



Kyunga v Kenya Commercial bank Ltd & another; Karaya (Interested Party) (Environment and Land Case 324 of 2008) [2024] KEELC 4273 (KLR) (2 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4273 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE 324 OF 2008**

LL NAIKUNI, J

MAY 2, 2024

BETWEEN

JULIUS MUSILI KYUNGA PLAINTIFF

AND

KENYA COMMERCIAL BANK LTD 1ST DEFENDANT

JOEL TITUS MUSYA T/A MAKURI ENTERPRISES 2ND DEFENDANT

AND

JAMES MURIUKI KARAYA INTERESTED PARTY

RULING

I. Introduction

1. This Honourable Court is tasked on making the determination of the Notice of Motion application dated 18th May, 2022 by James Muriuki Karaya, the Interested Party herein under the provision of Order 8 Rules 3, 5, and 7, Order 51 Rule 1, Order 11 Rule 7 of the *Civil Procedure Rules* (2010), Sections 1A, 1B, 63(e) and 100 of the *Civil Procedure Act* (Cap 21) Laws of Kenya and all other enabling Provisions of the Law.
2. Upon effecting service, it was only it's only the Former Plaintiff and the 1st Defendant in the Counter - Claim who filed both the Grounds of Opposition dated 7th June, 2022 and on 1st February, 2024 filed their written submissions thereof. Thus, the Court has decided to make its determination on it on merit.



II. The Notice of Motion application dated 18th May, 2022

3. The Interested Party sought for the following orders:-
 - a. That this Honourable Court be pleased to grant leave to the Interested Party/Applicant to amend his Defence and Counter claim in terms of the draft amended Defence and Counter Claim annexed hereto.
 - b. That this Honourable Court be pleased to grant leave to the interested Party/Applicant to file supplementary list of witnesses, Statements and documents.
 - c. That costs of this Application be provided.

4. The application by the Interested Party herein was premised on the grounds, testimonial facts and averments made out under the 26th Paragraphed Supporting Affidavit of James Muriuki Karaya, the Interested Party/ Applicant herein with five (5) annexures marked as “JMK 1 to JMK 5” sworn and dated 18th May, 2022 averred that:
 - a. On the 11th November, 2008 the Interested Party/Applicant entered an agreement of sale with the 2nd Defendant herein, Joel Titus Musya t/a Makuri Enterprises to purchase all that land known as LR 2812/I/MN Shanzu, the suit property, after being the successful bidder at a Public Auction and paid the required deposit. Annexed in the affidavit and marked as “JMK – 1”.
 - b. At the fall of the hammer, property in the suit land passed to the Interested Party/Applicant.
 - c. Before completing the transaction, the Plaintiff filed this suit on 13th November, 2008 seeking inter alia for the nullification of the charge document dated 4th September, 1997 in respect of LR 2812/1/MN against the Defendant, restraining it from selling, or otherwise alienating, mortgaging, or otherwise dealing with LR No.2812/I/MN and the account between the parties be declared as settled or if not the debt be recovered through a civil suit.
 - d. Upon filing the said suit, the Plaintiff obtained successive orders of injunction both before this court and in the Court of Appeal, barring the Interested Party/Applicant from proceeding to complete the sale and register his interest with the last ruling being delivered on 22nd April, 2016 by the Court of Appeal, dismissing the appeal by the Plaintiff.
 - e. In the meantime, *vide* a Notice of Motion application dated 20th January, 2009, the Interested Party/Applicant sought leave to be joined into the suit, which application was granted on 30th March, 2009 and on 4th May, 2009, and he filed defence and counter-claim.
 - f. On 4th of June, 2010, the Plaintiff filed another application for injunction pending the hearing and disposal of the appeal filed and obtained interim orders, until the 20th December, 2012 when the application was allowed and a conservatory order of 60 day was granted pending the hearing and disposal of the appeal in civil appeal no. 3 of 2013.
 - g. Ruling in that appeal was delivered on 12th February 2015, and the appeal was dismissed.
 - h. On 16th March, 2016, the Plaintiff filed a Notice of Motion for a conservatory order which was heard and dismissed on 30th October, 2015.



