



REPUBLIC OF KENYA



Kimitei (Suing as an administrator to the Estate of the Late Nyongio Kimitei) & 11 others v Tarus & 50 others (Environment and Land Case 40 of 2019) [2025] KEELC 8544 (KLR) (4 December 2025) (Judgment)

Neutral citation: [2025] KEELC 8544 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND CASE 40 OF 2019
CK YANO, J
DECEMBER 4, 2025

BETWEEN

ANNAH KIMITEI (SUING AS AN ADMINISTRATOR TO THE ESTATE OF THE LATE NYONGIO KIMITEI) 1ST PLAINTIFF
KENNETH KIPKOECH KORIR 2ND PLAINTIFF
JOHN CHERUIYOT TOO 3RD PLAINTIFF
PRICILLA JEROTICH MITEI 4TH PLAINTIFF
CHRISTINE JEPTOO MITEI 5TH PLAINTIFF
EZEKIEL KIPCHIRCHIR SITIENEI 6TH PLAINTIFF
ABRAHAM KIPRUGUT LELMENGIT 7TH PLAINTIFF
ROSE CHELAGAT MITEI 8TH PLAINTIFF
EUNICE JEPKEMBOI KIBOR 9TH PLAINTIFF
JACKSON KIMOSBEI KORIR 10TH PLAINTIFF
DANIEL KIPCHUMBA MITEI 11TH PLAINTIFF
JAMES KIPROP MITEI 12TH PLAINTIFF

AND

ERICK KIBIWOTT TARUS 1ST DEFENDANT
NELSON KIPRONO ORGUT 2ND DEFENDANT
KELMAS INVESTMENT LTD 3RD DEFENDANT
JAPHETTE KIPKEMBOI MAGUT 4TH DEFENDANT



EZEKIEL KIPKULEI KOMEN	5 TH DEFENDANT
NICHOLAS ROP KIPKEMBOI	6 TH DEFENDANT
NORBAT MAINGI MUYA	7 TH DEFENDANT
BENJAMIN KIPKORIR KUTO	8 TH DEFENDANT
PAULINA CHUMBA	9 TH DEFENDANT
ELIJAH CHEMAIYO	10 TH DEFENDANT
LILIAN JERUTO KITUR	11 TH DEFENDANT
STANLEY KIPTOO METOO	12 TH DEFENDANT
WILFRED KIMALAT KIPTUM	13 TH DEFENDANT
JURGEN RICHARD (LEGAL ADMINISTRATOR TO THE ESTATE OF THE LATE ACHIM HUBERTUS QUANDT)	14 TH DEFENDANT
JOSHUA KIPROTICH MAGUT	15 TH DEFENDANT
ROSA JERUBET BIWOT	16 TH DEFENDANT
MARY JUSTER CHEPLETING	17 TH DEFENDANT
JOAN BERNARD SICARD	18 TH DEFENDANT
GRACE M. SICARD	19 TH DEFENDANT
SAMWEL KIPROP SAMOEI	20 TH DEFENDANT
PAUL KIPSANG MENGICH	21 ST DEFENDANT
MARTHA ONYANGORE	22 ND DEFENDANT
MARY NEKESA SOGHO	23 RD DEFENDANT
AUGUSTINE LELIT	24 TH DEFENDANT
MONICAH JERUTO RUTO	25 TH DEFENDANT
LINUS CHERUIYOT	26 TH DEFENDANT
PAUL KIPKORIR SUM	27 TH DEFENDANT
KIMUTWAL CHERUIYOT	28 TH DEFENDANT
JOSEPH KOMEN	29 TH DEFENDANT
SISUMA INVESTMENT	30 TH DEFENDANT
BRI KIPROP	31 ST DEFENDANT
DAVID KIMUREI MENGICH	32 ND DEFENDANT
JOSEPH KIBET ROTICH	33 RD DEFENDANT
PERES JEMELI KOIMUR	34 TH DEFENDANT
FRANCIS OSANO OMWENGA	35 TH DEFENDANT



