



**Macharia v NIC Bank Limited (Civil Appeal 521 of 2018)  
[2025] KEHC 33 (KLR) (Civ) (13 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 33 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 521 OF 2018**

**RC RUTTO, J**

**JANUARY 13, 2025**

**BETWEEN**

**STEPHEN GAKERE MACHARIA ..... APPELLANT**

**AND**

**NIC BANK LIMITED ..... RESPONDENT**

**RULING**

1. On 24<sup>th</sup> June 2024 the Court directed the advocates on record to consult with their respective clients with a view of recording a possible settlement on costs. It is apparent that the parties failed to reach any agreement. Each party was thus directed to file their respective submissions on who should bear the costs of the appeal after it was withdrawn.
2. The facts of the case are that the appellant, upon being dissatisfied with the ruling of the lower court in Nairobi CMCC 695 of 2016 *NIC Bank Limited v Stephen Gakere Macharia*, lodged this appeal. Accordingly, he filed his appeal and record of appeal on 4<sup>th</sup> March 2022 and the appeal was admitted for hearing on 29<sup>th</sup> June 2022. That before the appeal could be heard, the parties reached an agreement which compromised and settled the appeal.
3. The appellant's position is that on 26<sup>th</sup> September, 2023 the Respondent directly reached out to him seeking to discount his indebtedness to Kshs 1,238,400 as full and final settlement in place of Kshs 2,476,643 as set out in the appeal. Following this, the appellant settled the debt hence abandoning the appeal leading to its withdrawal. That this agreement was reached between the parties without the involvement of their respective advocates and hence the appeal was not withdrawn to avoid settling the Respondent's debt.
4. The appellant urged the court to exercise its discretion and find that the event had not crystalized and that each party should bear its costs. In urging this, reference was made to the Supreme Court decision



in Nairobi Petition 014 (021) of 2021 *Sonko v Clerk, County Assembly of Nairobi & 12 others* (Petition 14 (E021) of 2021(2022)KESC 17 (KLR) (19 May 2022)(Ruling). Also relied upon was the case of Nairobi Civil case 15 of 2016 *Munyaka Kuna Company Limited v Herman Kimani & 6 others* [2018] eKLR where it was held that that a consent cannot be interpreted to mean that one party has succeeded in a suit. Hence, it would be just for the parties to bear their own costs.

5. In response, the Respondent stated that the appellant had mistaken that the letter dated 26<sup>th</sup> September 2023 was an all-inclusive settlement of the decretal sum inclusive of the appurtenant costs. It was their submission that the appellant filed the appeal and to date (six years later) failed to file and serve a complete record of appeal. That the appellant took advantage of the instant appeal to frustrate execution proceedings against him and kept the respondent at arm's length.
6. It was its further submission that the letter dated 26<sup>th</sup> September 2023 was a settlement proposal which has not been honoured to date. That the appellant did not act in good faith as he ought to have instructed his advocates on record to draft the requisite consent which would have seen the matter settled and the modalities of withdrawing the appeal agreed upon amicably. Further, that the costs should follow the event and the appellant having dragged the respondent to the appellate court must be condemned to meet the respondent's reasonable party to party costs. In urging this, they relied upon the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & others* [2014] eKLR that costs are to compensate the successful party for the trouble taken in prosecuting or defending the case. Also relied upon was the book *Judicial Hints on Civil Procedure*, 2nd Edition, 2011 by Richard Kuloba at page 101 to urge that the issue of costs cannot be defeated and that this Court should proceed and make an award for reasonable costs in light of the withdrawal of the appeal.
7. Section 27 of the *Civil Procedure Act* provides that costs should follow the event. In *Reid, Hewitt & Co v Joseph*, AIR 1918 Cal 717 and *Myres v Defries* (1880) 5 Ex D 180, the House of Lords noted that: -

“The expression ‘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 where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.”

8. In the case of *DGM v EWG* [2021] eKLR Civil Case No E002 of 2021, the court while addressing the issue of costs held as follows;

“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 *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR the court noted that;

- i. 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.”



