

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC CASE NO. E288 OF 2022

CHRISTOPHER **O.**
KENYARIRI.....PLAINTIFF/APPLICANT

VERSUS

DOUBLE WIN COMPANY LIMITED**1ST**
DEFENDANT/RESPONDENT

MIAO YUNFEI.....2ND
DEFENDANT/RESPONDENT

LIU YUPING.....3RD
DEFENDANT/RESPONDENT

EQUITY BANK (K) LIMITED.....4TH
DEFENDANT/RESPONDENT

RULING

1. Before me is the notice of motion dated 5th September, 2025 filed by the plaintiff/applicant, and it is expressed to be brought under **Orders 25 and 51(1) of the Civil Procedure Rules, Sections 3A and 27 of the Civil Procedure Act** seeking the following orders: -

1. *The Plaintiff/Applicant be granted leave to withdraw and/or discontinue this suit against all the Defendants/Respondents as shown in the Notice of Withdrawal of suit filed herein dated 5th September, 2025.*

2. *Consequent upon the withdrawal, the Defendants/Respondents be condemned to pay the Plaintiff/Applicant costs of this suit.*

3. This Honourable Court be pleased to grant such other or further orders as it may deem fit and just in the circumstances.

2. The application is premised on the grounds on the face of it, and the affidavit of the plaintiff/applicant sworn on even date. The plaintiff/applicant deposed that in February, 2020 he entered into a contract with the 1st to 3rd defendants/respondents for the purchase of apartments A102 and A105 at Sandalwood Garden, Nairobi.

3. He further deposed that the agreed completion date was 31st December, 2020 where the defendants/respondents were under an obligation to avail the completion documents. The plaintiff/applicant deposed that despite having complied with his contractual obligations, the defendants/respondents failed to deliver the completion documents within time and as a result, he filed the instant suit. Further, that they availed to him a duly executed transfer of titles in August, 2025 which he executed thus resolving the substantive dispute in issue. He added that the filing of the present suit was necessitated by the defendants/respondents' default and that it was just that he be awarded costs of the suit.

4. The application was opposed vide the replying affidavit of Samuel Wamaitha, the 4th defendant/respondent's Assistant Legal Manager sworn on 13th October, 2025. He deposed that he was a stranger to the contractual and proprietary issues raised in the main suit. He further deposed that the 4th defendant/respondent's role was limited to that of a chargee having advanced financial support to the 1st defendant/respondent and subsequently discharged its charge upon full repayment of the loan.
5. He deposed that the plaintiff/applicant's cause of action, if any, lay exclusively against the 1st to 3rd defendants/respondents with whom the contractual relationship subsisted. He added that the inclusion of the 4th defendant/respondent was unnecessary and only amounted to an abuse of the court process.
6. He also deposed that the plaintiff/ applicant improperly enjoined it to this suit, and urged the court to dismiss the application and award it costs of the application and the entire suit.
7. The plaintiff/applicant filed a further affidavit of the 1st defendant/respondent sworn on 15th October, 2025. He deposed that vide his application dated 26th April, 2024 seeking to join the

4th defendant/respondent, it conceded to the joinder as it never opposed the application.

8. He further deposed that the court order dated 10th June, 2024 joining the 4th defendant/ respondent to the suit has never been set aside. He added that the 4th defendant/ respondent admitted to have released the mother title of the suit property it had charged on 21st October, 2021.
9. He deposed that the 4th defendant/respondent had an interest in the suit property thus having been joined as a party to the suit. He deposed that the 4th defendant/respondent could not claim costs against him.
10. The application was canvassed by way of written submissions. The plaintiff/applicant filed his written submissions dated 21st October, 2025 where he raised two issues for determination. The first issue was ***whether the Plaintiff is entitled to withdraw the suit.*** While submitting in the affirmative, he relied on **Order 25 Rule 2** of the **Civil Procedure Rules** and the Court of Appeal case in **Kenya Commercial Bank Ltd V Benjoh Amalgamated Ltd (2017) eKLR.**

11. On the second issue of costs, he relied on **Section 27** of the **Civil Procedure Act** and a number of cases including the case of **Jasbir Sing Rai & 3 Others V Tarlochan Singh Rai & 4 Others (2014) eKLR**. He submitted that the defendants/respondents pushed him to commence the present suit by failing to perform their part of the contract by completion date. He added that they should therefore be condemned to pay him costs since their late compliance rendered the court moot.
12. He submitted that the defendants/respondents eventual compliance in August, 2025 did not erase the prejudice and costs already incurred. He submitted that it would be just and equitable that the defendants/respondents bear costs of the withdrawn suit.
13. The 4th defendant/respondent filed its written submissions dated 3rd November, 2025. It was submitted that according to **Order 25** of the **Civil Procedure Rules**, the general rule was that a plaintiff may withdraw a suit, but he or she is generally liable to pay the costs of the defendant(s) up to the date of withdrawal. Further, that withdrawal is treated like losing for the purposes of costs, as it has been unnecessarily put to expense. Reliance was placed on the cases of **Kamlesh Mansukhlal Pattni & another v Central**

Bank of Kenya [2016] KEHC 1010 (KLR) and Pacis Insurance Company Ltd v Francis Njeru Njoka [2018] KEHC 4855 (KLR).

