



REPUBLIC OF KENYA



**Ngatho & another (Both Suing as Administrators of Wanjiku Njau) v Kigo & another  
(Environment & Land Case E389 of 2022) [2025] KEELC 670 (KLR) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 670 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E389 OF 2022  
AA OMOLLO, J  
FEBRUARY 20, 2025**

**BETWEEN**

**LILIAN WAIRIMU NGATHO ..... 1<sup>ST</sup> PLAINTIFF**

**ELIZABETH MURUNGARI NJOROGE ..... 2<sup>ND</sup> PLAINTIFF**

**BOTH SUING AS ADMINISTRATORS OF WANJIKU NJAU**

**AND**

**STEPHEN KIGO ..... 1<sup>ST</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiffs/Applicants filed a notice of motion dated 8<sup>th</sup> October 2024 supported by an affidavit and supplementary affidavit, both sworn by Elizabeth Murungari Njoroge on 8<sup>th</sup> October 2024 and 2<sup>nd</sup> December 2024 respectively seeking for the following orders;
  1. Spent
  2. That the Honorable Court be and is hereby pleased to review the Order issued on 15<sup>th</sup> July, 2024 in respect of the award for costs of the suit in favour of the 1st Defendant and substitute the same with an Order that the suit is withdrawn with no order as to costs.
  3. That the costs of this application be provided for.
2. The motion was based on the grounds that the Plaintiffs/Applicants sought to withdraw the suit through a Notice of Withdrawal dated 26<sup>th</sup> April 2024, which was duly served on the 1<sup>st</sup> Defendant/Respondent on 7<sup>th</sup> May 2024 and acknowledged on 8<sup>th</sup> May 2024.
3. That at the time of service, the 1<sup>st</sup> Defendant had not yet filed its Statement of Defence and despite being aware of the Plaintiffs' intention to withdraw, he proceeded to file a Statement of Defence and



Counterclaim on 7<sup>th</sup> June 2024, an action that was deemed baseless and aimed at obstructing the withdrawal of the suit.

4. That when the matter came before the Court on 15<sup>th</sup> July 2024, it was noted that the 1<sup>st</sup> Defendant had no grounds to file the Statement of Defence and Counterclaim after being served with the Notice of Withdrawal. Consequently, the Court marked the suit as withdrawn, however, upon extraction of the Court Order, the Plaintiffs discovered that costs had been awarded to the 1<sup>st</sup> Defendant despite its unjustified filing of the Defence and Counterclaim after the Notice of Withdrawal had been served.
5. The Plaintiffs argue that awarding costs to the 1<sup>st</sup> Defendant is a clear error on the record, as the Court had already determined that the Defendant had no right to file the Defence and Counterclaim.
6. They stated that no prejudice would be suffered by the 1<sup>st</sup> Defendant if the order awarding costs were set aside, as it had not filed any pleadings before being served with the Notice of Withdrawal and that the motion has been made promptly.
7. In opposition the 1<sup>st</sup> Defendant filed a replying affidavit sworn on 28<sup>th</sup> October 2024 by Stephen Kigo. He acknowledges that the Plaintiffs/Applicants served a Notice of Withdrawal of Suit on 7<sup>th</sup> May 2024, but argues that this notice merely signified an intention to withdraw and was not a formal withdrawal.
8. He raises concerns about the timing of the notice, pointing out that it was dated 26<sup>th</sup> April 2024 but only filed on 7<sup>th</sup> May 2024, shortly after the Plaintiffs had transferred the suit property to a third party which was strategic to frustrate his interest in the property. The 1<sup>st</sup> Defendant asserts that the Plaintiffs did not approach the court with clean hands and their actions were intended to evade legal consequences.
9. He further argues that filing and serving a Notice of Withdrawal does not automatically conclude a suit as formal withdrawal can only be effected through a court order. Therefore, it was within its rights to file a Statement of Defence and Counterclaim as a precautionary measure, especially since the court had scheduled a hearing for 15<sup>th</sup> October 2024 and had not set aside previous directions for compliance.
10. Additionally, the Defendant disputes the Plaintiffs' claim that the award of costs was erroneous, asserting that both parties' advocates were present when the order was made. He insists that contesting the costs through a review application is inappropriate, and the Plaintiffs should have either appealed the decision or opposed the Defendant's bill of costs.
11. This Defendant emphasized that he has suffered prejudice, having actively participated in the suit and incurred legal expenses since 2022. That the application for review is deemed a delay tactic aimed at frustrating the Defendant's right to recover costs. Further, he contends that since the court formally withdrew the suit on 15<sup>th</sup> July 2024, it become functus officio and lacks jurisdiction to entertain the present application.