- i. The Plaintiff again filed another application in the Court of Appeal no. 64 of 2015 which was dismissed on 22nd April 2016. Annexed in the affidavit and collectively marked “JMK - 2” were true copies of the relevant Rulings/Judgements.
- j. Upon the dismissal of the last appeal the Interested Party/Applicant wrote numerous to the Defendants to complete the sale entered into on 11th November, 2008, but the Defendants refused. Annexed in the affidavit and collectively marked as “JMK -3” were true copies of the relevant correspondence.
- k. He then filed a civil suit - Cmcc (Mombasa) No. 1365 of 2016 to compel the 1st Defendant to complete the transaction, but which suit has been stayed. Annexed in the affidavit and collectively marked as “JMK - 4” were true copies of the relevant pleadings.
- l. Unbeknownst to the Interested Party/Applicant, the 1st Defendant herein had quietly allowed the Plaintiff to purport to redeem the suit property, granted him a discharge which was then registered on 30th August, 2016 and released the original title to him.
- m. The Plaintiff had then attempted to transfer the property, but because of the orders of the court prohibiting dealing in the property, he was unable to do so and on 21st June, 2017 the Defendant applied through the Notice of Motion application dated 20th June, 2017, to rectify the register and remove the conservatory orders thereby allowing him to transfer the property thus defeating Applicant’s rights in the property.
- n. In the said application, the Applicant learnt that the Plaintiff and the Defendant had secretly reached a consent dated 11th July, 2016 and filed in court on 12th July, 2016, whose effect was to withdraw this suit and mark it as settled, thus defeating the interests of the Interested party.
- o. In the Ruling of the court delivered on 30th May, 2019, the court set aside the Consent Order of 11th July, 2016 and all consequential orders but allowed the Notice of Withdrawal of the suit to remain in force and thus the suit between the Plaintiff and the Defendant became withdrawn.
- p. On 5th November, 2020, the 1st Defendant applied for leave to file defence to the counterclaim, by the interested party and file witness statements, list of documents and list of witnesses which application was allowed on 3rd June, 2021.
- q. The Interested Party/Applicant was not granted a corresponding leave to file fresh documents.
- r. The recent developments since this case was filed in the year 2008 have altered the character of the case by the Applicant and need to be brought to the attention of the court by amending the Defence and Counterclaim.
- s. If the application is not allowed, the Applicant stands to suffer immensely as his interests will not have been properly protected in the suit as is presently.
- t. The Respondents never stood stand to suffer any prejudice if the application was allowed.
- u. The current situation was occasioned purely by the Respondents by their actions and could not be blamed on the Applicant.
- v. The suit would have been defaulted if it is allowed to proceed as it is.
- w. He believed it was in the interest of justice that the application be allowed



III. Submissions

5. On 31st May, 2022 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 18th May, 2022 be disposed of by way of written submissions and all the parties complied. Pursuant to that, it was only the Former Plaintiff and the 1st Defendant in the Counter Claim who obliged and on 14th February, 2024 a ruling date was reserved on 10th April, 2024 by Honourable Court accordingly.
 - A. The Written Submissions by the Former Plaintiff and the 1st Defendant in the Counter Claim
6. While opposing the application dated 18th May, 2022, by the Interested Party, the Learned Counsels for the Former Plaintiff and the 1st Defendant in the Counter Claim the Law firm of Messrs. Munyithya, Mutugi, Umara & Muzna Advocates filed their written submission. Mr. Munyithya Advocate commenced by stating that these were the submissions of the Former Plaintiff – Mr. Julius Musili Kyunga. Briefly, the Learned Counsel informed Court that Mr. Kyunga (Hereinafter referred to as “The Former Plaintiff”) filed this suit way back in the year 2008. The parties were Kenya Commercial Bank Limited and Joel Titus Musya (the 1st and 2nd Defendants respectively). Later, Mr. James Muriuki Karaya applied and was joined as an Interested Party in the matter. He invited the court is invited to look at the application by the Former Plaintiff dated 4th November, 2020 and filed in court on 5th November, 2020. In support of that application was a supporting affidavit which disclosed the following:-
 - a. The interested party had filed an application dated 2nd January, 2009.
 - b. The application was allowed by Seron J. (now J.A) on 1st April, 2009. Thereafter, no directions were given as to the nature of documents the Interested Party would file. At the same time the pleadings were never amended to include the name of the Interested Party.
 - c. On 4th May, 2009, the Interested Party filed a Defence and Counter - Claim. As at that moment, the pleadings had not been amended and no claim had been made against the Interested Party.
7. According to the Learned Counsel, while exercising his right under the law, the Former Plaintiff withdrew this suit on 15th July, 2016. A ruling was then delivered by Hon Yano J. confirming that the Former Plaintiff could not be compelled to proceed with the suit and that he had the right to discontinue the suit. This was part of the court record. On the other hand, the Interested Party wished to continue with the Counter - Claim as drawn. However, in the application dated 18th May, 2022, the Interested Party sought leave to amend his Counter - Claim and introduce further documents.
8. While in opposition of this application, the Former Plaintiff filed four (4) Grounds of Opposition dated 7th June, 2022. These grounds were informed on points of law. The Learned Counsel proceeded to argue them as set out therein as follows:-
9. Firstly, that there was no suit. For that reason, there was no Plaintiff and/or a Defendant. For that reason, there could not be a Counter - Claim and there was nothing for amendments. As to whether there was a suit or not, the issue was fully settled in the ruling against the Notice of Motion Application dated 28th February 2018 of Yano J. delivered on 30th May 2019. For that reason, and whatever happened with the other points raised herein, the heading of this suit must change. The Former Plaintiff could not continue appearing as the Plaintiff even after the suit had been withdrawn.
10. The process of joinder of parties in a suit filed by way of a Plaint only provided for two types of parties namely:- a Plaintiff, the Defendant and a Third Party. There was no provision for an Interested Party. Further, where a party had been joined by the court, there was always direction given for the



amendment or pleadings and filing of documents. In the case of a third party, the rules provided for provision of directions after joinder. The third party was allowed to plead within a certain period.