DANIEL KOMEN	36 TH DEFENDANT
JOSHUA KIPLETING SULAI	37 TH DEFENDANT
JOHN KIPKEMBOI KOECH	38 TH DEFENDANT
PROF. GABRIEL MISANGO ANABWANI	39 TH DEFENDANT
DAVID KIPTALAM BETT	40 TH DEFENDANT
MARY OLOO SALA	41 ST DEFENDANT
DR. SILVANO KIPYEGO ROTICH	42 ND DEFENDANT
CLEMENT KOMEN	43 RD DEFENDANT
EVERLINE JEPKEMBOI KEINO	44 TH DEFENDANT
BARNABA LAGAT	45 TH DEFENDANT
WILSON CHUMA	46 TH DEFENDANT
ESMAIL HASHAM LALJO NURANI	47 TH DEFENDANT
HASHAM LALJO PROPERTIES	48 TH DEFENDANT
UASIN GISHU COUNTY	49 TH DEFENDANT
THE NATIONAL LAND COMMISSION	50 TH DEFENDANT
THE ATTORNEY GENERAL	51 ST DEFENDANT

JUDGMENT

1. The Plaintiffs filed a suit against the Defendants vide a plaint dated 20th March, 2019 which was amended on 17th February, 2021 and further amended on 2nd October, 2023. In opposing the plaintiff's suit, the 1st to 46th defendants filed a joint statement of defence dated 26th April, 2019 and an amended defence and counter-claim dated 21st May, 2021. Pursuant to applications for joinder, the other defendants were added. There is also an amended statement of defence dated 4.9.2024 by the 1st Defendant.
2. This matter then came up for directions both before the Deputy Registrar and the court to confirm compliance with Order 11 of the Civil Procedure Rules. Subsequently, the matter was fixed for hearing on 16.12.2024, but it was adjourned to 1.4.2025 because the court was on transfer. On 1.4.2025, again the matter was adjourned at the request of the Plaintiffs who informed the court that there was a judgment in petition No. 8 of 2020 between the same parties and the cause of action arose from the same parcel of land. The case was then fixed for mention on 7.5.2025 for the plaintiffs to decide on the way forward. On 7.5.2025, Mr. Omboto learned counsel for the plaintiffs applied for the plaintiffs' suit to be marked as withdrawn. Mr. Mathai, learned counsel for the 1st Defendant, Mr. Ngigi Mbugua, learned counsel for the 2nd-47th Defendants, Ms. Odeyo for the 49th & 51st Defendants and Mr. Ogongo for the Interested parties did not object to the withdrawal subject to payment of their costs. In addition, Mr. Ngigi Mbugua requested for a hearing date for the counter-claim and the same was fixed for hearing on 10.11.2025.



