



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

**AT KITALE**

**Civil Appeal 1 of 2007**

**SHAH RAMJI PUNJA.....APPELLANT**

**VERSUS**

**PETER WANJALA KILWAKE.....RESPONDENT**

**RULING**

On 29/3/2007, the appellant, **SHAH RAMJI PUNJA**, filed a Notice of Withdrawal of Civil Appeal No.1 of 2007.

Following the said withdrawal of that appeal, the Respondent, **PETER WANJALA KILWAKE**, brought an application through which he asks this court to award him the costs of that appeal.

According to the respondent, he was served with Civil Appeal No.1 of 2007, on 12/3/2007. After the appellant had filed and served that appeal, he made an application for stay of execution. However, the respondent successfully opposed that application.

Thereafter, the appellant applied for enlargement of time to file an appeal, and the court did grant his plea. The appellant then filed Civil Appeal No.12 of 2007, which is still pending.

The respondent now asks this court to award him the costs of Civil Appeal No.1 of 2007. His reason for submitting that he is entitled to those costs is that costs follow the event. He also submitted that instruction fees fell due upon service of the Memorandum of Appeal, and upon his participation in the said appeal, however minimal.

The respondent also pointed out that it was not right for him to bear the brunt of the appeal which was withdrawn. His view was that the appellant should not be permitted to benefit from the incompetence of the appeal which they had withdrawn.

In answer to the application, the appellant submitted that costs were not automatically payable. In his view, the respondent had an obligation to prove that he was entitled to costs.

The appellant also said that pursuant to Order 24 rule 1 of the Civil Procedure Rules, a party was

entitled to withdraw a suit at any time before it was set down for hearing. It was in those circumstances that the appellant says he withdrew Civil Appeal No.1 of 2007, before it was set down for hearing. Therefore, as far as the appellant was concerned, he did not need to have withdrawn the appeal with an order for costs.

The appellant submitted that pursuant to the provisions of Order 24 rule 2 of the Civil Procedure Rules, costs shall be payable only if a matter is set down for hearing.

It was also the appellant's submission that once the court granted him leave to appeal out of time, and after he then filed Civil Appeal No.12 of 2007, that said appeal was the same as Civil Appeal No.1 of 2007. Therefore, the appellant feels that if he is ordered to pay costs now, and if he were ordered to pay costs at the conclusion of the pending appeal, he would have had to pay costs twice.

In any event, the appellant holds the view that the respondent undertook no steps in Civil Appeal No.1/2007, which would warrant an award of costs. It is said that the respondent incurred no expenses.

In my reading of Order 24, I find that it addresses the withdrawal, discontinuance and adjustments of suits. The operative word therefore is "**suits**".

In effect, the said order does not appear to have anything to do with "**appeals**".

And, in the matter before me, the appellant did not withdraw a suit. He withdrew an appeal.

In section 2 of the Civil Procedure Act "**suit**" is defined as: -

***" all civil proceedings commenced in any manner prescribed."***

In contrast to suits, appeals always arise from orders, decrees or judgments made in suits. In other words, civil proceedings of any kind cannot be commenced by way of an appeal.

I therefore hold the view that Order 24 of the Civil Procedure Rules has no application to appeals.

In this case, the appeal was lodged in relation to the judgment and decree of the Hon. Mrs. P. Gichohi P.M, Kitale, in PMCC NO. 681/2004. As the learned trial magistrate had given a hearing to the parties, and thereafter delivered her verdict, the appellant could not have withdrawn the suit.

But even if the provisions of Order 24 of the Civil Procedure Rules did apply to this case, it must be noted that pursuant to Rule 3, the registrar would be required to sign a judgment for the costs of a suit that had been withdrawn, provided that the defendant requested him in writing, to do so.

As regards instruction fees, I find that it is not for me to determine at this stage, whether or not the same had become payable. That exercise would need to be addressed first by the learned taxing officer, in the event that I should hold that costs were payable.

My role, in this application, is to determine whether or not costs are payable, as a matter of principle, as applied to the facts before me.

Section 27 (1) of the Civil Procedure Act provides 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.***

Herein, the appellant withdrew Civil Appeal No.1/07. He then filed Civil Appeal No.12/07. First, there is no way that those two can be one and the same. One appeal stands withdrawn, whilst the other is alive. If, as the appellant says, the two are the same, then it would mean that by filing Civil Appeal No.12/07, he now has two appeals, or that it was actually superfluous.

By the appellant's own words, he had;

***“ withdrawn wholly the Memorandum of Appeal dated 19/2/2007 in this suit and has discontinued any proceedings in court against the Respondent thereof.”***

Obviously therefore, Civil Appeal No.12 is a new and different appeal from the one that had been withdrawn and wholly discontinued.

Following the withdrawal of that appeal, costs thereof should follow the event, unless, for good reason, the court should order otherwise.

As far as I am concerned, I find no good reason to order otherwise. I say so because there is an even chance as between the appellant and the respondent, that one of them will be ordered to pay costs of Civil Appeal No.12/07. If the appellant is successful, he will probably be awarded costs. But if the respondent is ultimately successful, he will probably be awarded costs of that appeal.

Now, just because the appellant may end up paying costs of that appeal too, in the event that he lost, is not reason enough to shield him from paying costs of Civil Appeal No.1/07.

In the exercise of the inherent power of this court, I do now order that the appellant shall pay to the respondent, the costs of the appeal that has been withdrawn. The appellant will also pay the costs of the application dated 22/6/2007.

Dated and Delivered at Kitale, this 20<sup>th</sup> day of November, 2007.

**FRED A. OCHEING**

**JUDGE**