the *de facto* commencement of a hearing. Parties are deemed to have been heard by simply preparing their submissions and filing them, whereupon the court may then simply issue a judgment date. Thus, the foregoing analysis therefore identifies 25/2/2025 as the date on which the appeal was set down for hearing.
39. Subsequently, both the appellant and the respondent in the present appeal filed their submissions for or against the appeal on different dates. The appellant’s submissions urging the court to grant his appeal are dated 12th March 2025 while the respondents’ submissions urging the court to dismiss the appeal are dated 14th April 2025. And on 5/5/2025, Mr Mwawasi, addressing the court, pointedly confirmed



filing of the submissions before any other business was undertaken in that session. Of course the court had not by then seen the notice of withdrawal but it was brought to its notice by counsel for the respondent on that day.

40. It is now clear that the appeal having been set down for hearing on 25/2/2025 and by virtue of it only awaiting issuance of a judgment date, and the filing of a notice of withdrawal of suit dated 28/4/2025 having occurred the appeal had been set down for hearing, it is only the terms of withdrawal under Order 25 Rule 2 that apply to it.
41. Although Ms Mboya insisted that the matter had been withdrawn, it is this court's view that she could only persuade this court that it had been withdrawn under Order 25 Rule (2) by adducing evidence by affidavit of either a consent to withdrawal executed by all parties and duly filed in court, or a notice of withdrawal served on all parties and accompanied by an order of this court endorsing the withdrawal. The respondent was accorded an opportunity to respond but he availed none of those documents. He could not therefore establish before this court that an effective withdrawal of the appeal under Order 25 Rule (2) has occurred.
42. Consequently, this court finds that the present appeal was not effectively withdrawn by the purported notice of withdrawal dated 28th April 2025. The application dated 9th April 2025 has merit and it is granted in terms of prayer no (c) thereof. The costs of the application shall abide the outcome of the appeal. The appeal shall be mentioned on 27/11/2025 for issuance of a judgment date.

DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 4TH DAY OF NOVEMBER, 2025.

MWANGI NJOROGE.

JUDGE, ELC, MALINDI.

