

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND COURT AT KAKAMEGA
ELC APPEAL NO. E021 OF 2023

JOSHUA NDANGÁNA..... APPELLANT

VERSUS

IRENE INEMBALI MASIKA.....1ST

RESPONDENT

JOSEPH SHAMMULLA.....2ND

RESPONDENT

RULING

Introduction

1. Before court is a Notice of Motion dated 3rd May 2024 filed by the appellant seeking orders that the Honourable court be pleased to expunge the notice of withdrawal of appeal herein filed by the firm of Kiveu & Company advocates in this matter; that the court allows the firm of Maobe Mukhwana & Company Advocates to come on record for the appellant and that the appellant be allowed to amend his Memorandum of appeal.

2. The application is supported by the affidavit sworn by the appellant on 3/5/2024. The applicant's case is that he did not instruct his former advocates to withdraw the appeal herein and that he has now instructed the firm of Maobe Mukhwana Advocates. That Kiveu & Company advocates did not inform him of having withdrawn the appeal and that he instructed the firm of Maobe Mukhwana when she did not have proper facts leading to the said Advocates filing an application for leave to appeal out of time. That he stands to suffer prejudice if orders sought are not granted and that the mistake of counsel should not be visited on him.

3. The application was opposed. The respondent filed replying affidavit dated 16th November 2024 opposing the application. She stated that the application was fatally defective. That Kiveu & Company advocates are presumed to have acted on the appellant's behalf. That her advocate was served with the notice of withdrawal on 15/02/2024. That a notice of withdrawal takes effect from the time it is served on the adverse party, hence the notice took effect on 15/02/2014. That there is no

provision in law for revocation of notice of withdrawal and reinstatement of suit after service of notice of withdrawal. That the applicant has to date never served the motion dated 14/10/2024 despite having been ordered to serve, which compelled the respondent's advocate to download it from the court's CTS.

4. Parties filed submissions in support of their respective positions. On record are submissions filed by the applicant dated 16th October 2024 and those filed by the respondent dated 23rd July 2025; both of which this court has duly considered.

Analysis and determination

5. Having considered the application, the replying affidavit as well as parties' rival submissions, the only issue that arise for the court's determination is whether the applicant deserves the orders sought.
6. Order 26 Rule 1 of the CPR provides for withdrawal of suit as follows;

“Withdrawal by plaintiff [Order 25, rule 1]

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.”

7. Therefore, a party can withdraw their suit any time before the suit is set down for hearing. In such a case, the withdrawal takes effect on the service of the withdrawal notice. However, where a suit has been set down for

hearing, the withdrawal takes effect upon filing of a written consent by the parties or by leave of court.

8. In the case of **Beijing Industrial Designing & Research Institute v Lagoon Development Ltd (2015) KECA 365 (KLR)**, the Court of Appeal set out the three scenarios regarding discontinuance or withdrawal of suits as follows:

“The above provision presents three clear scenarios regarding discontinuance of suit or withdrawal of claims. The first scenario arises where the suit has not been set down for hearing. In such an instance, the plaintiff is to give notice in writing to that effect and serve it upon 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 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 the discontinuance of

the suit or withdrawal of the claim or any part thereof. In such eventuality, the plaintiff must obtain leave of court to discontinue the suit or 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"

9. In the instant matter, the appellant filed the Memorandum of appeal on 14/9/2023 and on 14/12/ 2023, he filed a notice of withdrawal of the appeal dated 14/12/2023. The respondent states that her counsel was served with notice of withdrawal of appeal on 12/02/2024.
10. No directions for the hearing of this appeal have been issued by this court and no Record of appeal has been filed by the appellant. Therefore, the withdrawal of this appeal was made before the appeal had been set down for hearing, therefore the same took effect from the date of service of the notice of withdrawal of appeal, which is 15/2/2014. Thus, this appeal was effectively

withdrawn as of 15/2/2024. In the instant application counsel for the appellant did not cite any law under which the application was presented or which law allows a withdrawn appeal to be reinstated. In my view once an appeal is withdrawn, there is nothing capable of being reinstated. Besides, the appeal herein having been withdrawn on 15/2/2024, there is no appeal before court capable of being amended hence the prayer for amendment of memorandum of appeal is dismissed.

11. The appellant's allegation that the withdrawal by his former advocate was without his instructions, was baseless and without proof as it is trite that instructions to an advocate are presumed to exist unless proved otherwise. **(See Kenya Commercial Bank v Specialized Engineering Co. Ltd (1980) KEHC 11 (KLR))**. In the instant matter, the appellant did not rebut this presumption, by availing evidence to show that at the point of withdrawal of the appeal, the firm of Kiveu Advocates acted without instructions.

12. Order 9 Rule 9 allows a party who wishes to change an advocate after conclusion of case to do so with leave of

court. The appellant is entitled to an advocate of his choice. As no impediment exists to stop the firm of Maobe Mukhwana appearing for the appellant, the appellant's prayer in that regard is hereby allowed.

13. In the premises, save that the firm of Maobe Mukhwana & Company Advocates is granted leave to represent the appellant in the place of Kiveu & Company Advocates, the application dated 3rd May 2024 is hereby dismissed with costs to the respondent.

14. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA
IN OPEN COURT/VIRTUALLY THROUGH
MICROSOFT TEAMS VIDEO CONFERENCING
PLATFORM THIS 5TH DAY OF NOVEMBER 2025**

**A. NYUKURI
JUDGE**

In the presence of;

Ms. Mukhwana for the appellant
No appearance for the respondent

Court Assistant- Delphine