

**THE REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KITALE**  
**ELC NO. E004 OF 2023**

REUBEN FWAMBA  
MBITA-----PLAINTIFF/APPLICANT

VERSUS

HENRY SHIKUKU BARASA-----1<sup>ST</sup>  
DEFENDANT/RESPONDENT

JOASH CHIMUGE WASWA-----2<sup>ND</sup>  
DEFENDANT/RESPONDENT

JOHN NYONGESA NGENYWA-----3<sup>RD</sup>  
DEFENDANT/RESPONDENT

JEREMY LABORDE----- 4<sup>TH</sup>  
DEFENDANT/RESPONDENT

FRANCIS MUTIMBIA-----5<sup>TH</sup>  
DEFENDANT/RESPONDENT

DOMINIC KHISA-----6<sup>TH</sup>  
DEFENDANT/RESPONDENT

ISAAC WANJOFU-----7<sup>TH</sup>  
DEFENDANT/RESPONDENT

MAURICE WANYONYI-----8<sup>TH</sup>  
DEFENDANT/RESPONDENT

LUCHENDO WANYONYI-----9<sup>TH</sup>  
DEFENDANT/RESPONDENT

EVANS ILUNDI-----10<sup>TH</sup>  
DEFENDANT/RESPONDENT

FRANCIS SIMIYU-----11<sup>TH</sup>  
DEFENDANT/RESPONDENT

WYCLIFF MUKANDA-----12<sup>TH</sup>  
DEFENDANT/RESPONDENT

JOSEPH WAFULA-----13<sup>TH</sup>  
DEFENDANT/RESPONDENT

VICTORIA MBOLOLE-----14<sup>TH</sup>  
DEFENDANT/RESPONDENT

KENYA GOOD NEWS OUTREACH CHURCH-  
AND WORSHIP CENTRE-----15<sup>TH</sup>  
DEFENDANT/RESPONDENT

MATISI OUTREACH CHURCH-----16<sup>TH</sup> DEFENDANT/  
RESPONDENT

## **RULING**

- 1.** Before the court is the application dated **6/11/2025**. The plaintiff, as the applicant, seeks review, setting aside the court order of **23/6/2025**, and reinstatement of the applicant's suit.
- 2.** The grounds are that the applicant withdrew the suit on **23/6/2025**, and since he was acting in person at the time, he did not understand the legal implications of withdrawing his claim without involving all the parties.
- 3.** The applicant avers that at the time of withdrawing the suit, he had not been served with the amended defence and counterclaim dated **31/1/2025** by the 4<sup>th</sup> - 14<sup>th</sup>

respondents. The applicant now prays to be heard and that no prejudice shall be occasioned to the respondents.

4. The application is opposed through a replying affidavit sworn on **18/11/2025**, by the 5<sup>th</sup> respondent, on behalf of the 4<sup>th</sup>, and 6<sup>th</sup> - 14<sup>th</sup> respondents. They depose that the application as presented is misconceived, lacks legal and factual basis and that the same should be struck out, since it was the applicant who requested to withdraw the suit after dismissing his advocates on record, M/S Arusei Chepchumba & Company Advocates, which firm had advised him on several occasions but he failed to give instructions to his counsel as alluded to in the application to cease acting attached as **FM1**.
5. It is deposed that the court on the said date explained to the applicant the repercussions of withdrawing the suit, including cost implications, which were awarded to the 4<sup>th</sup> to 14<sup>th</sup> respondents.
6. Further, the 4<sup>th</sup> to 14<sup>th</sup> respondents aver that **Order 45** of the Civil Procedure is not available for a suit withdrawn under **Order 25** of the Civil Procedure Rules, and such a suit cannot be reinstated or reviewed.
7. A return of service is attached as **FM2**, indicating that the counterclaim had been served on the applicant on

**6/1/2025**. A copy of the notice of withdrawal is attached as **FM3**.

- 8.** The deponent deposes that the Counterclaim by the 4<sup>th</sup> to 14<sup>th</sup> respondents is an independent suit on its own, and the applicant has an ample opportunity to ventilate his case since he is a defendant in the counterclaim.
- 9.** In a further affidavit sworn by the applicant on **8/12/2025**. He denies paragraphs **5, 6, and 7** of the replying affidavit as mere hearsay. The applicant avers that this court has the discretion to set aside the withdrawal orders. The applicant deposes that the affidavit of service as sworn is false, since he resides in Namanjalala. Further, the applicant says that the counterclaim is affecting him since his land is at stake.
- 10. Order 25** of the Civil Procedure Rules provides that 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.** As regards when a suit has been set down for hearing, a plaintiff may discontinue or withdraw upon filing a consent signed by all the parties.

