



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL APPEAL NO 3 OF 2014**

**Biashara Sacco Society Ltd.....1<sup>st</sup> Appellant**

**Joseph Kamau Njamuku.....2<sup>st</sup> Appellant**

**Rose W. Kimaru.....3<sup>rd</sup> Appellant**

**Versus**

**Dickson Miricho Kihagi.....Respondent**

**RULING**

On 30<sup>th</sup> August 2016, Counsel for the Appellants herein informed the court that this appeal had been overtaken by events in that the suit in the lower court which gave rise to this appeal had been reinstated rendering this appeal unnecessary. As a consequence counsel applied to withdraw this appeal, which application was not opposed, but the Respondents counsel insisted on costs stating that the Respondent incurred costs in this appeal and since the parties could not agree on costs, the issue was left to the court to determine, hence this Ruling.

Having taken into account the rival arguments advanced by both counsels, it's important at the outset to reproduce below the provisions of section 27 of the Civil Procedure Act<sup>[1]</sup> which provides as follows:-

*27 (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 give all the necessary directions for the purposes aforesaid; and the fact that the court 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 direct.*

The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that *costs follow the event*. Secondly, it's necessary to examine the law and judicial pronouncements on the issue of determining costs.

It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the

case.<sup>[2]</sup> Thus, it is imperative to bear in mind the various steps taken by the parties in this case so as to appreciate the trouble taken by both parties since the appeal was filed. The record shows that the memorandum of appeal was filed on 11<sup>th</sup> February 2014, that the Respondents advocates were served on 28<sup>th</sup> March 2014 and on 21<sup>st</sup> May 2014 the Appellants counsel invited the Respondents counsel to fix a hearing date. Of course, this step was premature since the appeal had not been admitted and to date the appeal has not been formally admitted, hence directions have not been taken.

On 13<sup>th</sup> April 2016, the Respondents advocates applied to have this appeal dismissed for want of prosecution prompting the Appellants counsel to file grounds of opposition describing the application as bad in law and also stated that civil case no. 11 of 2013 which gave rise to the appeal had been reinstated. There were 4 court appearances for the hearing of the said application, the last one being the date stated above when the appeal was marked as withdrawn.

I find useful guidance in the following passage from the *Halsbury's Laws of England*;<sup>[3]</sup>

*“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”* (Emphasis added).

Writing on the same subject **Mr. Justice (Retired) Kuloba**<sup>[4]</sup> stated:-

*“Costs are {awarded at} the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise..”*

To my mind there appears to be no clear or prescribed definition of what constitutes “good reasons” that will justify the courts departure, in awarding costs, from the general rule that ‘costs follow the event.’ Discussing the same point, the supreme court of Kenya in the case of *Jasbir Singh Rai & Others vs Tarlochan Rai & Others*<sup>[5]</sup> observed that:

*“in the classic common law style, the courts have to proceed on a case by case basis, to identify “good reasons” for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs.....”*

The reason for the above reasoning is that in public litigation, a litigant is usually advancing public interest as opposed to personal gain.

In *Party of Independent Candidate of Kenya vs Mutula Kilonzo & 2 others*,<sup>[6]</sup> citing two leading decisions of the subject the court held *inter alia* that:-

*“It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. 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 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.”*

In my view section 27 of the Civil Procedure Act<sup>[7]</sup> provides the general rule which ought to be followed unless for good reason to be recorded. The said section in my view does not make distinctions between determinations made by consent or on courts own determination or withdrawals. This position is well stipulated by **Richard Kuloba** in the earlier cited book where he observed that:-

“the fact that the unsuccessful party did not contest the case is not in itself a ground for refusal of costs but it is a factor that can be taken into account if other good reason exists” (Emphasis added).

However, the only consideration is the “event” as was held in the supreme court of Uganda in *Impressa Ing Fortunato Federice vs Nabwire*<sup>[8]</sup> where the court stated:-

*“The effect of section 27 of the Civil Procedure Act is that the Judge or court dealing with the issue of costs in any suit, action, cause or matter has absolute discretion to determine by whom and to what extent such costs are to be paid; of course like all judicial discretions, the discretion on costs must be exercised judiciously and how a court or judge exercises such discretion depends on the facts of each case. If there were mathematical formula, it would no longer be discretion... while it is true that ordinarily, costs should follow the event unless for some good reason the court orders otherwise, the principles to be applied are- (i) under section 27 (1) of the Civil Procedure Act, costs should **follow the event unless the court orders otherwise**. This provision gives the judge discretion in awarding costs but that discretion has to be exercised judicially. (ii), A successful party can be denied costs if it is proved that but for his conduct the action would not have been brought.. It is trite law that where judgement is given on the basis of consent of parties, a court may not inquire into what motivated the parties to consent or to admit liability.....”*

Also of useful guidance is the decision in the Ugandan case of *Re Ebuneiri Waisswa Kafuko*<sup>[9]</sup> where the court held as hereunder:-