11. In the instance case, the Learned Counsel averred that the Court was dealing with a strange and a foreign party known as an Interested Party. He submitted that such a party was not known in law for a civil suit commenced by way of a Plaint. To buttress on this point, he relied on the case of: “*Francis Kariuki Muruatetu & Another – Versus - Republic & 5 others*, Sup. Ct. Pet. 15 & 16 of 2015 (Consolidated):[2016] eKLR, as follows (paragraphs 41, 42) where the Supreme Court stated:-

“Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/ principal parties’ before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us. Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court.”

12. The Learned Counsel held that the second ground of objection was that the Interested Party could not and cannot file a Defence of Counter - Claim as there was never a suit against the Interested Party. This ground flows from ground 1. If the Court found out that there was never a suit against the Interested Party, he urged the Court to find that there was no foundation for filing of the Defence and the Counter – Claim.

13. With regard to ground three. It introduced the existence of another suit, namely Civil suit “Cmcc (Mombasa) No. 1365 of 2016. The parties were “James Muriuki Karaya – Versus - Kenya Commercial Bank Limited”. The existence of this suit in the lower court, was part of the court record and was disclosed by the Interested Party in the application dated 18th May, 2022 as annexure marked as “JMK – 4”. This suit was seeking remedies similar to the remedies sought by the Interested Party in the Counter - Claim. The Learned Counsel argued that under the provision of Section 6 of the *Civil Procedure Act*, Cap. 21, the law denied a court jurisdiction to proceed with a matter which was subject of discussion in another court involving the same subject matter and concerning the same parties. He urged the court to find that the Interested Party could adequately raise his issues before the lower court as properly pleaded in the pleadings voluntarily disclosed by the Interested Party.

14. On the question of sub-judice, the Counsel relied on the following authorities:-

The Supreme Court of Kenya in “*Kenya National Commission on Human Rights – Versus - Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR”, stated:-

“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 a 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 Res 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”

15. Further, he cited the case of “The Court in *Ephraim Miano Thamaini – Versus - Nancy Wanjiru Wangai & 2 others* [2022] eKLR” relied on the decision in the case of: “*David Ndi & others – Versus - Attorney General & Others* 2021 eKLR” where a bench of five Judges “inter alia” stated:-

“The rationale behind this provision (Section 6 of the *Civil Procedure Act*) is that it is vexatious and oppressive for a claimant to sue concurrently in two courts. Where there are two courts faced with substantially the same question or issue, that question or issue should be determined in only one of those courts.....”.

16. It was the contention of the Learned Counsel that the Interested Party had to elect which suit to proceed with, was it the Counter Claim herein or the CMCC No. 1365 of 2016 but not both suits. In view of this, he concluded by urging Court to find that the Counter Claim lacked merit and the application dated 18th May, 2022 should be dismissed with costs.

IV. Analysis & Determination.

17. I have carefully read and considered the pleadings herein by the Interested Party, the Grounds of Opposition by the Former Plaintiff and the 1st Defendant in the Counter – Claim, the written submissions by the Former Plaintiff and 1st Defendant in the Counter - Claim, the myriad of cases cited herein by said party, the relevant provisions of the *Constitution* of Kenya, 2010 and the statutes.
18. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has four (4) framed issues for its determination. These are:-
- a. Whether the Plaintiff/ Defendant in Counter - Claim’s grounds of opposition are merited.
 - b. Whether the Interested party can be granted leave to amend his Defence and Counter - Claim in terms of the draft amended Defence and Counter Claim annexed hereto?
 - c. Whether the Interested Party can be granted leave to the interested Party/Applicant to file supplementary list of witnesses, Statements and documents
 - d. Who will bear the Costs of Notice of Motion application dated 18th January, 2022.

Issue No. a). Whether the Plaintiff/ Defendant in Counter - Claim’s grounds of opposition are merited

19. Under this sub – heading, the Honourable Court will be examining whether the Counter – Claim has any merit taking that the fact that the Plaintiff already withdrew the main suit. Thus, the legal concept on Counter Claim and the legal validity, efficacy and effectiveness of a dismissal, staying; or discontinuing or withdrawal of a suit will be critical here. Before raising the issue of amendment, this Honourable Court wants to take note that the former Plaintiff in his grounds of opposition and



submission has brought to the Courts attention that he had filed a Notice of Withdrawal on 15th July, 2016. A ruling was then delivered by Hon Yano J. confirming that the Former Plaintiff could not be compelled to proceed with the suit and that he had the right to discontinue the suit. This was part of the court record. The pith and substance of this matter is two – fold a). did the Plaintiff actually withdraw his suit or not? And b). If at all the suit was actually withdrawn, what is the effect of the Counter Claim by the Interested Party?

