



**Fuxin Engineering (K) Limited v Li Jun & another (Civil Suit  
E209 of 2023) [2025] KEHC 2186 (KLR) (Civ) (13 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2186 (KLR)

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

**CIVIL  
CIVIL SUIT E209 OF 2023**

**LP KASSAN, J**

**FEBRUARY 13, 2025**

**BETWEEN**

**FUXIN ENGINEERING (K) LIMITED ..... PLAINTIFF**

**AND**

**LI JUN ..... 1<sup>ST</sup> DEFENDANT**

**QIU JIE ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiff filed a plaint dated 30.11.2023 accompanied by an Application of an even date brought under Certificate of Urgency. The same was certified urgent and the court ordered the same to be served upon the Defendants/Respondents for interparties hearing. The Defendants/Respondents filed a response after entering an appearance through the firm of Kamollo-Mwalo & Associates LLP, who filed a replying affidavit sworn by the 2<sup>nd</sup> Defendant/Respondent on 13.12.2023. Parties filed written submissions, the Plaintiff/Applicant's dated 20.12.2023 and filed on 21.12.2023 together with a further affidavit sworn by the director of the Plaintiff/Applicant's company. The Plaintiff/Applicant also filed a supplementary written submission dated and filed on 23.01.2024.
2. The Defendants/Applicants filed an application dated 28.02.2024 under a Certificate of Urgency through the firm of F. Ndar Omollo & Associates Advocates. The same was certified urgent and ordered to serve the Plaintiff/Respondent for an interparties hearing.
3. The Plaintiff/Applicant filed an application dated 07.03.2024 under a certificate of urgency.
4. Before any of the pending applications were heard, the Plaintiff filed a notice of withdrawal dated 27.03.2024 seeking to discontinue the entire suit against the Defendants/Respondents. The same was endorsed by the court on 16.04.2024 and the file marked as closed.



5. The Defendants each separately filed their respective party and party bill of costs for taxation. On 01.10.2024 the Deputy Registrar ordered the file be placed before the Judge to address the issue of costs.
6. From the above, the court when withdrawing the suit remained silent on the issue of costs.
7. Parties canvassed the issue of costs through written submissions.

#### **Plaintiff's submissions**

8. The Plaintiff submitted that the court has discretion to determine whether a party was entitled to costs or not. That the court in exercising its discretion is guided by the principles set out in the case of Morgan Air Cargo Limited-vs-Evrest Enterprises Limited as quoted in the case of David Kiptum Korir-vs-Kenya Commercial Bank & Ano. (2021) eKLR. These principles include the conduct of the 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*.
9. The Plaintiff submitted that the Defendants/Respondents did not file a defence in the matter only a Replying Affidavit dated 13.12.2023 in response to the Plaintiff's Application dated 30.11.2023. That the main suit was never set down for hearing as it was withdrawn at an immature stage which the court herein should take into consideration. Attention was drawn to the provisions of Rule 62A of the Advocates (Remuneration) Order on how the taxing officer ought to tax a bill of costs presented where there was a change of advocates on record. That the Advocate on record for the Defendants/ Respondents has submitted on professional services rendered by them as well as the firm of Kamollo Mwalo & Associates LLP (previous advocates). Also noting that the Defendants/Respondents have not filed separate pleadings, applications or documents as a demonstration that they were defending the suit separately. That instructions were jointly issued by the Defendants/Respondents to the Advocate thus entitling them to file one bill of costs as was the finding in the case of Desai Sarvia & Pallan Advocates-vs-Tausi Assurance Company Limited (2015) eKLR as cited in the case of Kiunjuri-vs-Waithaka & 2 Others (Appeal 17 of 2020) (2022) KEELC 2256 (KLR) (19 May 2022) (Ruling). That the 2<sup>nd</sup> Defendant's bill of costs be struck out.

#### **Defendants'/Respondents' submissions**

10. The Defendants submitted that it was the court's discretion in awarding costs which discretion must be exercised judiciously, based on reason and justice and not arbitrarily or capriciously. That they should not be made to bear the costs as they were brought to court by the Plaintiff and they had to defend the suit against them. As such costs should follow the event unless the court has good reason to order otherwise. The Defendants didn't differ from the Plaintiff on the factors influencing the award of costs. That although a plaintiff can withdraw a suit before it was set down for hearing, that did not automatically mean the Defendants were not entitled to costs. The Defendants prayed for costs to be awarded to them.
11. I have considered the submissions filed herein.
12. The issue for determination herein is singular;

Whether the Defendants should be awarded costs on the withdrawal of the suit herein?



13. 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.”

14. 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-vs-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-vs-Twentsche Overseas Trading Co. Ltd* (1967) EA 287 and *Mulla* (12<sup>th</sup> Edn) P.150.

.....

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 Federice-vs-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.”

15. 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 suit amounts to a determination in favour of the Defendants/Respondents and pursuant to the provision of Section 27 of the Civil Procedure Act, the Defendants/Respondents would be entitled to costs. The Plaintiff filed the suit together with an application which was served upon the Defendants/Respondents. Although a defence was not filed, a response was filed to the application. Further, the Defendants/Respondents filed an application which was served upon the Plaintiff/Respondent. As such, there were services rendered by the Advocate of the Defendants/Respondents.
16. I will not get into the merits of the bill of costs filed by the Defendants/Respondents as the same is yet to be taxed, 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 13<sup>TH</sup> DAY OF FEBRUARY 2025.**

**L. P. KASSAN**

**JUDGE**

In the presence of:-

Muohia holding brief Anchichi for Plaintiff

Adaga holding Omollo for 1<sup>st</sup> and 2<sup>nd</sup> for Respondents

Carol – Court Assistant

