



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELCLOM NO. E002 OF 2023

EXCLUSIVE LIVING EAST AFRICA LIMITED
PLAINTIFF

=VERSUS=

ANN MIDEVA BULIMU
DEFENDANT

RULING

1. Before me for determination are two applications. The first application is a Notice of Motion dated 16th November 2025, brought under Section 13(7) of the Environment and Land Court Act 2011, Order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A and 3A of the Civil Procedure Act 2010 and Articles 40, 50(1), 53(2) and 162(2) (b) of the Constitution of Kenya, 2010, in which the Defendant/Applicant seeks the following orders:

a. Spent

b. Spent

c. THAT pending the determination of this suit, a conservatory order be and is hereby issued restraining the Plaintiff/Respondent whether directly or through its directors, employees, servants, agents or related entities from wasting, damaging, removal, alienating, selling and/or obstructing the Applicant from accessing Rivulet Residence Apartments developed on land parcel known as L.R. No. 209/2389/16 situated in Pangani area within Nairobi County and/or otherwise interfering with her quiet enjoyment thereof.

d. THAT the Plaintiff/Respondent bear the costs of the suit.

2. The application is based on the grounds appearing on its face together with the supporting affidavit of Ann Mideva Bulimu, sworn on even date.

THE APPLICANT'S CASE

3. The Applicant averred that at the inception of the Plaintiff's company, there were two directors and shareholders, namely Mr. Marc Oliver Strack and Mr. Alexander Joch, both foreign nationals who held equal shares. She further averred that the company's offices were initially located at her NGO's premises, Kenya Young Greens, at Maendeleo House, and that she served as the company's contact person.
4. She stated that the company continued to use her postal address and telephone number, as documented in its CR12

form. Additionally, she averred that she was formally incorporated into the company as both a director and a shareholder pursuant to a gentlemen's agreement, owing to the company's inability to secure local financing for the development of Rivulet Residences on L.R. No. 209/2389/16, which was attributable to the foreign status of its directors.

5. Following the changes reflected in the company's CR12, she actively participated in the company's management and affairs as a director and shareholder by attending board meetings, being a signatory to the company's bank accounts, co-signing cheques, executing leases, testifying in court on behalf of the company, securing statutory approvals, executing contracts, and sourcing construction materials.
6. She explained that she paid an initial deposit of KShs. 9,500,000/- toward the purchase of L.R. No. 209/2389/16 as an investment. She stated that Alexander Joch secured a loan of Five Million Euros, part of which was applied toward the completion of the purchase price, payment of stamp duty, and the importation of finishes valued at KShs. 30 Million, which were freighted directly to her.
7. The deponent further stated that she raised Kshs 120 million through off-plan sales of fifteen units, with an additional 1,700,000 euros from Caba Marki, who purchased thirty units. Upon completion of the Rivulet Residences, she and Marc Oliver Strack jointly incorporated a service company,

Rivulet Management Service Company, with each holding one ordinary share.

8. She averred that Marc Oliver Strack did not make any financial contribution toward the acquisition of the land or the construction of the apartments, except for bringing Alexander Joch on board to secure financing. She further averred that in 2017, after receiving 1,700,000 Euros into a KCB Euro account, she detected financial improprieties, and that Marc Oliver Strack subsequently withdrew Kshs. 40 million from the company's SBM Bank accounts without a satisfactory explanation.
9. She stated that Marc Oliver Strack subsequently lodged a complaint with the Registrar of Companies challenging her directorship and shareholding, which led to her removal from the company's CR12 and resulted in various civil and criminal proceedings, including Nairobi High Court Commercial Case No. HCCOMM E453 of 2020, which was determined on 1st September 2025. She stated that an appeal against that decision was pending before the Court of Appeal, being COA CA PPL/E538/2025.
10. She explained that Marc Oliver Strack intended to sell or otherwise alienate the suit property, specifically the Rivulet Residence Apartments developed on L.R. No. 209/2389/16, despite the pending appeal. She asserted that she holds an equitable financial interest in the property arising from an implied partnership or joint venture in the formation and operation of the Plaintiff company.

11. The deponent further stated that she, her estranged husband, and their minor child had established their matrimonial home in the penthouse within the Rivulet Residence Apartments, and that she had been rendered homeless when he deployed police officers and other persons to bar her access to the residence, thereby violating their child's best interests as guaranteed under Article 53(2) of the Constitution.
12. She explained that the present suit had initially been stayed pending the determination of Nairobi High Court Commercial Case No. HCCOMM E453 of 2020 on grounds of sub judice. The Applicant is apprehensive that, unless the Court intervenes, the suit property is at risk of being wasted, damaged, alienated, or disposed of, thereby prejudicing her interests and leaving her unheard.
13. The deponent asserted that the Plaintiff would suffer no prejudice if the orders sought are granted, as any inconvenience could be compensated by costs.