20. First and fore – most, its significant to appreciate the meaning, nature and scope of the Counter Claim. According to the *Black Law dictionary*, Counter – Claim means:

“A claim for relief asserted against an opposing party after the original claim has been made, especially a Defendant’s claim in opposition to or as a set – off against the Plaintiff’s claim”

From the statutes, Counter – Claim are governed under the provision of Order 7 Rules 3, 8, 12 and 13 of the *Civil Procedure Rules*, 2010. These provisions provide as follows:-

Rule 3:-

“A Defendant in a suit may set – off or set – up by way of Counter – Claim against the claims of the Plaintiff, any right or claim, whether such sets or Counter Claim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set – off or Counter – Claim shall have the same effect as a Cross – suit, so as to enable the Court to pronounce a final Judgement in the same suit, both on the original and on the cross – claim; but the Court may on the application of the Plaintiff before trial, if in the opinion of the Court such set – off or counter – claim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to Defendant to avail himself thereof”;

Rule 8 provides:-

“Where a Defendant by his defence sets up any Counter Claim which raises questions between himself and the Plaintiff together with any other person or persons, he shall add to the title similar to the defence a further title similar to the title in the Plaint, setting forth the names of all persons who, if such Counter – Claim 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.”;

Rule 12 states as follows:-

“Where a Defendant sets up a Counter Claim, if the Plaintiff or any other person named in the manner aforesaid as party to such Counter – Claim contends that the claim thereby raised ought not to be disposed of by way of Counter – Claim, but in an independent suit, he may at any time before reply, apply to the Court for an Order that such a Counter – Claim may be excluded, and the Court may, on the hearing of such application, make such Order as shall be just”;

Rule 13 provides:

“If, in any case in which the Defendant sets – up a Counter Claim the suit of the Plaintiff is stayed, discontinued or dismissed, the Counter Claim may nevertheless be proceeded with.
(Emphasis is mine)



21. The law and procedure governing withdrawal or discontinuance of suits, in Superior and Subordinate Courts is found in the provision of Order 25 of the *Civil Procedure Rules*. The Order is headed “Withdrawal, Discontinuance and Adjustment of Suits”.

- “ 1. At 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.
2. (1) 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 parties.
- (2) 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, the filing of any other suit, and otherwise, as are just.
- (3) The provisions of this rule and rule I shall apply to counterclaims.
3. Upon request in writing by any defendant the registrar shall sign Judgment for the costs of a suit which has been wholly discontinued, and any Defendant may apply at the hearing for the costs of any part of the claim against him which has been withdrawn.”

Rule 1 thereof provides discontinuance of the whole or any part of the Claim where a suit has not been set down for hearing. The procedure thereto has been explained elaborately by the Court of Appeal in the case of:- *Beijing Industrial Designing & Research Institute – Versus - Lagoon Development Ltd* (2015) eKLR”.

22. Now to apply this legal principles to the instant case. The Former Plaintiff and now 1st Defendant in the Counter - Claim invited the court to look at the application by the Former Plaintiff dated 4th November, 2020 and filed in court on 5th November, 2020. In support of that application was a supporting affidavit which disclosed the following:-

- a. The interested party had filed an application dated 2nd January, 2009.
- b. The application was allowed by Seron J. (now J.A) on 1st April, 2009. Thereafter, no directions were given as to the nature of documents the Interested Party would file. At the same time the pleadings were never amended to include the name of the Interested Party.
- c. On 4th May, 2009, the Interested Party filed a Defence and Counter - Claim. As at that moment, the pleadings had not been amended and no claim had been made against the Interested Party.

23. According to the Learned Counsel, while exercising his right under the law, the Former Plaintiff withdrew this suit on 15th July, 2016. A ruling was then delivered by Hon Yano J. confirming that the Former Plaintiff could not be compelled to proceed with the suit and that he had the right to discontinue the suit. This was part of the court record. On the other hand, the Interested Party wished to continue with the Counter - Claim as drawn. However, in the application dated 18th May, 2022, the Interested Party sought leave to amend his Counter - Claim and introduce further documents. The former Plaintiff failed to tell the court that the Interested Party filed a Notice of Motion dated 28th February, 2018 seeking amongst the prayers for the Honourable Court be pleased to set aside the



notice of withdrawal of the 3rd defendant's suit dated 11th July, 2016 filed herein on 12th July, 2016 by the Advocates for the Plaintiff and the setting aside the consent order between the plaintiff and the defendant dated 11th July, 2016, filed on 12th July, 2016 and all consequential orders therefrom, already at this point the Court feels misled by supposed former Plaintiff as the Court in that said application opined itself as follows:-