- 12.** Leave may also be granted to the plaintiff in such a case upon such terms as to costs. When this matter came up for hearing, the plaintiff was represented by two law firms. The learned counsel told the court that the plaintiff was not willing to proceed with the matter as it had been overtaken by events, since he was already a title holder of the suit land. Learned counsel urged the court to allow the plaintiff to withdraw the suit against the defendants with no orders as to costs.
- 13.** In a rejoinder, the learned counsel for the defendants addressed the court at length in opposition.
- 14.** Learned counsel for the plaintiff insisted that he cannot be ordered to proceed with the suit as he has a right to withdraw or discontinue the suit in law.
- 15.** The court directed that the plaintiff file a formal notice of withdrawal or discontinuance of the suit. The matter was rescheduled in view of that request. Subsequently, when the matter was mentioned on **3/2/2025** and **19/2/2025**, the plaintiff said that he was representing himself and was in possession of a title deed to the suit land, and thus he wished to discontinue with the suit.
- 16.** A formal notice to withdraw the suit dated **17/6/2025** was filed, and the court marked the suit as withdrawn and directed the counterclaim to be listed for hearing.

17. After several months, the applicant has filed an application seeking to have the suit reinstated for hearing. The reasons are that the counterclaim touches on his land, and he has a stake.
18. As to whether the applicant is entitled to the reliefs sought. First, it is instructive to note that the plaintiff was warned of the consequences of withdrawing the suit in the presence of his lawyers on record, who nevertheless insisted that their client could not be forced to proceed with the suit.
19. The court ordered a formal notice to be filed and served upon the parties. The applicant voluntarily withdrew his suit under **Order 25** of the Civil Procedure, despite several questions by the court on the repercussions.
20. In ***Priscilla Nyambura Njue -vs- Geovhem Middle East Ltd; Kenya Bureau of Standards (Interested Party) [2021] eKLR***, the court observed that withdrawal of a suit is itself its end. 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.
21. **Order 25** has no provision permitting the reinstatement of a suit once the withdrawal has taken effect.

- 22.** The court lacks jurisdiction to reverse the plaintiff's voluntary choice to withdraw the suit. The plaintiff cannot blame anyone but himself, for the record shows that the application to withdraw was initially made through his then advocates and later at his instance. The plaintiff had initially given his former lawyers instructions to make an oral application to withdraw the suit in his presence.
- 23.** In **Mwangi -vs- Mwangi (Civil Appeal E250 of 2013) [2025] KEHC 14777 (KLR) (21 October 2025) (Ruling)**, the court held that a withdrawal amounts to a discontinuance, which is an act in finality. As a consequence, the suit dissipates, and there is nothing left before the court to act upon.
- 24.** From the foregoing, it is evident that the plaintiff's suit does not exist, and there is nothing for this court to reinstate. A suit belongs to a party and not his advocates on record; the applicant must live with the consequences of signing, filing, and insisting that he be discharged from the suit.
- 25.** As to the counterclaim, **Order 7 Rule 8** of the Civil Procedure Rules provide that where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff together with any other

person or persons, he shall add to the title of his defence a further title similar to the plaint, setting forth the names of all persons who, if such counterclaim were to be enforced by cross-action, would be defendants to such cross action, and shall deliver to the court his defence for service on such of them as are parties to the action together with his defence for service on the plaintiff within the period within which he is required to file his defence.

- 26.** The *Black's Law Dictionary, 11th edition*, defines a counter-claim as 'a claim for relief asserted against an opposing party after an original claim has been made; especially a defendant's claim in opposition to or as a set off against the plaintiff's claim.
- 27.** The court in **Kihara -vs- Gituma t/a Dona Snacks & 2 others (Environment and Land Case Civil Suit 1190 of 2013) [2022] KEELC 13326 (KLR) (30 September 2022) (Ruling)**, the court cited **Sh Jag Mohan Chawla & Another -vs- Dera Radha Swami Satsang & Ors on May 7, 1996** that a defendant can claim any right by way of a counter-claim in respect of any cause of action that has accrued to him even though it is independent of the cause of action averred by the

plaintiff and have the same cause of action adjudicated without relegating the defendant to file a separate suit.

- 28.** In this case, the plaintiffs' suit was marked as withdrawn on **23/6/2025**; there is nothing to be reinstated. The applicant, as a defendant in the counterclaim, can still defend the suit and state his stake therein, as the counterclaim is an independent suit on its own.
- 29.** Therefore, the application is found devoid of merit and is dismissed with costs to the respondents.

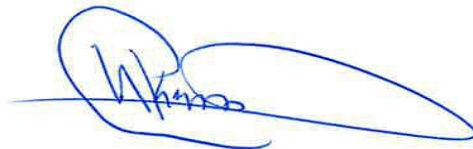
**Ruling dated, signed, and delivered via Microsoft Teams/Open Court at Kitale, this 24<sup>th</sup> day of March 2026.**

**In the presence of:**

Court Assistant - Dennis

Arunga for Munialo for the plaintiff/applicant present

Odiya for the plaintiff in the Counterclaim



**HON. C.K. NZILI  
JUDGE, ELC KITALE.**