THE PLAINTIFF/RESPONDENT'S CASE

14. The Plaintiff filed a replying affidavit, sworn on 2nd December 2025, by Marc Oliver Strack, a Director of the Plaintiff, in opposition to the application. The deponent averred that the present suit was inadvertently commenced while a similar matter, HCCOMM E453 of 2020, Marc Oliver Strack and Exclusive Living East Africa Limited v Ann Mideva Bulimu, was pending before the High Court, and was ultimately

determined by a judgment dated 1st September 2025. He stated that the Plaintiff filed a Notice of Withdrawal dated 13th February 2024.

15. He asserted that the dispute, having been fully determined by the High Court, renders these proceedings moot. He contended that the counterclaim and the application dated 16th November 2025 constitute an attempt to reopen matters conclusively determined and amount to inviting this Court to sit on appeal against the judgment of Honourable Justice JWW Mongare delivered on 1st September 2025.
16. He explained that the Defendant has lodged an appeal against the said judgment in Nairobi Civil Appeal No. E538 of 2025, together with an application seeking reliefs similar to those sought herein. He asserted that the counterclaim and the present application are barred by the doctrine of res judicata, as the issues in the present suit have been determined by the High Court, and by the doctrine of sub judice, given the pending proceedings before the Court of Appeal.
17. He asserted that the Court of Appeal has not granted any stay of execution, and that the reliefs sought would undermine the appellate process and effectively overturn the High Court judgment. He also argued that the Applicant has failed to substantiate claims of irreparable harm, asserting that any purported loss is compensable through damages.

18. The second application is a Notice of Motion dated 2nd December 2025, in which the Plaintiff/Applicant seeks the following orders:

a. THAT an order for a Notice of Withdrawal of suit dated 13 February 2024 be and hereby adopted.

b. THAT the Counterclaim dated 18th November 2025 and the Notice of motion application under certificate dated 16th November 2025 be struck out and or dismissed for being an abuse of Court process.

c. THAT the costs for this application be in the cause.

19. The application is premised on the grounds appearing on its face together with the supporting affidavit of Marc Oliver Strack, sworn on even date.

THE APPLICANT'S CASE

20. The deponent averred that the present suit was filed while HCCCOMM E453 of 2020 was pending, and that, upon legal advice, he caused a Notice of Withdrawal dated 13th February 2024 to be filed.

21. He averred that the High Court thereafter determined the dispute by judgment delivered on 1st September 2025, and consequently, the dispute in the present suit is spent and ought to be formally marked withdrawn.

22. He further contends that the Defendant's counterclaim and application dated 16th November 2025 seek to relitigate issues already determined by the High Court and are

therefore incompetent. He reiterates that an appeal has been lodged in **Nairobi Civil Appeal No E538 of 2025**, along with an application seeking similar interim relief.

23. On that basis, he asserts that the counterclaim and the said application offend the doctrines of res judicata and sub judice. He also mentioned that the Court of Appeal has not granted a stay of execution and that the orders sought would undermine the High Court's existing judgment.
24. He urged the Court to strike out the counterclaim and dismiss the application with costs.
25. Parties were directed to canvass the applications by way of written submissions. At the time of writing this ruling, parties had not filed their submissions as directed.

ANALYSIS AND DETERMINATION

26. Having considered both applications and responses filed, the following issues arise for determination:
 - a. *Whether the Notice of Withdrawal ought to be adopted;*
 - b. *Whether the Defence and Counterclaim are barred by the doctrine of res judicata and sub judice;*
 - c. *Whether an order of injunction can issue.*
27. Regarding the first issue, it is not disputed that the Plaintiff filed a Notice to withdraw this suit dated 13th February 2024.
28. **Order 25 Rule 1** provides that at any time before the suit is set down 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.

29. Under **Order 25 Rule 2**, 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. The court may also grant the plaintiff leave to discontinue his suit or withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just.
30. The Court of Appeal in **Beijing Industrial Designing & Researching Institute v Lagoon Development Limited [2015] KECA 365 (KLR)** clarified the operation of **Order 25 Rules 1 and 2**:

“The above provision presents three clear scenarios regarding discontinuance of suits or withdrawal of claims. The first scenario arises where the suit has not been set down for a hearing. In such an instance, the plaintiff is at liberty, at any time, to discontinue the suit or to withdraw the claim or any part thereof. All that is required of the plaintiff is to give notice in writing to that effect and serve it upon the 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. In this scenario, the right of the plaintiff is circumscribed by the requirement that he must obtain the 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 discontinuance of the suit or withdrawal of the claim or any part thereof. In such eventuality, the plaintiff must obtain leave of the court to discontinue the suit or to 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."