12. The other issue is whether this court can set aside, the said withdrawal by the plaintiff. The question of notice to withdraw under Order 25 has been decided by the courts. In the case of *Beijing Industrial Designing & Research Institute – v Lagoon Development Ltd* (2015) eKLR, the Court of Appeal set out the three scenarios regarding discontinuance of suits or withdrawal of claims and held:
“The above provision presents three clear scenarios regarding discontinuance of suit or withdrawal of claims. The first scenario arises where the suit has not been set down for hearing. In such an instance, the Plaintiff is at liberty, 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 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 of all 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 thereto. In such eventuality, the plaintiff must obtain leave of court to discontinue the suit or 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.”
13. In this case, the record shows that on 22nd March 2016 the suit was fixed for hearing on 17th November, 2016. It follows therefore that the wish of the plaintiff as declared in the notice to withdraw, to wholly withdraw the suit against the Interested Party on 12th July 2016 when the notice was filed required leave of the court as no consent had been reached by all the parties. There is no indication that the Interested Party was notified of the Plaintiff's intention to withdraw the suit against him. It is also evident that no consent was signed by all the parties as none was filed. Further, the Plaintiff did not obtain leave of the court to withdraw the suit against the Interested Party. The matter having been set down for hearing, the plaintiff was required to move the court under Order 25 Rule 2. Rule 1 of Order 25 which the plaintiff invoked, in my view, was not applicable since it is apparent that the suit had been set down for hearing. In the circumstances, the withdrawal of suit in the manner invoked by the plaintiff would have no efficacy before the sanction of the court. In my view, a unilateral withdrawal could not be permitted. Besides the sanction of the court, a party who is affected by the withdrawal was entitled to be notified. I have perused the said notice dated 11th July 2016. There are remarks made thereon by the Deputy Registrar requesting to see a return of service of the notice upon M/s Kanyi & CO Advocates who are on record for



the Interested Party. The record does not indicate whether such evidence of service was availed as requested.

14. In the case of *Nicholas Kiptoo Arap Korir Salat -v- Independent Electoral and Boundaries Commission & 7 Others* (2014)eKLR, the Supreme Court of Kenya stated as follows:

“A Party’s right to withdraw a matter before the court cannot be taken away. A court cannot bar a party from withdrawing his matter. All that the court can do is to make an order as to costs where it is deemed appropriate.”

15. The Supreme court also considered the issue of withdrawal of a notice of appeal in the case of *John O. Ochanda – Versus - Telkom Kenya Limited* (2014) eKLR and stated inter alia:

“I do hold the view that a prospective Appellant is at liberty to withdraw a notice of appeal at any time before the appeal has been lodged and any further steps taken. No proceedings have commenced strictly. I am also of the view that just like under the *Civil Procedure Rules* or Court of Appeal Rules the right to withdraw or discontinue proceedings or withdraw a notice of appeal respectively ought to be allowed as a matter of right subject to any issue of costs which can be claimed by the respondents, if any”

16. In the light of the guidance contained in the above authorities of the supreme court which no doubt bind this court, it is my view that this court cannot bar the Plaintiff or take away the Plaintiff’s right to withdraw the suit against the Interested party. I note that in the said notice the suit was withdrawn with costs to the Interested Party. Therefore the interested party cannot suffer any prejudice as he is entitled to costs of the suit against him that has been withdrawn. Moreover, the Interested party’s counter-claim is still in force and therefore he is at liberty to pursue the same . For the reasons given, I decline to set aside the notice of withdrawal of suit dated 11th July 2016 and filed on 12th July 2016 by the Plaintiff.

17. The other issue is whether this court can set aside the consent order dated 11th July 2016 between the plaintiff and the defendants. In the case of *Samuel Mbugua Ikumbu –Versus - Barclays bank of Kenya Limited* (2015) eKLR, the Court of Appeal stated:

“.. The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts.....”

In the case of *Flora Wasike –Versus - Destimo Wamboko* (1982 - 1988)I KAR 625, Hancox JA (as he then was) stated:

“It is now settled law that a consent Judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out”

18. The consent dated 11th July 2016 was in the following terms:

“By consent:



- 1) The Plaintiff shall pay the 1st Defendant a sum of Kshs.3,875,000/= made up as follows:
 - a). Kshs.2,500,000/= being the aggregate liability of the plaintiff to the 1st defendant in relation to the existing charges over Plot.lr. No.2812/I/MN.
 - b). The refund of the 25% paid by the Interested Party being Kshs.1,375,000/=
 - c). This amount shall be paid within three (3) days after the 1st defendant complies with clause (2) below and as per clause (3) below.
- 2) Upon the filing in court of this consent the 1st defendant shall release to its advocates the original title/certificate of title of Plot Lr. No.2812/I/MN and the 1st defendant's advocates shall confirm to the advocates of the plaintiff the receipt of the document.
- 3) Once the 1st Defendant has complied with clause 2) above the Plaintiff shall deposit by way of RTGS the sum of Kshs.3,875,000 to an account as advised by the 1st Defendant's advocates.
- 4) The advocate for the 1st Defendant shall release to the advocates for the Plaintiff the original title deed/certificate of lease within three (3) days of confirmation of deposit as per the clause (3) above.
- 5) The plaintiff hereby agrees to indemnify the 1st Defendant and undertakes to settle any liability adjudged payable by the 1st defendant to the interested party over and above Kshs.1,375,000/= in relation to this suit or Counter - Claim.
- 6) The Plaintiff shall withdraw this suit as against the interested party and pay the costs thereof. A notice of withdrawal of suit has been filed in court prior to the filing of this consent.
- 7) Upon compliance with clauses 1,2, 3, 4 and 5 above this suit shall be deemed as settled as between the Plaintiff and the Ddefendants.”
19. The above consent was signed by M/s. Munyithya Mutugi, Umara & Muzna Co. Advocates for the plaintiff and M/s Omondi Waweru & Co. Advocates for the Defendants, the Interested Party was not party to the consent. The Interested Party was not party to the consent. Whereas the said consent was reached by the Plaintiff and the defendants, and without the involvement of the interested party, it is clear that the rights of the interested party were going to be affected by the said consent. In my considered view, the said consent was entered into between the Plaintiff and the Defendant in collusion to abrogate the interested party's right over the suit property. There is no evidence that the interested party had agreed to be refunded the 25% he paid for the suit property. Nonetheless, the consent indicated that the said 25% was to be refunded.
20. For the reason that the said consent was reached without the involvement of the Interested Party whose rights the consent sought to abrogate, the consent is liable to be set aside. A consent that was arrived secretly and without the knowledge of the Interested Party whose rights would be adversely affected, in my view cannot stand. The Plaintiff and the Defendants had a duty to involve



the Interested Party in the consent, more so as a party to the suit and one who also has a claim over the suit property.

21. For the reasons given, the court hereby sets aside the consent order between the Plaintiff and the Defendant's dated 11th July 2016 and filed on 12th July 2016 and all consequential orders therefrom.
24. Evidently, and from the Court's records, this said Notice of Withdrawal had not been admitted by the Court neither had it been endorsed on 15th July, 2016 as stated by the Plaintiff. There is no record of the endorsement of the same in the proceeding and from the said notice, there was a note that same would be endorsed by the Deputy Registrar if the Plaintiff has filed a return of service which is not on the records of the court.
25. Be that as it may, whether the suit was formally withdrawn or not, the Court will still proceed on the validity of the Counter – claim herein. The suit herein was filed on 13th November 2008 by the Plaintiff and on 16th January 2009, the court entered interlocutory Judgement against the 1st and 2nd Defendants. The Interested Party joined the suit *vide* an order of court on 1st April 2009 as an affected party. However the applicant pleaded that court did not give directions on which documents the parties would file or amend. The Applicant pleaded that the interested party, after been enjoined and without leave of court filed a defence and counterclaim on 4th May 2009. The applicant further claimed that he has since withdrawn the suit herein, but added that while the suit was alive, he had no cause of action against the interested party. The applicant on 23rd February 2021 filed a Notice of Preliminary Objection on the grounds that an interested party does not exist in a suit initiated by a plaintiff and that the pleadings by the interested party in the form of a statement of defence and counterclaim dated 4th May 2009 is a nullity ab initio and is for striking out with costs. The Honourable Court held that:-
 14. While I do find that this application seeking directions, eleven (11) years after the interested party filed his defence and counterclaim has been brought after inordinate delay, I also do find that directions have never been given by the court on how the parties were to proceed after leave was granted to the respondent to be enjoined into the suit as an affected party. Accordingly, having considered the plaintiff's application, it is the view of this court that allowing the application permits the court to have the interested party's counterclaim decided on its merits. On the other hand, if the court were to disallow the application, it would be denying the plaintiff an opportunity to ventilate their case pertaining to the counterclaim. This court is not satisfied that the plaintiff's inaction over the years should result in shutting the doors of justice to the plaintiff to defend itself on the counterclaim. Indeed the interested party has since filing the counterclaim not taken any step on the same, until now when jolted by the current application and preliminary objection.
 15. In addition, it is also the view of this court that upholding the preliminary objection raised by the plaintiff would deny the interested party an opportunity to ventilate his case, the court having previously allowed him to be enjoined into the suit, even though the plaintiff has since withdrawn his case against the defendants. Indeed, the question of whether the plaintiff has a defence on merit against the interested party's counterclaim and if he can sustain the same ought to be considered during the hearing of the counterclaim herein when this court will consider the proposed defence



against the counterclaim. The issue cannot be considered at this stage as there is potential of the court inadvertently delving into the merits or otherwise of the counterclaim. The court having enjoined the interested party as an affected party to the suit has the mandate of ensuring that all matters in controversy between the parties should be completely and finally determined. This is to avoid instances where the parties file multiplicity of legal proceedings.

26. But then the Court takes cognizance that on 3rd June, 2021 the Honourable Court dismissed the Plaintiff's Notice of Preliminary Objection dated 23rd February 2021. It opined itself that the Notice of Motion dated 4th November 2020 is allowed and the court made the following directions:-

- a) The Plaintiff, Julius Musili Kyunga (and the Defendants if they so wish) do file Defence to the Counter - Claim by the interested party and to file witness statements, list of documents and list of witnesses within fourteen (14) days from the date hereof.
- b) Costs of this application shall be in the cause.

27. I do fully agree with my brother Justice Yano that denying the Interested Party their day in Court would tantamount to infringing his constitutional rights to fair hearing as enshrined under the provision of Articles 25 (c) and 50 (1) and (2), which guarantees every person the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court. Additionally, under the same breath, the Interested Party is entitled to fair administrative action as enshrined under the provision of Article 47 of the Constitution of Kenya, 2010. There is nowhere in the Court record that the Interested Party was barred from filing the Counter - Claim and amending it. The Court takes note that in regards to a Counter - Claim being in operation after the main suit has been withdrawn by the Plaintiff, the general principle is that a Counter - Claim can be and in most cases it is distinct and independent of the Plaintiff's original claim. In simple terms, therefore, this means that even if the main suit is dismissed or withdrawn, the Counter - Claim can still proceed on its own. In saying so, I reiterate that a Counter - Claim is considered an independent action. Thus, the withdrawal or dismissal of the main claim does not automatically affect the prosecution of the Counter - Claim. Therefore as my brother Justice Yano previously stated the withdrawal of the suit by the Plaintiff did not in any way affect the Interested Party's Counter - Claim.

28. For the above stated reasons, therefore, I discern that the Counter - Claim filed by the Interested Party herein has all the legal validity and effectiveness. Thus, I shall proceed to examine the Interested Party's Notice of Motion application on amendment of its Statement of Defence and Counter - Claim.

Issue No. b). Whether the Interested party can be granted leave to amend his Defence and Counter claim in terms of the draft amended Defence and Counter Claim annexed hereto

29. Under this sub-title, this Honourable Court will examine the amendment of the Defence and Counter claim. Amendment of pleadings are anchored on the provisions of Order 8 Rule 5(1) of the Civil Procedure Rules which provides;

“5(1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to cost or otherwise as are just.”



30. Further Order 8 Rule 3(1) and (5) of the *Civil Procedure Rules*, 2010 which provides as follows:-

- “ 1. subject to Order I, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such as it may direct, allow any party to amend his pleadings.
5. An amendment may be allowed under sub rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as the cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.....”

31. This provision of the law gives the court the legal mandate to allow amendment of pleadings at any stage of the proceedings on such terms that may be just. The amendment sought in this case is due to the recent developments since this case was filed in year 2008 have altered the character of the case by the Applicant and need to be brought to the attention of the court by amending the Defence and Counter - Claim.

32. In the case of “*Rubina Ahmed & 3 others -Versus - Guardian Bank Ltd (Sued in its capacity as a successor in Title to First National Finance Bank Ltd)* [2019] eKLR” the Court of Appeal while dismissing an appeal relied on *Halsbury’s Laws of England*, 4th Ed. (re-issue), Vol. 36(1) at paragraph 76, which stated the following about amendments of pleadings:-

“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”. [Emphasis added].

33. Principally, the court has the power to amend pleadings which power can be exercised at any stage of the proceedings before judgment as per Bullen and Leake & Jacob's Precedents of Pleading, 12th Edition, which provides as follows concerning amendment of pleadings:

“...power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action...”



34. Similarly, in *Halsbury's Laws of England*, 4th Ed. (re-issue), Vol. 36(1) at paragraph 76, state the following about amendments of pleadings: -

“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”.

35. In the instant case, the Interested Party/Applicant sought for leave to amend the his defence and counter claim being that on 5th November, 2020, the 1st Defendant applied for leave to file Defence to the Counter - Claim, by the interested party and file witness statements, list of documents and list of witnesses which application was allowed on 3rd June, 2021. The Interested Party/Applicant was not granted a corresponding leave to file fresh documents. The recent developments since this case was filed in 2008 have altered the character of the case by the Applicant and need to be brought to the attention of the court by amending the Defence and Counterclaim.

36. Under the provision of Order 8, Rule 3 of the *Civil procedure Rules*, 2010, the court has unfettered discretion to allow an amendment of pleadings. It is trite that the discretion ought to be exercised judiciously and not capriciously. Courts should freely allow amendments but this discretion should be exercised judiciously. Thus, for these reasons, I discern that the prayer for leave to amend the Interested Party's pleadings is merited and hence be hereby allowed.

Issue No. c). Whether the Interested Party can be granted leave to the interested Party/Applicant to file supplementary list of witnesses, Statements and documents?

