



Ndegwa & 6 others v Registered Trustees of the Nyahururu Jamia Mosque (Environment and Land Appeal E015 of 2022) [2023] KEELC 22626 (KLR) (27 July 2023) (Ruling)

Neutral citation: [2023] KEELC 22626 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT AND LAND APPEAL E015 OF 2022**

**YM ANGIMA, J
JULY 27, 2023**

BETWEEN

WILSON NDEGWA & 6 OTHERS APPELLANT

AND

**REGISTERED TRUSTEES OF THE NYAHURURU JAMIA
MOSQUE RESPONDENT**

RULING

1. The material on record shows that on 13.06.2023 the parties agreed to have the appeal withdrawn but they did not agree on the issue of costs. It was consequently agreed that the court shall determine the issue of costs of the withdrawn appeal.
2. It was further agreed by the parties that they shall file and exchange written submissions on the issue of costs within 28 days with effect from 13.06.2023. By the time of preparation of the ruling, however, none of the parties had filed submissions.
3. The principles applicable to the award of costs of an action or proceeding are governed by Section 27(1) of the *Civil Procedure Act* (Cap. 21) and case law. Section 27 of the *Civil Procedure Act* (Cap. 21) stipulates as follows:

“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.”

4. Those principles were reiterated in the case of *Hussein Janmohamed and Sons Ltd v Twentsche Overseas Trading Co. Ltd* [1967] EA 287 in which it was held that:
 - i. The general rule is that costs should follow the event and the successful party should not be deprived of them except for good cause;
 - ii. It was incumbent upon the unsuccessful respondent to show good cause;
 - iii. There were no proper grounds for the exercise of the court’s discretion in depriving the successful appellant of his costs and the order made was arbitrary and perverse.
5. In the case of *Party of Independent Candidates of Kenya & another v Mutula Kilonzo & 2 others* [2013] eKLR the court quoted the following passage on costs by Murray CJ in *Levben Products v Alexander Films (1A) (Pty) Ltd* 1957(4) SA 225 (SR) at 227:

“It is clear from authorities that the fundamental principle underlying the award of costs is twofold. In the first place the award of costs is a matter in which the trial judge is given discretion..... But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at..... In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”
6. Similarly, in the case of *David Kiptum Korir v Kenya Commercial Bank & another* [2021] eKLR, it was held, inter alia, that:

“Notably, it is clear that a successful Defendant, who after all is brought into court against his/her will, can only be deprived of his/her costs when it is shown that his conduct, either prior to or during the course of the suit has led to litigation which but for his own conduct might have been averted.....”
7. Finally, the *Halbury’s Laws of England*, 4th Edition (Re-Issue) 2010 Vol. 10 paragraph 16 states that:

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”
8. The court has noted that the parties withdrew the appeal by consent following out of court negotiations. The court has taken into account the fact that the appeal was withdrawn in its early stages before directions could be given under Order 42 rules 11 & 13 of the *Civil Procedure Rules, 2010*. The court has further noted that the Appellants’ application for interim orders dated 08.09.2022 was never prosecuted and no response thereto were ever filed by the Respondents. The appeal appears to have been withdrawn largely because it had been overtaken by events.



9. The court is of the opinion that the above notwithstanding, the Respondents are still entitled to costs of the withdrawn appeal since there is no good reason why they should be deprived of costs as the successful parties in the appeal. However, they shall not be entitled to full costs because the appeal was withdrawn before hearing and during its infancy. The court is thus of the view that the Respondents are entitled only to one third (1/3) of the costs of the appeal.
10. The upshot of the foregoing is that the court finds and holds that the Respondents are entitled to costs of the withdrawn appeal. However, they shall be awarded only one third (1/3) of the costs for reasons given in the ruling. Accordingly, the Respondents are hereby awarded one third (1/3) of the costs of the appeal.

Orders accordingly.

RULING DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 27TH DAY OF JULY, 2023.

In the presence of:

Ms. Kwamboka holding brief for Mr. D.W. Mbugua for the Appellants

Mr. Mathea for the Respondents

C/A - Carol

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Y. M. ANGIMA

JUDGE