31. The record shows that by a ruling dated 24th January 2024, this suit was stayed pending the determination of HCCOMM E453 of 2020. The Notice of Withdrawal was filed shortly thereafter, before the suit was set down for hearing. Accordingly, the withdrawal falls within Order 25 Rule 1,

under which the Notice of Withdrawal takes effect upon service on all parties in the suit.

32. Although no affidavit of service for the Notice of Withdrawal was filed, the parties' subsequent conduct demonstrates knowledge of it. On 21st October, 2025, the Defendant's Counsel for the Defendant sought an adjournment to obtain instructions on costs arising from the withdrawal.
33. In the absence of evidence that the suit had been set down for hearing and no prejudice demonstrated, the Notice of Withdrawal took effect upon filing and service.
34. Accordingly, the suit stood withdrawn as from 13th February 2024, subject only to the determination of costs.
35. Regarding the second issue, under Order 7 Rule 13 of the Civil Procedure Rules, a counterclaim may proceed even if the original suit is withdrawn, discontinued, or dismissed.
36. However, such a counterclaim must have been properly on the record at the time of withdrawal or be filed with leave of the Court. In the present case, the counterclaim was filed more than one year after the Notice of Withdrawal became effective.
37. There was therefore no pending suit in which a counterclaim could be properly asserted. The counterclaim was filed in a suit that had already been withdrawn and is therefore procedurally untenable.
38. The Respondent argued that the application offends the doctrine of res judicata and sub judice. The doctrine of res

judicata is founded on Section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya, which states as follows:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

39. The elements required to succeed in a defense of res judicata were outlined in **Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR**, where the Court of Appeal stated that:

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

The suit or issue was directly and substantially in issue in the former suit. That former suit was between the same parties or parties under whom they or any of them claim.

Those parties were litigating under the same title.

The issue was heard and finally determined in the former suit.

The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

40. The doctrine of res judicata is grounded in public policy. Its primary objectives are to ensure the finality of litigation and to protect individuals from repetitive legal proceedings over the same dispute.
41. It is clear that HCCOMM E453 of 2020 involved the same parties as in this suit. The judgment delivered on 1st September 2025 determined, inter alia, the Defendant’s alleged directorship, shareholding, and financial stake in the Plaintiff company, including ownership and development of Rivulet Residences.
42. The Defendant’s counterclaim herein seeks declarations of an implied partnership or joint venture, a substantial equitable interest in Rivulet Residences, and compensation arising therefrom. These issues were directly and substantially in issue in HCCOMM E453 of 2020 and were determined on their merits. Based on the foregoing, I find that the application is res judicata.
The Plaintiff further invoked the doctrine of sub judice in opposition to the Defendant’s application. Section 6 of the

Civil Procedure Act provides that:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

43. The Supreme Court in **Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 Others (Interested Parties) [2020] eKLR** explained the rationale and elements of the doctrine as follows:

“The term sub judice is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub judice rule is to stop the filing of multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent

jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of sub judice must therefore establish that; there is more than one suit over the same subject matter, that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

44. The Applicant does not deny that an application for stay of execution of the decree filed on 8th September 2025 before the Court of Appeal is currently pending, awaiting the hearing and determination of an intended appeal against the High Court’s judgment.
45. It is evident that the parties in the present proceedings are the same as those in the appellate proceedings, and that the question of access to and control over the suit property arises from the same substratum of facts as determined by the High Court. Had this Court found that a competent suit or counterclaim was properly before it, the existence of pending

appellate proceedings addressing substantially the same issues would have raised serious sub judice concerns, as parallel determinations could result in conflicting decisions.

46. In light of the prior findings on withdrawal, res judicata, and sub judice, this court finds that the Defendant's application cannot be sustained.

47. For the foregoing reasons, this court makes the following orders:

(a) The Defendant's application dated 16th November 2025 is hereby dismissed with costs.

(b) The Plaintiff's application dated 2nd December 2025 is allowed.

(c) The Defence and Counterclaim dated 18th November 2025 are hereby struck out.

(d) This suit is marked as withdrawn.

(e) Costs of the applications shall be borne by the Defendant

RULING SIGNED, DATED, AND DELIVERED VIA MICROSOFT TEAMS THIS 13TH DAY OF FEBRUARY, 2026.

.....

HON. T. MURIGI
JUDGE

IN THE PRESENCE OF: -

Korir for the Plaintiff/Applicant

Kipyegon holding brief for Mosi for the Defendant/Respondent

ORIGINAL