3. However, by a Notice of Motion dated 16th May, 2025, the Plaintiffs sought for the orders of withdrawal of the Plaintiffs' suit allegedly made on 7.2.2025 to be set aside, vacated or reviewed, and for the suit to be reinstated for hearing on its merits. That application is the subject of this ruling.
4. The application was based on the grounds set out on the face of the motion and supported by an affidavit sworn by David Rioba Omboto Advocate for the plaintiffs on the 16th May, 2025. He deponed that on 7th February, 2025 (sic), he orally applied for the withdrawal of the suit with a mistaken belief that the defendants had not filed an amended defence and counter-claim to the plaint. He claimed that at the time the withdrawal was made, it was not within his knowledge that the 1st to 51st defendants had filed an amended defence and counter-claim as it had not been brought to his attention. That the effect of the withdrawal is that the plaintiffs now stand exposed to the risk of an adverse judgment on the counter-claim despite not having had an opportunity to defend the same.
5. Mr. Omboto deponed that the plaintiffs ought not be prejudiced for what was a procedural hiccup and oversight not of their own making. He averred that it is in the interest of justice that the orders of 7th February, 2025 (sic) be set aside and the suit be reinstated so that the issues raised in the counter-claim can be addressed on their merits. Further, that the application has been brought without delay and in utmost good faith, and that the defendants will not suffer any prejudice if the orders sought are granted, but the plaintiffs stand to suffer serious injustice and loss if the application is not allowed.
6. The application was opposed by the 1st Defendant through a Replying affidavit dated 25.9.2025 in which he argued that the application is fatally defective, raises no triable issues, is frivolous, vexatious, scandalous and an abuse of the court process, hence ought to be dismissed in limine.
7. The 1st Defendant deponed that the withdrawal was voluntary and the same cannot be reinstated under Order 25 of the Civil Procedure Rules. He claimed that the court cannot exercise any discretion on a withdrawal matter since upon withdrawal, that matter ceased to exist. That the defendants also consented to the withdrawal and the same can only be reinstated by consent of the defendants. The 1st defendant pointed out that when this matter was mentioned on 7th May, 2025, counsel for the plaintiffs was present and was aware that upon him withdrawing the suit, the counter-claim was set down for hearing on 10.11.2025. He claimed that this application is brought in bad light with concealment of material facts.
8. The 2nd -51st Defendants also opposed the application through a replying affidavit dated 6.10.2025 sworn by Edward Kiplagat Soi which contains the same grounds as those raised by the 1st Defendant. They added that the supporting affidavit was sworn by the advocate instead of the plaintiffs, hence is defective. That the withdrawal was voluntary and made with the consent of the defendants, hence cannot be reinstated under Order 25 of the Civil Procedure Rules and without the consent of the defendants.
9. The application was canvassed by way of written submissions and both parties filed their respective submission. In their submissions dated 9.10.2025, the plaintiff's counsel submitted that this court has the requisite jurisdiction to review, vary or set aside its own orders where the ends of justice so demands. The plaintiffs' counsel relied on Section 3A of the [Civil Procedure Act](#) which preserves the inherent jurisdiction to make such orders as may be necessary to prevent abuse of the process of court and to ensure the ends of justice are met. Counsel also cited Order 45 Rule 1 of the Civil Procedure Rules which empowers the court to review its orders upon discovery of new and important matter or evidence, or where sufficient reason exists, and claimed that the existence of the Amended Defence and Counter-claim unknown to the plaintiffs at the time of withdrawal constitutes new matter. He also relies on a number of decisions such as *Mbogo v Shah* (1968) EA 93; *Patel V E.A Cargo Handling*



- Serices Ltd and Philip Chemwolo & Another v Augustine Kubende (1986) KLR 492 on the principles that guide the court's discretion to set aside orders and in which it was held that mistakes by advocates should not be visited upon litigants, and urged the court to grant the orders sought in the application.
10. The 1st Defendant's advocate filed submissions dated 16.10.2025 in which they cited the provisions of section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules and relied on the case of Kithoi v Kioko (1982) KLR 181; Belgo Holdings Limited v Robert Kotch Otachi & Another NRB High Court Civil suit No. 454 of 2014 which cited with approval the case of Bernard Githii on behalf of Mutathini Farmers Co. v. Kiholo Farmers Co. Ltd HCCC No. 32 of 1994; Gulam Hussein Jivanji v. Jivanji & Another (1929 – 30) KLR 44 and Civicum Limited v. Kirowatt Limited (2025) KEHC 3124 (KLR), and submitted that the plaintiffs' application falls short of the standards for review and the same is fatally defective.
 11. The 1st Defendant's counsel also relied on Supreme Court of Nigeria case of Abayomi Babatunde v Pan Atlantic Shipping & Transport Agencies Ltd & others, SC 154/2002 and John Ochanda V Telkom Kenya Ltd, SC App. No. 25 of 2014 and cited Order 25 of the Civil Procedure Rules which provides for withdrawal, discontinuance and adjustment of suits, and submitted that the plaintiffs exercised their right where they asked the court through their advocate to have the suit withdrawn, and the advocates for the defendants did not object to the withdrawal. That at the time of the withdrawal, the plaintiffs were made aware of the existence of the counter-claim but nonetheless opted to proceed and withdraw their suit. It was submitted that once the suit has been withdrawn, it cannot be reinstated because a withdrawn suit ceases to exist. That the only available avenue for the plaintiffs is to file a fresh suit. It is therefore submitted that the instant application lacks merit and the same ought to be dismissed with costs.
 12. In their submissions dated 12th November, 2025, counsel for the 2nd – 47th Defendants also cited the provisions of section 80 of the *Civil Procedure Act* and Order 45 Rule 1, and Order 25 Rule 1 of the Civil Procedure Rules and submitted that the plaintiffs' application has not met the threshold for grant of the orders sought as the Plaintiffs have failed to demonstrate the grounds for review. They relied on Benjoh Amalgamated Ltd & Another v. Kenya Commercial Bank Ltd (2014) eKLR; Francis Origo & Another v. Jacob Kumali Mungala (2005) eKLR; Kurji & 4 others v. Kurji & 3 others (2024) KECA 882 (KLR) and Kenya Commercial Bank Ltd v. Nyantika & Another (2004) eKLR and contended that the application lacks merit and ought to be dismissed with costs. They relied on the case of Toney Keter & 5 others V The Hon. Attorney General & 3 others (2013) eKLR and DGM v. EWG (2021) eKLR and cited Section 27 of the *Civil Procedure Act*.
 13. I have considered the application herein, the response, the rival submissions as well as the authorities relied on. The issues arising for determination are:-
 - i. Whether the application is fatally defective.
 - ii. Whether the orders made on 7th May, 2025 marking the plaintiffs' suit as withdrawn should be set aside/vacated or reviewed and the suit reinstated.
 - iii. Who shall bear the costs of the application.
 14. The first issue I need to dispose of is the one raised by the defendants that the application is fatally defective because the supporting affidavit was sworn by the advocate instead of the plaintiffs themselves. I am not persuaded by this argument. The plaintiffs' suit was withdrawn pursuant to an oral application made by Mr. Omboto advocate who was and is still acting for the plaintiffs/applicants. The Advocates Practice Rules does not prevent an advocate from swearing an affidavit on formal and non-contentious matters in any matter in which he/she acts/appears such as this. It is the advocate