*“The judge in his discretion may say expressly that he makes no order as to costs and in that case each party must pay his own costs. If he does not make an order as to costs, the general rule is that he shall order that the costs follow the event except where it appears to him in the circumstances of the case some other order should be made as to the whole or any part of the costs. But he must not apply this or any other general rule in such a way as to exclude the exercise of the discretion entrusted to him and the material must exist upon which the discretion can be exercised. The discretion, like any other must be exercised judicially and the judge ought not to exercise it against the successful party except for some reason connected with the case. It is not judicial exercise of the judge’s discretion to order a party who was completely successful and against whom no misconduct is even alleged to pay costs.”*

To my mind, in determining the issue of costs, the court is entitled to look at *inter alia* (i) the conduct of the parties, (ii) the subject of litigation, (iii) the circumstances which led to the institution of the proceedings, (iv) the events which eventually led to their termination, (v) the stage at which the proceedings were terminated, (vi) the manner in which they were terminated, (vii) the relationship between the parties and (viii) the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of the Constitution.<sup>[10]</sup> In other words the court may not only consider the conduct of the party in the actual litigation, but the matters which led to the litigation, the eventual termination thereof and the likely consequences of the order for costs.<sup>[11]</sup>

I have considered the rival arguments advanced by the parties and the above considerations. Just like in cases whereby the parties enter into a consent, the court does not go further to inquire the reasons for the consent, this court is not bound to dig into the reasons why the Appellant withdrew the case, nor can an adverse inference be made against the Appellant while determining costs. The only relevant issue is that it had the effect of resolving this case and *the implication of the withdrawal on the legal position that costs follow the event unless this court for reasons to be recorded orders otherwise*. The court is only interested in determining whether or not the Appellant or the respondent is entitled to costs for the steps taken by both parties as enumerated earlier.

The question that arises is whether or not the act of withdrawing the appeal was an event within the phrase **“costs follow the event.”** It is not in dispute that as at the time of the withdrawal, the parties had taken the steps earlier on enumerated raising the question whether the Respondent is entitled to costs for the trouble hitherto undertaken.

Did the filing of the appeal and the various steps taken by the parties and the resolution of this appeal by withdrawing as aforesaid amount to an event as envisaged under section 27 CPA cited above. Justice (Retired) Richard Kuloba<sup>[12]</sup> in the earlier cited book states as follows:-

*“The words “the event” mean the result of all the proceedings to the litigation. The event is the result of the entire litigation. It is clear however, that the word “event” is to be regarded as a collective noun and is to be read distinctively so that in fact it may mean the “events” of separate issues in an action. Thus the expression “the costs shall follow the event” means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it. An issue in this sense need not go to the whole cause of action, but includes any issue which has a direct and definite event in defeating the claim to judgement in the whole or in part”*

At page 101 of the same book, Kuloba authoritatively states as follows:-

*“The law of costs as it is understood by courts in Kenya, is this, that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part-no omission or neglect, and no vexatious or oppressive conduct is attributed to him, which would induce the court to deprive him of his costs-the court has no discretion and cannot take away the plaintiffs right to costs. If the defendant, however innocently, has infringed a legal right of the plaintiff, the plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course”*

To my mind, the Respondents’ actions enumerated above show that they are not guilty of any misconduct. It matters not that the case was withdrawn as stated earlier, what matters is whether the Respondents are entitled to costs for the trouble undertaken by them since they were served with the appeal. In this connection, I am guided by the decision in the case of *Orix ( K) Limited vs Paul Kabeu & 2 others*<sup>[13]</sup> where it was held *inter alia*:-

*“.....the court should have been guided by the law that costs follow the event, and the plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied costs or the successful issue was not attracting costs. None of the deviant factors are present in this case and the court would still have awarded costs to the plaintiff, which I do.”*

Considering the entire chain of events from filing this appeal up to the withdrawal, and bearing in mind the fact that the appeal had not been admitted and directions had not been taken, and considering the reasons why the appeal was withdrawn, I find no reason to penalize the Appellants by ordering them to pay costs to the Respondents. I hereby order that each party shall bear its own costs for this appeal.

Orders accordingly

Right of appeal 30 days

Signed, Delivered and Dated at Nyeri this 21<sup>st</sup> day of September 2016

**John M. Mativo**

**Judge**

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[1] Cap 21, Laws of Kenya

[2] Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & others {2014} eKLR

[3] 4<sup>th</sup> Edition ( Re-issue), {2010}, Vol.10. para 16

[4] Judicial Hints on Civil Procedure, 2<sup>nd</sup> Edition, ( Nairobi) Law Africa) 2011, page 94

[5] Supra note 4

[6] HC EP No. 6 of 2013

[7] Supra

[8] {2001} 2 EA 383

[9] Kampala HCMA No. 81 of 1993 cited by Odunga J in Pet No 466 of 2014 cited above, see note 11

[10] See Odunga J in JR No. 466 of 2014 between Republic vs Kenya National Highway Authority & Others , Ex parte Kanyingi Wahome

[11] See Hussein Janmohamed & Sons vs Twentsche Overseas Trading Co. Ltd {1967} EA 287 and Mulla 12<sup>th</sup> Edition AT Psage 150

[12] Richard Kuloba, Judicial Hints on Civil Procedure, 2<sup>nd</sup> Edition, page 99

[13] {2014}eKLR