

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW NO. E 138 OF 2024

**REPUBLIC AND KENYA ASSOCIATION OF MUSIC
PRODUCERS**

LIMITED.....APPLICANTS

-VS-

**KENYA COPYRIGHT BOARD AND THE BOARD
CHAIRMAN, KENYA COPYRIGHT BOARD AND 2
OTHERS.....RESPONDENTS**

RULING

1. On 18th September, 2024 the applicant withdrew the application dated 26th June 2024 together with all consequential orders.
2. The applicant has now moved this court through the application dated 7th October, 2024 seeking the following orders: -

1) THAT the Honourable Court be pleased to reinstate the Judicial Review Application dated 26th June 2024 pending the hearing and determination of this Application.

2) THAT the court proceedings and the order made on 18th September, 2024 withdrawing the Applicant application together with all consequential orders be set aside and the said Application dated 26th June 2024 be reinstated and fixed for hearing.

3) THAT the costs of this application be provided for. It is the applicant's case that it instructed an Advocate by the name, Mwanji to hold brief with instructions to secure date for the hearing of the application.

2. It is the applicant's case that the advocate instructed to attend court to hold brief for their advocate proceeded to withdraw the Application against the Applicant's advocate's instructions. The applicant's counsel argues that their client is keen on prosecuting the application.
3. The Application seeks to have the Judicial Review Application dated 26th June 2024 reinstated and fixed for hearing and that the Orders made on 18th September 2024 withdrawing the Application be set aside. The application is premised on the provisions of Section IA, 1B, 3A and of the Civil Procedure Act (Cap 21) Laws of Kenya, Order 51 Rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the law.

4. The Applicant argues that due to the time limitations and restrictions on filing of Judicial Review Applications, it was prudent that an application to Reinstate the suit be filed rather than filing a fresh suit. This is because the decision to be reviewed was made and delivered via a press statement of 6th June 2024. The 1st Respondent herein had licensed the 4th Respondent as a single Collective Management Organization.
5. The Applicant submits that the power to reinstate a suit is discretionary. The aim is to do justice to the parties. **Musyoka J in Catherine Kigasia Kivai v Ernest Ogesi Kivai & 4 others [20211 e KLR** stated: -

“Reinstatement of a suit is at the discretion of the court, which discretion ought to be exercised in a just manner, as was held in Bilha Ngonyo Isaac vs Kembu Farm Ltd & another[20181e KLR (JN Mulwa J), which echoed the decision of the court in Shah vs Mbogo & Another(1967) EA 116(Harris J), where the court stated on the matter of discretion: " The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”

6. In the case of **CFC Stanbic Limited versus John Maina Githaiga & another [2013] eKLR**, the Court of Appeal held as follows-

*“On the issue of the mistake of counsel, it is not in dispute that the appellant gave instructions to its advocates in good time once it was served with the pleadings and summons to enter appearance. Therefore, the failure to enter appearance and file a defence is clearly attributable to its advocate who failed to enter appearance and file defence in good time. This being the mistake of counsel, the same ought not to be visited upon the appellant. This Court is guided by the case of **LEE G MUTHOGA V HABIB ZURICH FINANCE (K) LTD ANOTHER, CIVIL APPLICATION NO. NAI 236 OF 2009**, where this Court held: "It's a widely accepted principle of law that a litigant should not suffer because of his advocate's oversight. " In the instant appeal, we are of the view that the appellant should not suffer because of the mistakes of its counsel.”*

7. In the case of **Philip Chemwolo & Another vs Augustine Kubende (1982-88) KAR 103 104** the Court held; -

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the

penalty of not having his case determined on its merits.”

I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

- 8.** It submits that indeed, the Courts do appreciate that mistakes do occur in the process of litigation. This was held so by the Court of Appeal, in the case of **Murai vs. Wainaina (No. 4) [1982] KLR 38**, where it was held that:

“A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by Senior Counsel. Though in the case of Junior Counsel the Court feel compassionate more readily. A blunder on a point of law can be a "mistake. The door of Justice is not closed because a 'mistake has been made by a lawyer of experience who ought to know better. The Court "lay not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that

Courts of Justice themselves make mistakes which are politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule.

9. Section 3A of the Civil Procedure Act which provides that: -

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

10. In order to give meaning to the overriding principle, this court is not hamstrung and where circumstances so demand, can invoke its jurisdiction under Section 3A of the Civil Procedure Act.

11. It is the Applicant’s case that in the instant case, the withdrawal was as a result of miscommunication with the Advocate holding brief. The Ex parte Applicant is still desirous of proceeding with the Application and no prejudice will be suffered by the Respondents if the suit is reinstated.

12. On its part the 1st, 2nd and 3rd Respondents vehemently oppose the application. It is their case that the Applicant's Judicial Review application dated 26th June 2024, was voluntarily and unconditionally withdrawn in totality by the Applicant with no orders to cost and the file marked as closed on 19th September 2024 and the same was duly

recorded in court. The Applicant therefore, effectively abandoned the judicial review application in totality.