37. Under this sub-title the Honourable Court shall examine if the Interested Party has made out a case for the grant of leave to file supplementary list of witnesses, statements and documents. In legal proceedings, the concept of “leave to file” refers to seeking permission from the court to take a specific action. In this case, the Plaintiff in the matter of “Hussein Hasanali Jivani – Versus - Merali Jivra Tajdin & Anor (Civil Suit No. 471 of 2015)” sought leave to file supplementary witness statements.

38. There are three principles that this Honourable Court will consider in granting leave:-

- a. Seriousness and significance of the failure to comply with rules or court orders.
- b. Triviality of the failure.
- c. Efficient progress of litigation, even if no specific prejudice occurred.

39. According to the Interested Party, on the 11th November, 2008 the Interested Party/Applicant entered an agreement of sale with the 2nd Defendant herein, Joel Titus Musya t/a Makuri Enterprises to purchase all that land known as LR 2812/I/MN Shanzu, the suit property, after being the successful bidder at a Public Auction and paid the required deposit. Annexed in the affidavit and marked JMK 1. At the fall of the hammer, property in the suit land passed to the Applicant/Interested Party. Before completing the transaction, the Plaintiff filed this suit on 13th November, 2008 seeking inter alia for the nullification of the charge document dated 4th September, 1997 in respect of LR 2812/1/MN against the Defendant, restraining it from selling, or otherwise alienating, mortgaging, or otherwise dealing



with LR No.2812/I/MN and the account between the parties be declared as settled or if not the debt be recovered through a civil suit.

40. Upon filing the said suit, the Plaintiff obtained successive orders of injunction both before this court and in the Court of Appeal, barring the Interested Party/Applicant from proceeding to complete the sale and register his interest with the last ruling being delivered on 22nd April, 2016 by the Court of Appeal, dismissing the appeal by the Plaintiff. In the meantime, *vide* a Notice of motion dated 20th January, 2009, the Interested Party/Applicant sought leave to be joined into the suit, which application was granted on 30th March, 2009 and on 4th May, 2009, and he filed Defence and Counter - Claim.
41. The trial on the Interested Party's counter claim is at its early stages and no prejudice will be caused to the Plaintiff. The other parties to the suit will have an opportunity to interrogate the said evidence at the trial. No prejudice will be caused to the other parties to the counter claim who can file additional statements should she deem it necessary to do so. The Court has considered and weighed the matter of prejudice to the parties in the suit and finds that no prejudice will be suffered because the hearing of the Counter claim had not commenced by the time of the filing of the motion to amend the defence and counter claim filed in 2009.
42. In the interest of justice and guided by Article 50 of the Constitution read together with the provision of Article 159 (2) (d) of the Constitution of Kenya, 2010 and to maintain fair play in the hearing of the case. Therefore, I find the prayer to be merited and thus allow it.

Issue No. d). Who will bear the Costs of Notice of Motion application dated 18th May, 2022.

43. It is now well established that the issue of Costs are at the discretion of the Court. The Black Law Dictionary defines cost to mean:-

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”

44. In other words, Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 of the Civil Procedure Act, Cap. 21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) of the Civil Procedure Act provides as follows;-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

45. A careful reading of the provision of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18th Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise.



46. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs of suit but also costs of application in suit as described by Mulla (*supra*) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book *Judicial Hints on Civil Procedure*, 2nd Edition, 2005 at 95 notes that the words ‘the event’ means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under section 27 remains at the discretion of the court.
47. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In the case of:- “*Morgan Air Cargo Limited – Versus - Everest Enterprises Limited* [2014] eKLR” the court noted that;
- “The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”
48. In this case, as this Honourable Court has opined above, the Applicant has convinced the Honourable Court to grant the prayers sought in the notice of motion application, therefore he shall have to costs of the application.

V. Conclusion & Disposition

49. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, this court arrives at the following decision and makes below order:-
- a. That the Notice of Motion application dated 18th May, 2022 is found to have merit is hereby allowed in its entirety.
 - **b.* That this Honourable Court be and hereby grants leave to the Interested Party/ Applicant within the next seven (7) days from the date of this Ruling to amend, file and serve the Amended Defence and Counter Claim in terms of the draft amended Defence and Counter Claim annexed hereto.
 - c. That similarly this Honourable be and hereby grants leave to the Interested Party/Applicant to file and serve supplementary list of witnesses, Statements and documents.
 - d. That an order granted to the Plaintiff to have corresponding leave to file and serve Amended Plaintiff and Reply to the Amended Defence and Defence to the Amended Counter Claim within 7 days from the date of service accordingly.
 - e. That for expediency sake, this matter be fixed for hearing on 26th September, 2024. There shall be a mention on 17th July, 2024 for conducting a Pre – Trial conference pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010.
 - f. That the costs of the Notice of Motion application dated 18th May, 2022 are awarded to the Interested Party/ Applicant



IT IS SO ORDERED ACCORDINGLY

**RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT
MOMBASA THIS 2ND DAY OF MAY 2024.**

**HON. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT
MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. No appearance for the Plaintiff/Respondent.
- c. Mr. Waweru for the 1st Defendants/Respondents.

