



**Winstone v Bolo (Environmental and Land Originating Summons
E026 of 2024) [2025] KEELC 7975 (KLR) (14 November 2025) (Ruling)**

Neutral citation: [2025] KEELC 7975 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E026 OF 2024
FO NYAGAKA, J
NOVEMBER 14, 2025**

BETWEEN

PETER WINSTONE APPLICANT

AND

JOSEPH OWUOLO BOLO RESPONDENT

RULING

(On withdrawal of an originating summons after it had been set down for hearing)

1. This Originating Summons came up for formal proof hearing on the 11th November 2025. Prior to that, it had been screened for mediation on 18th March 2025. It appears the mediation did not yield any fruit as neither the Plaintiff/ Applicant nor Respondent took part in the exercise. Then on 24th April 2025, the parties did not attend court. The matter was fixed for the 10th June 2025 for notice to show cause why it should not be dismissed for want of compliance because the Applicant had not demonstrated to the court that they had taken any steps in the matter. On the same date, the plaintiff asked for it to be mentioned further, hence it was fixed for mention on 15th July 2025.
2. When it came up for mention on the material date, the applicant requested to fix it on another date, this time for formal proof hearing. It was fixed for formal proof on 11th November 2025. On that later date, the plaintiff applied to withdraw the entire Originating Summons, hence this ruling.
3. Before me, then, is an oral application for the withdrawal of the entire Originating Summons. The Applicant did not cite any legal provisions under which he made the application. Be that as it may, Order 25 Rule 1 of the Civil Procedure Rules 2010 provides that;

“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.”

4. The provision cited above is to the effect that in instances where a matter has not been set down for a hearing, the Plaintiff is at liberty to withdraw it, only by way of notice which must be in writing. It should be served on all the defendants. It, in my view, ought to be served first on all the parties before it can take effect. When it takes effect, the withdrawal will not serve as a bar to any subsequent action that may be brought by the plaintiff.
5. In the instant matter, as it is borne by the record as summarized above, the Originating Summons had been fixed for formal proof hearing by the time the application for the withdrawal was made. Needless to say, that the application for withdraw was made orally at the time of hearing. These facts, therefore, oblige this Court to examine the provisions regarding withdrawal of suits which been fixed for hearing.
6. Order 25 rule 2(1) and (2) of this Civil Procedure Rules provide that
 - “(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.”
7. The first subparagraph is on situations where the Plaintiff wishes to withdraw a suit already set down for hearing or discontinued it without the involvement of the court, meaning, without waiting for it to be placed before the Judge or Judicial Officer. In such circumstances, the plaintiff will enter a consent with all the other parties for the withdrawal of this suit, and file it. Upon that happening it will be effective. However, where the parties do not enter into a consent prior to the hearing, the Plaintiff or Patty who wishes to withdraw the matter will move the court during hearing, for leave to discontinue or withdraw it or any part of the claim. The court will, while doing so, impose conditions as to costs, and or the filing of any other suit subsequently.
8. In the instant matter, it seems the latter provision is the one the plaintiff/ applicant relied on in applying for withdrawal of this suit. He did not indicate the reasons why he was withdrawing the suit. Of course, he did not indicate the reasons why he had not served the Respondent either.
9. This court has considered the application. There is no challenge to the withdrawal of the Summons. This court cannot stop any party from withdrawing their matter since it is their unfettered right to do so. In *Skyline Sacco Society Ltd v Cheboror* (Civil Appeal E007 of 2023) [2024] KEHC 9074 (KLR) (25 July 2024) (Judgment) it was held,
 - “From the foregoing, a party who files suit in court has unfettered right to withdraw the suit under Order 25 Rules 1 and 2(1) of the civil procedure Rules. 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.”



10. In the case of Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 Others, Supreme Court Application No. 16 of 2014, the Supreme Court stated as follows:-

“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.”

11. Similarly, in Beijing Industrial Designing & Researching Institute vs. Lagoon Development Limited [2015] eKLR, the Court of Appeal stated as follows:-

“As a general proposition, the right of 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. The Supreme Court of Nigeria in Abayomi Babatunde vs. Pan Atlantic Shipping & Transport Agencies Ltd & Others SC 154/2002 identified those circumstances to include where;

1. A Plaintiff realizes the weakness of his claim in the light of the defence put up by the Defendant.
2. A Plaintiff’s vital witnesses are not available at the material time and will not be so at any certain future date,
3. Where by abandoning the prosecution of the case, the Plaintiff could substantially reduce the high costs that would have otherwise followed after a full-scale but unsuccessful litigation, or
4. A Plaintiff may possibly retain the right to relitigate the claim at a more auspicious time if necessary.”

12. Thus, a suit can be withdrawn at the instance of the party who brought it. However, the imposition of the conditions for withdrawal is at the discretion of the court. Therefore, I have carefully perused the record. Having considered the application before me, I find merit in it and allow it. But it is interesting this matter has been in this court for over a year, thus creating backlog. Moreover, there is no evidence that the Applicant complied with Order 5 Rule 1 and 3 of the Civil Procedure Rules respecting the requirement that where a suit is filed a summons shall issue, and that every summons shall be accompanied by a plaint respectively, and Order 5 Rule 6 which provides that

“Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue, failing which the suit shall abate.”

13. The totality of the above is that this suit not only abated after thirty days of filing, but it has clogged the system for a year yet the applicant knew that service of summons was not going to be done anyway, yet he purported to fix it for formal proof. The plaintiff has withdrawn an abated suit: it abated over a year ago. I doubt whether an abated suit withdrawn can ever be revived. The withdrawal seals it completely. Thus, to avoid abuse of the process of the court, there being no reason why the applicant failed to serve the Respondent/ Applicant is not permitted to or shall not file another suit against the same party over the same subject matter, without first seeking from and being granted the leave of this court to do so.

14. There shall be no order as to costs.

15. Orders accordingly.



**RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM
THIS 14TH DAY OF NOVEMBER, 2025.**

HON. DR. IUR NYAGAKA

JUDGE

In the presence of,

None of the parties

