



REPUBLIC OF KENYA



**Elegwa & another v Wachira & another (Civil Appeal E1316 of 2023)
[2025] KEHC 2270 (KLR) (Civ) (13 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2270 (KLR)

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

CIVIL

CIVIL APPEAL E1316 OF 2023

LP KASSAN, J

FEBRUARY 13, 2025

BETWEEN

ANNET VIKE ELEGWA 1ST APPELLANT

SAMUEL ADAGI ELEGWA 2ND APPELLANT

AND

JOYCE WANGUI WACHIRA 1ST RESPONDENT

SIMON MAINA NGUGI 2ND RESPONDENT

RULING

1. The Appellants herein filed a Memorandum of Appeal dated 28.11.2023. The matter was mentioned before the Deputy Registrar Hon. Wambo on 15.05.2024 wherein there was an appearance by the Counsel for the Respondents. A further mention for 11.06.2024 was given wherein both parties were present. The Appellant sought to withdraw the Appeal vide a notice dated 30.05.2024 with no orders as to costs. The same was opposed by the 2nd Respondent necessitating the file to be placed before this court to address the issue of costs. The 1st Respondent never entered an appearance.
2. The court directed that parties submit on the issue of costs.

Appellants' submissions

3. The Appellant submitted that they had a right to withdraw the appeal as it had not been set down for hearing, as such the 2nd Respondent was not entitled to costs. That under Order 25 (1) of the *Civil Procedure Rules 2010*, a plaintiff can discontinue a suit before it is set down for hearing. Further, awarding of costs was discretionary which must be exercised judicially. The Appellants relied on factors to be considered while awarding costs as held in the case of *fDGMvEWG* (2021) eKLR which included



the conduct of parties, the subject of litigation, the circumstances which led to the institution of the proceedings, the events which eventually led to their termination, the stage at which the proceedings were terminated, the manner in which they were terminated, the relationship between the parties and the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) of the Constitution.

4. That the 2nd Respondent's Advocate did not do much work on the case, having only filed a notice of address of service and attended court once before withdrawal. That there was no reason to warrant the court to exercise its discretion to award costs as such prayed the court not to make any orders as to costs.

2nd Respondent's submissions

5. The 2nd Respondent submitted that he had no objection to the withdrawal of the matter but sought costs as there was attendance in court on several dates (15.05.2024, 30.05.2024, 11.06.2024 and 15.10.2024). That under section 27 of the Civil Procedure Act costs follow the event unless there was a good reason otherwise and relied on the case of Joseph Oduor Anodev Kenya Redcross Society (2012) eKLR. That the Appellants failed to attend court which led to unnecessary costs and inconvenience thus justifying the award of costs of the appeal.

6. I have considered the submissions filed herein.

7. The issue for determination herein is singular;

Whether the 2nd Respondent should be awarded costs on the withdrawal of the appeal.

8. Section 27 of the Civil Procedure Act on costs reads:-

“(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.

“(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

9. The general rule is that costs follow the event but where the court feels that it has a good reason to depart from the rule then it must give reasons. In the case of Republic v Kenya Airports Authority &/ 4 Others Ex-Parte Transglobal Cargo Centre Limited (2015) eKLR, the court stated:

“10. In determining the issue of costs, the court is entitled to look at inter alia the conduct of the parties, the subject of litigation, the circumstances which led to the institution of the legal proceedings, the events which eventually led to their termination, the stage at which the proceedings were terminated, the manner in which they were terminated, the relationship between the parties and the need to promote reconciliation amongst the disputing parties



pursuant to Article 159 (2) (C) of *the Constitution*. In other words the court may not only consider the conduct of the party in the actual litigation, but the matters which led up to litigation, the eventual termination thereof and the likely consequences of the order for costs. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* (1967) EA 287 and Mulla (12th Edn) P.150.

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12. When all things are equal, however, the only consideration is the “event”. As was held by the Supreme Court of Uganda in *Impressa Ing Fortunato Federicev Nabwire* (2001) 2 EA 383:

“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 a 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 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* (Chapter 65), costs should follow the event unless the court orders otherwise. This provision gives the judge discretion in awarding costs but that discretion must be exercised judiciously.
- (ii) A successful party can be denied costs if it proved that but for his conduct the action would not have been brought. The costs should follow the event even when the party succeeds only in the main purpose of the suit.....It is trite law that where judgment 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 since admission of liability implied acceptance of the particulars of injuries enumerated in the plaint and the evidence in favour of the Respondent, including loss of hearing and speech.”

10. The withdrawal herein was not by consent of the parties and was done before the matter could be determined in the normal manner. The withdrawal of the matter amounts to a determination in favour of the Respondents and pursuant to the provision of section 27 of the Civil Procedure Act, the 2nd Respondent would be entitled to costs. The 2nd Respondent entered an appearance dated 18.12.2023 and attended court before the Appellants sought to withdraw the appeal. Having appointed a Counsel to represent the 2nd Respondent, who has appeared in court. Who then should cater for his legal costs? It would be unjust given the facts to deny the 2nd Respondent costs.
11. I am inclined to grant the costs on the usual party and party basis to be taxed by the Deputy Registrar.



DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13TH DAY OF FEBRUARY 2025.

L. P. KASSAN

JUDGE

In the presence of:-

Kinyanjui holding brief Kinyua for Applicant

Awuor for Respondent for Respondent

Carol – Court Assistant