9. In that case, the court further provided the factors that should be taken into consideration when determining the costs of suit. This include:
  - a. the conduct of the parties
  - b. the subject of litigation
  - c. the circumstances which led to the institution of the proceedings
  - d. the events which eventually led to their termination
  - e. the stage at which the proceedings were terminated
  - f. the manner in which they were terminated
  - g. the relationship between the parties and
  - h. The need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of the *Constitution*.
  - i. Noteworthy, the list is not exhaustive. In other words, the court must be guided not only by the conduct of the parties in the actual litigation, but also other matters including likely consequences of the order for costs.”
10. In this instant, the appeal was withdrawn on 30<sup>th</sup> May 2024 when the parties appeared before the Deputy Registrar (DR). Upon withdrawal, the Respondent prayed for costs and the DR directed that the matter be placed before the Judge for further directions.
11. This court notes that the basis of the withdrawal of the appeal was that the parties had reached a settlement and the appellant was no longer interested in the appeal. It is noted that vide a letter dated 5<sup>th</sup> June 2024 addressed to the DR, counsel for the appellant informed the court that the Respondent herein vide a letter dated 26<sup>th</sup> September 2023 discounted the claim which formed the basis of the appeal from Kshs 2,476,643/- to Kshs 1,238,400/= with a view of settling the claim. The court was also informed that the appellant had paid the Kshs 1,238,400/- hence the appeal had been fully compromised. The Appellant Counsel attached a copy of the said letter dated 26<sup>th</sup> September 2023.
12. A perusal of the letter shows that indeed letter is from the Respondent bank and is addressed to the Appellant in person. It makes reference to the various correspondences which have not been provided. The letter proceeds to inform the Appellant that the bank has agreed to discount the debt and proceeds to set out the terms and conditions attached to the discount. It also presents an opportunity for the Appellant to accept the said set terms and conditions. This court also notes that the letter is signed off by the authorized personnel of the Respondent Bank and the terms thereof, have been agreed to by the Appellant.
13. From this set of occurrences, the Court discerns that indeed a compromise was reached after the respective parties engaged without the aid and assistance of their respective advocates on record. This court notes of the Respondent’s assertion that the appellant has not made good the settlement proposal thereby lacking in good will, and finds that not only has evidence not been provided to that effect but also that it is not an issue for determination before the court to warrant addressing. Even if I were to address it, this is something that the respective advocates would have perhaps picked up, had they been involved as it stems from an ambiguity in the contents of the letter by the respondent containing the settlement proposal. As it stands, the appeal is withdrawn but for the limited issue of costs.



14. Flowing from the above set of events it is clear that the parties were able to settle their dispute and had the appeal withdrawn. Should a party then be penalized to pay costs? I draw reference from the case of Rufus Njuguna Miringu & Another v Martha Murithi & 2 Others (*supra*) quoted by the counsel for the appellant where it was held that;

“a. Consent cannot be interpreted to mean that one of the other party has succeeded in a suit. Even if in the present case a settlement has worked out in the defendants favour, the successful determination of the dispute is still attributable to both the plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> defendants..... In the circumstance, it would be just for the parties to bear their own costs of the proceedings.”

15. Likewise in this instance, this appeal was withdrawn as a consequence of the actions of both the appellant and the respondent as stated in the earlier paragraphs of this ruling. Both parties herein succeeded, the appellant’s claim which formed the basis of the appeal was reduced and the respondent was able to recover part of the appealable amount and the dispute before court compromised. It would therefore be unjust for this court to penalize any of the parties to pay the costs of the other. Thus, in exercise of the discretion to award costs, I find it prudent and fair for each party to bear its own costs of the appeal.

Orders accordingly.

**RHODA RUTTO**

**JUDGE**

**DELIVERED, DATED AND SIGNED THIS 13<sup>TH</sup> DAY OF JANUARY 2025**

For Appellant:

For Respondent:

Court Assistant:

