



**Maurice v Musakala (Civil Application 106 of 2025)
[2025] KEHC 17589 (KLR) (20 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 17589 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPLICATION 106 OF 2025
S MBUNGI, J
NOVEMBER 20, 2025**

BETWEEN

OTUNGA MAURICE APPLICANT

AND

CYRUS ENSON MUSAKALA RESPONDENT

RULING

1. Vide a notice of motion application dated 16th July 2025, the applicant/appellant sought orders to be granted leave to come on record for the applicant after judgment and, upon the leave being granted, leave to file a memorandum of Appeal out of time.
2. The application was supported by an affidavit by the applicants who assert that they were sued by the Respondent as the 1st defendant in Kakamega CMCC 405 of 2016, which was a road traffic accident case.
3. He avers that he only learnt that the judgment was delivered in the case no 19/10/2024 without him being given a chance to be heard, and later learnt that the Respondent extracted a decree issued on 19th December 2024, where he was to pay the respondent Kshs. 1,823,615.00 in damages and interest, and costs of Kshs. 205,905, bringing the total to Kshs. 2,033,520/=
4. The applicant states that he was aggrieved by the whole judgment on both liability and quantum and now wishes to appeal against the same. However, the Respondent has commenced the process of execution and denied ever being served with the hearing notices either by the court or his former advocate or the notice of entry of judgment.
5. He stated that he notices of entry of judgment was entered in May 2025 after the judgment was delivered in December 2024 hence the period for filing the memorandum of appeal against the judgment has expired and prays that the mistake of the court and his former advocate should not



be visited upon him and deny him a right to be heard as the appeal raised triable issues against the impugned judgment.

6. On 25th July 2025, the applicant filed a notice to withdraw the application.
7. The applicants have now approached the Court seeking orders that the Notice of Withdrawal be expunged from the record and that the withdrawn application be allowed to proceed.
8. The respondent opposes the request, stating that the applicant is bound by the procedural steps taken, that the notice cannot be expunged, and that the Court should mark the matter as closed.

Analysis and determination

9. The main issue for determination is whether a party that has filed a Notice of Withdrawal of an application may request that the notice be expunged and the withdrawn application allowed to proceed.
10. Order 25 Rule 1 states “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. Although Order 25 of the Civil Procedure Rules expressly provides for the withdrawal and discontinuance of suits, courts have consistently applied its principles to applications.
12. The Court of Appeal in *Peter Ng’ang’a Muiruri v Credit Bank Ltd & Another* [2008] eKLR held: “A withdrawal of a suit is a final act. Once withdrawn, a suit is no longer before the court, unless reinstated upon application and demonstration of sufficient cause
13. In *David Njoroge Macharia v Francis Mburu* [2019] eKLR, the High Court affirmed that A notice withdrawing an application is effective immediately and cannot be ignored. Revival of such an application requires an application for reinstatement.
14. It is not disputed that the applicant filed a Notice of Withdrawal on 25th July 2025. That act terminated the application. This Court cannot alter the record by removing the notice as though it was mistakenly or unlawfully filed.
15. That said, I am persuaded that the applicant’s request, though framed as one seeking expungement, is in substance a plea for reinstatement of the withdrawn application.
16. Allowing the withdrawal to remain in effect would be unfair, particularly in a case where the applicant claims he was not served, was denied an opportunity to be heard, and execution has already commenced on a significant judgment.
17. The respondent has not demonstrated any prejudice that cannot be compensated in costs. In applications of this nature, the Court has a duty to ensure that litigants, especially those claiming not to have participated in proceedings, are not shut out unnecessarily.
18. The principles in *Belinda Murai & Others v Amos Wainaina* [1978], as cited in numerous decisions, remain good law; mistakes of counsel should not automatically lock out a litigant from the seat of justice.
19. I am persuaded that the justice of the matter favours allowing the application to proceed.
20. Based on the following analysis, this court makes the following orders;



- a. The prayer to expunge the Notice of Withdrawal dated 25th July 2025 is declined, as the notice was a valid procedural step and cannot be removed from the court record.
- b. The applicant is, however, granted leave to file a fresh application for reinstatement of the withdrawn motion, giving sufficient reasons, should he still intend to pursue the matter.
- c. The said application shall proceed to a hearing on its merits.
- d. Mention on 24.6.2026 for further directions.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 20th DAY OF NOVEMBER, 2025.

S.MBUNGI

JUDGE

In the presence of:-

CA: Angong'a

Parties Absent.

Advocates Absent.