- 14.** The 4th defendant/respondent submitted that the withdrawal of the suit did not absolve liability for costs since the moment the plaintiff/applicant initiated the suit, he bore the risk of costs if he chose to withdraw, as the 4th defendant/respondent was forced to incur expenses to defend the claim.
- 15.** It was further submitted that the 4th defendant/respondent had filed a notice of motion dated 26th September, 2024 seeking to be struck out from the case and to be awarded costs of the said application and generally for defending the suit which was pending determination by the court. Further, that the plaintiff/applicant's resolution to drag the 4th defendant/respondent into contractual disputes between other parties was misconceived and legally untenable. He submitted that the plaintiff/applicant's cause of action, if any, lay exclusively against the 1st, 2nd and 3rd defendants/respondents, with whom the contractual relationship subsisted.
- 16.** In conclusion, the 4th defendant/respondent submitted that to saddle it with costs would offend the principles of equity and

fairness, as it would amount to penalizing an innocent party who was dragged into litigation without reasonable cause.

17. I have considered the application, the replies thereof and the written submissions filed by the plaintiff/applicant and the 4th defendant/respondent. The sole issue for determination is *whether the application is merited.*

18. **Order 25 of the Civil Procedure Rules** provides as follows:-

“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.”

19. It is not in dispute that the plaintiff/applicant filed the Notice of Withdrawal of suit dated 5th September, 2025 seeking to be awarded costs of the suit. The 1st to 3rd defendants/respondents were not opposed to the same aside from the 4th defendant/respondent who contends that it should not be condemned to pay costs since it was not a necessary party to the suit. It argued that the plaintiff/ applicant joined it to the suit yet

the issue in contention was between the plaintiff/applicant and the 1st to 3rd defendants/respondents.

20. In the Court of Appeal case of **Supermarine Handling Services Ltd V Kenya Revenue Authority Civil Appeal no. 85 of 2006** the court stated as follows:-

“Costs of any action or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. If, however, there be, in fact, some grounds to support the exercise by the trial judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance...Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where the reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule...In the instant case the learned

judge gave no reasons whatsoever for his decision to deprive the successful plaintiff of its costs and yet it was not shown that the defendant had been guilty of some misconduct which led to litigation. In the court's view the learned judge's order was wrong and for the foregoing reasons, the plaintiff's appeal succeeds as to the award of interest and costs on the principal sum awarded".

21. In the instant case, the plaintiff/applicant contends that the basis for the suit being filed was as a result of failure by the defendants/respondents to fulfil their part of the contract in providing him with the completion documents. He contends that were it not for such action, he could not have filed the suit hence the reason he ought to be awarded costs of the suit.
22. I have considered the entire proceedings and it is my view that indeed the plaintiff/ applicant was justified in filing the suit against the defendants/respondents. It is not in dispute that the case proceeded until when the defendants/respondents fulfilled their obligation by availing the completion documents prompting the plaintiff/applicant to file a notice of withdrawal.
23. It is this court's view that the 4th defendant/respondent role was indeed only limited to that of a chargee having advanced financial credit to the 1st defendant/ respondent. I find that the 4th

defendant's/respondent's presence in the suit was to prove the state and or position of the title for the suit property. It is my opinion that the reasons advanced by the 4th defendant/respondent and its conduct in the matter is one which should not be penalised by costs. The 1st to 3rd defendants/respondents on the other hand did not adduce any cogent reasons or justification which in my view would warrant their escape of costs to the proceedings since they were responsible for the plaintiff/applicant's institution of the suit. In the circumstance, I find that the plaintiff/applicant should be awarded costs until the point of withdrawal of his suit.

- 24.** The upshot of the above is that the notice of motion dated 5th September, 2025 is merited. The plaintiff's suit is marked as withdrawn. The plaintiff/applicant is also awarded costs of the suit until withdrawal, and the same is to be borne by the 1st, 2nd and 3rd defendants/respondents.

Orders accordingly.

**DATED, SIGNED & DELIVERED VIRTUALLY
THIS 11TH DAY OF DECEMBER, 2025.**

**HON. MBOGO C.G.
JUDGE
11/12/2025.**

In the presence of:

Mr. Benson Agunga - Court assistant

Dr. Kenyariri for the Plaintiff

Mr. Mbaji for the 4th Defendant

Mr. Tanui for the 1st to 3rd Defendants