who made the application for withdrawal of his clients suit and in my view, he is the one who could give an explanation why the order of dismissal should be reviewed or set aside/vacated and have the suit reinstated.

15. The next issue to consider is whether the orders made on 7th May, 2025 (not 7th February, 2025 as shown in the application herein) marking the plaintiffs suit as withdrawn should be set aside/vacated and the suit reinstated for hearing. The question therefore is whether the plaintiffs/applicants have satisfied the court to set aside the Order of withdrawal of the suit and for it to be reinstated.
16. As earlier stated, this suit came up for directions on various dates to confirm compliance with Order 11 of the Civil Procedure Rules. Thereafter the case was set down for hearing. At the request of the plaintiffs' advocates, the matter was fixed for mention on 7th May, 2025 to enable them decide on the way forward in view of a judgement allegedly delivered in petition No. 8 of 2020 between the same parties and over the same parcel of land which is the suit property herein. When the matter was called out, Mr. Omboto Advocate who appeared for the plaintiffs applied for the plaintiffs' suit to be marked as withdrawn. Mr. Mathai, Mr. Ngigi Mbugua, Ms. Odeyo and Mr. Ogongo advocates for the defendants herein indicated that they had no objection to the withdrawal of the plaintiff's suit, subject to payment of the defendants' costs, and fixing a hearing date for the counter-claim. Consequently, the court proceeded and marked the plaintiffs' suit as withdrawn with costs to the defendants. There was no indication from Mr. Omboto that he and/ or the plaintiffs were not aware of any counter-claim. Indeed, the withdrawal was made pursuant to an application made by the plaintiff's advocate and who was present when the defendants asked for costs and a date for hearing for the counter-claim.
17. Order 25 Rule 2 provides inter alia that 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. Indeed, that is exactly what the court did in this case. If anything, the withdrawal was consented to by the defendant's subject to the payment of costs and setting down the counter-claim for hearing.
18. The effect of withdrawal of a suit as done by the Plaintiff in this suit, has been explained in numerous legal decisions. Very recently, in *Kwale International Sugar Company Limited v Ndutumi Auctioneers* [2025] KEELC 649 (KLR), the court held that:-

“9. The above provisions of the law in as far as the withdrawal of the suit is concerned is rather straightforward. The effect of this is that the suit ceases from existing and cannot be reinstated any more. In the instant case, the withdrawal of the Appeal means there is no more appeal on record. To buttress on this point, I seek solace from the cases of: *Charles Kiptarbei Birech -v- Paul Waweru Mbugua & another* (2021) eKLR, where it was held that:

“Of importance to note is that the Rules that provide for the discontinuance or withdrawal of a suit do not provide for the revocation of withdrawal notice or the setting aside of the suit. And once a suit is discontinued in whichever manner howsoever, it ceases to exist. A party cannot breathe life into it by whichever means, not even by a consent setting aside the orders of withdrawal. This is because, once a suit is withdrawn there is no party that exists in relation to that suit. The existence of a suit can be equated to the existence of light from a bulb: it only exists if there is an electric current and the gadget known as “bulb”. Once either the light or the bulb ceases to be in contact, the light goes out and in its place is darkness. The only way to get light again in that bulb is to supply current to it. The light that comes into existence again is not the continuation of the one that went out: it is new.”



And further to the case of: - In Antony Kayaya Juma -v - Humprey Ekesa Khaunya & another [2004] eKLR the court held: -

“It is my humble view that a suit which has been withdrawn pursuant to Order XXIV of the Civil Procedure Rules cannot be reinstated...the law under this Order does not envisage a litigant to seek for an order of reinstatement.”

19. In Priscilla Nyambura Njue v Geovhem Middle East Ltd Kenya Bureau of Standards (Interested Party) 2021 KEHC13341 (KLR), the High Court held that:-

“ 23. As acknowledged by the above cited decisions, the right provided under Order 25 Rules 1 & 2 (1) is not fettered by any conditions; it is an absolute right which a plaintiff can exercise at his sweet will at any time before the judgment is delivered. In Allah Baksh v Niamat Ali 1892 All WN 53 (1) the court described the right as "absolute" and capable of being exercised "without any permission from the court'. However, under the third category, withdrawal requires permission of the court but the plaintiff does not need consent of the defendant.

24. Withdrawal of a suit is itself its end. The right of a plaintiff to withdraw his suit is not a divine right but a right expressly conferred upon him by Order 25 and no right is similarly conferred upon him to revoke or rescind the withdrawal. So long as he remains the plaintiff, he may do any act which he may do in that capacity; he cannot, after withdrawal of the suit resulting in the loss of the capacity, do an act which can be done only in that capacity. Put differently, there is no provision conferring the right to revoke the withdrawal and there is no justification for saying that the right to withdraw includes in itself a right to revoke the withdrawal. Certain consequences arise from the withdrawal which prevent a party from revoking the withdrawal. The withdrawal is complete or effective as soon as it takes place. The right to revoke the withdrawal can only be allowed by the legislature by expressly providing so in the rule and not by the courts. In the same vein, the rules do not confer the court with power to reinstate a suit once withdrawn. Order 25 Rule 1 provides that the withdrawal shall not be a defence to any subsequent action. Before me is not a subsequent action, but the same suit.”

20. It is trite law that a duly instructed advocate has an implied authority to compromise and settle the action (see the decision of the Court of Appeal in M & E. Consulting Engineers Limited v Lake Basin Development Authority & Another (2015) eKLR). In this case, I am of the view that the plaintiffs' suit was properly withdrawn and the plaintiffs have not persuaded this court to have the orders of withdrawal set aside and have the suit reinstated. The explanation given by the plaintiffs that they were not aware of an existing counter-claim is not adding up because the defendants through their respective advocates made reference of the same and asked for a hearing date for the same before the orders marking the plaintiffs suit as withdrawn were made. The withdrawal was made intentionally and voluntarily. There was no mistake, accident or misrepresentation during the time the suit was withdrawn. If indeed the plaintiffs or their advocate did not know of the existence of the counter-claim as alleged, then why did they not raise a finger when the defendants requested for a hearing date and the same was fixed for hearing on 10.11.2025.



21. In this case, the court cannot exercise its discretion to reinstate the suit which was fully withdrawn by the plaintiffs through their advocate.
22. In the result, I find no merit in the notice of motion dated 16th May, 2025. Accordingly, the application is dismissed with costs to the defendants.
23. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 4TH DAY OF DECEMBER, 2025 VIDE MICROSOFT TEAMS.

HON. C. K. YANO.

ELC, JUDGE

In the virtual presence of:-

Mr. Mbugua for 2nd – 4th Defendants.

Mr. Orikodi for 1st Defendant.

Mr. Omboto for Plaintiffs.

Court Assistant - Laban.