13. It is their case that The Applicant's claim that the advocate on record withdrew the matter contrary to instructions is not true as the withdrawal was under their express or implied instructions.
14. The Applicant has not presented any new evidence or compelling reason that would justify reviving the case. The mere change of mind or dissatisfaction with the consequences of withdrawal is not a sufficient legal basis for reinstatement.
15. It is their case that litigation must come to an end and a party seeking reinstatement of a suit must demonstrate sufficient cause and not merely allege mistake or misunderstanding.
16. The withdrawal was voluntary and unconditional, the Applicant has not provided any compelling legal or factual reason for reinstatement and has not proved that the withdrawal and non-reinstatement causes prejudice. The application is a blatant abuse of court process and should be condemned.
17. In the grounds of opposition the 1st Respondent advances the ground that an order of reinstatement of a suit according to Order 12, Rule 7 of the Civil Procedure Rules, 2010, only

applies when a suit has been dismissed. There is no legal provision catering to the reinstatement of withdrawn suits.

18. The Ex Parte Applicant voluntarily withdrew their application can only institute a fresh suit.
19. It is their submission that Section 1A and 1B of the Civil Procedure Act (Cap 21) upholds the overriding objective of efficient and fair disposal of cases. Allowing reinstatement on flimsy grounds undermines the expeditious resolution of matters.
20. Order 25 Rule 1 of the Civil Procedure Rules a plaintiff/applicant may withdraw their suit or application at any time before judgment. Such withdrawal, once effected, is final unless reinstated for good cause. Under Section 3A of the Civil Procedure Act the inherent power of the court must be exercised judiciously to prevent abuse of process, not to revive matters voluntarily abandoned.
21. It is trite law that an advocate who appears in court, including one holding brief, is presumed to have full authority to act on behalf of the instructing advocate unless such authority is expressly limited on record.

22. An advocate holding brief for another has ostensible authority to act on behalf of the instructing counsel unless they clearly inform the court of limitations.
23. Courts have emphasized that withdrawal by counsel is binding unless there is evidence of mistake or fraud.
24. In this case, the advocate holding brief did not place any limitation on the record nor indicate that he lacked authority to withdraw the application. The withdrawal was clear and unconditional. Further, no evidence of mistake or fraud has been provided.
25. While courts have inherent discretion to reinstate withdrawn or dismissed applications, this discretion must be exercised judicially and not as a matter of course.
26. In **Mwangi S. Kimenyi v Attorney General & Another [2014] eKLR**, the court stated:

“Sufficient cause must relate to the failure to take a particular step, not general complaints of error or regret.”
27. The Applicant has not demonstrated any error on the face of the record, inadvertence, or misunderstanding, and there is also no affidavit from the advocate holding brief disowning or clarifying the authority. Withdrawal of pleadings is a substantive step that has legal consequences. Allowing a

party to reinstate a voluntarily withdrawn application without clear just cause would amount to an abuse of process. Court proceedings must have finality. Once a party has taken a step, especially withdrawal, reinstatement is not a matter of right.

Submissions by the AG

28. Order 25 of the Civil Procedure Rules further provides for the withdrawal of suits and has no provision concerning the reinstatement of a suit. Subsequently, this demonstrates that once a suit is withdrawn, it cannot be restored.

29. The same position was in **Priscilla Nyambura Njue v Geovhem**

Middle East Ltd; Kenya Bureau of Standards (Interested Party) [2021] eKLR, Justice Mativo (*as he then was*) *observed, “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.”

30. The Ex parte Applicant can redress the issue under Order 25, Rule 4 of the Civil Procedure Rules, which allows it to institute a fresh suit.

31. This was observed in the case of **George Mwangi Kinuthia versus Attorney General [2019] eKLR** in which the learned **Judge Makau A.J** held,

“It follows a party who withdraws his suit cannot seek to reinstate the same but a party withdrawing a suit has an option of instituting a fresh action as per provisions of order 25 Rule 4 of the Civil Procedure Rules... The order and Rule referred herein above do not envisage a litigant who has withdrawn the suit to seek a reinstatement; as a withdrawal means there is no suit pending anymore. In view of the above it is my view once a suit is withdrawn there is nothing that can be sought to be reinstated by the court.”

Analysis and Determination;

The only issue for determination is whether the application has merit or not.

32. Section 1A and 1B of the Civil Procedure Act (Cap 21) upholds the overriding objective of efficient and fair disposal of cases.
33. Section 3A of the Civil Procedure Act provides for the Inherent powers of the court must be exercised judiciously to prevent abuse of process, not to revive matters voluntarily abandoned.
34. Order 25 Rule 1 of the Civil Procedure Rules stipulates that a plaintiff/applicant may withdraw their suit or application at any time before judgment.
35. In the case of ***George Mwangi Kinuthia versus Attorney General [2019] eKLR*** it was held that;

“It follows a party who withdraws his suit cannot seek to reinstate the same but a party withdrawing a suit has an option of instituting a fresh action as per provisions of order 25 Rule 4 of the Civil Procedure Rules... The order and Rule referred herein above do not envisage a litigant who has withdrawn the suit to seek a reinstatement; as a withdrawal means there is no suit pending anymore. In view of the above it is my

view once a suit is withdrawn there is nothing that can be sought to be reinstated by the court.”

36. Once a suit is withdrawn, that marks the end of the suit leaving room open for the filing of a fresh suit subject to the dictates of the Limitation of Actions Act.
37. The Respondents have a legitimate expectation that there is finality to litigation.

Determination;

The application lacks merit.

Order;

The application is dismissed with costs.

**Delivered, Dated and Signed virtually this 21st Day of April
2026**

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**J. CHIGITI (SC)
JUDGE**