## **Submissions**

12. In support of the motion, the Plaintiffs filed submissions dated 2<sup>nd</sup> December 2024 while in opposition, the 1<sup>st</sup> Defendant filed submissions dated 9<sup>th</sup> December 2024. The Applicant argues that their request for a review is well-founded under Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules, which allow a court to review its own decisions in cases of errors apparent on the record or for other sufficient reasons.
13. They seek to review the Order issued on 15<sup>th</sup> July 2024 awarding costs to the 1<sup>st</sup> Defendant, arguing that the suit had been validly withdrawn through a Notice of Withdrawal filed on 7<sup>th</sup> May 2024. That at



that time, the 1<sup>st</sup> Defendant had not filed any Statement of Defence, making any subsequent pleadings by him legally ineffective and irrelevant to the suit.

14. The Plaintiffs/Applicants further emphasize that under established legal principles, once a suit is withdrawn, it ceases to exist and the court loses jurisdiction over it. He cited the case of Bahati Shee Mwafundi v Elijah Wambua [2015] eKLR and Charles Kiptarbei Birech v Paul Waweru Mbugua & another [2021] eKLR, which affirm that a withdrawal, whether by notice, consent, or court leave, terminates a suit completely.
15. They highlight that the Court had already determined on 15<sup>th</sup> July 2024 that the 1<sup>st</sup> Defendant had no right to file a Defence and Counterclaim after the withdrawal notice was served, however, the extracted court order erroneously awarded costs to the 1<sup>st</sup> Defendant, which in their view is an apparent error on the record. It is submitted that given that the suit was no longer in existence at the time the 1<sup>st</sup> Defendant took further steps, there was no legal basis for awarding costs in its favour.
16. In response, the 1<sup>st</sup> Defendant submits that the Applicants' arguments do not amount to an error apparent on the face of the record, as established in various precedents, including National Bank of Kenya Limited v Ndungu Njau [1997] Eklr and Nyamogo & Nyamogo v Kogo(2001)EA 170.
17. The 1<sup>st</sup> Defendant posits that the Applicants' grievances would be more appropriately addressed through an appeal rather than a review, as the court cannot sit in judgment over its own decision. Further, he raised concerns about the timing and motive behind the Applicants' withdrawal of the suit, noting that the notice of withdrawal was filed only after the property in question had been sold and transferred.
18. The 1<sup>st</sup> Defendant submitted that the court had already exercised its discretion in awarding costs, and the principle that costs follow the event was reaffirmed in cases such as Pacis Insurance Company Ltd v Francis Njeru Njoka (Civil Case 421 of 2010[2018] KEHC 4855(KLR)(Civ) (20 July 2018) for the proposition that a party forced to participate in a suit is entitled to costs upon withdrawal unless otherwise agreed or determined by the court. He concluded that the Applicants' motion for review is not only unfounded but also delayed, having been filed nearly four months after the initial order.

### **Analysis and determination**

19. The ground relied on in this application is that there is an error apparent on the face of the record. A mistake or an error must be one which is prima-facie visible and does not require any detailed examination. This position was stated by the Court of Appeal in the case of National Bank of Kenya vs Ndungu Njau (1997) eKLR, which held thus;

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”
20. The Plaintiffs argue that the 1<sup>st</sup> Defendant was awarded costs despite the court pronouncing itself on 15<sup>th</sup> July 2024 that the 1<sup>st</sup> Defendant had no right to file a Defence and Counterclaim after the withdrawal notice was served. On the other hand, the 1<sup>st</sup> Defendant states that the ground relied on does not amount to an error on the record but it is a ground for appeal.



21. In reliance on the excerpt by Stuart Sime in his book “A Practical Approach to Civil Procedure”, 9<sup>th</sup> Edition where the learned author states that notice to discontinue takes effect and brings the proceedings to an end as against each defendant, on the date it is served upon the defendant. Hence the question, was this Court in error to award costs because no defence had been filed?
22. My answer would be no as the withdrawal of a suit does not automatically disentitle a party sued from getting costs. It is the discretion of the Court to determine whether to award costs or not. In this suit, before the filing of the notice of withdrawal, there are proceedings which had taken place in the nature of an interlocutory injunction. The 1<sup>st</sup> Defendant had filed a response to the said application meaning he had participated in proceedings and expended some costs which includes court attendances. Thus, it is my considered view that the award of costs was not in error or by mistake. In terms of how much costs the 1<sup>st</sup> Defendant is entitled to, that is left to parties to argue before the taxing master.
23. Consequently, I find no merit in this application. It is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF FEBRUARY, 2025**

**A. OMOLLO**

**JUDGE**

