



**St Elizabeth Academy Karen v Kenya Commercial Bank & another (Commercial Case 389 of 2024) [2025] KEHC 2688 (KLR) (Commercial and Tax) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2688 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE 389 OF 2024  
F GIKONYO, J  
MARCH 6, 2025**

**BETWEEN**

**ST ELIZABETH ACADEMY KAREN ..... PLAINTIFF**

**AND**

**KENYA COMMERCIAL BANK ..... 1<sup>ST</sup> DEFENDANT**

**PHILLIPS INTERNATIONAL AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**Award of costs on withdrawn suit**

1. This suit was withdrawn by the plaintiff on 4<sup>th</sup> February 2025 for reason that the suit had been overtaken by events. The plaintiff sought that there be no order for costs.
2. The 2<sup>nd</sup> defendant insisted on being paid costs of the suit.
3. The matter came up for highlighting of submissions on the application dated 18<sup>th</sup> July 2024 when the suit was withdrawn for the reason stated above.

**Submissions**

4. Mr. Maiyeka for the plaintiff urged the court to make no orders as to costs to avoid punishing the plaintiff for a mistake of counsel who did not even file a defence.
5. However, Ms. Akelo for the 2<sup>nd</sup> defendants urged the court to award costs to the 2<sup>nd</sup> defendants because the plaintiff had kept the defendants in court despite them alerting it that the suit had been overtaken by events. She asserted that costs are not a punishment.



## Analysis and determination

6. A single issue arises for determination from the parties' rival submissions and the law:

Whether the 2<sup>nd</sup> defendant is entitled to costs following the withdrawal of the suit?

## Legal context

7. Order 25 Rule 3 of the Civil Procedure Rules provides that: -

“Upon discontinuation of a suit and upon request in writing by any defendant the Registrar has the power to sign judgment for the costs of a suit which has been wholly discontinued, and, any defendant may apply at the hearing for the costs of any part of the claim against him which has been wholly withdrawn.”

8. The general rule is that ‘costs shall be in the discretion of the court or judge’ but guided by the now too well settled principle that ‘costs...shall follow the event unless the court or judge shall for good reason otherwise order’. Section 27 of the *Civil Procedure Act*.

9. Court’s discretion in determining costs is wide and unfettered discretion. Yet, nevertheless, the discretion must be exercised judiciously taking into consideration the unique circumstances of a case.

10. In DGM v EWG [2021] eKLR, the Court observed that:-

“27. 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 Evrest Enterprises Limited [2014] eKLR the court noted that;

“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.”

28. Furthermore, this discretion must be exercised judiciously and courts should not deprive a plaintiff/defendant of his or her costs unless it can be shown that they acted unreasonably. The Halsbury’s Laws of England, 4th Edition (Re-issue), [2010], Vol.10. para 16, notes that:

“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).”

11. Additional factors for consideration are 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) (c) of *the Constitution*. Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] KEHC 7064 (KLR)
12. In this matter, the plaintiff withdrew the suit on the date set for the highlighting of submissions on its application dated 18<sup>th</sup> July 2024; it was before the suit was set down for hearing.
13. The plaintiff urged the court to make no orders as to costs to avoid punishing the plaintiff for a mistake of counsel who did not even file a defence.
14. On the other hand, the 2<sup>nd</sup> defendant argued that it is entitled to the costs as costs are not a punishment and that the plaintiff had kept the defendants in court despite them alerting it that the suit had been overtaken by events.
15. The unique circumstances of the case are outlined in background details.
16. The plaintiff filed this suit through a notice of motion dated 18<sup>th</sup> July 2024 under certificate of urgency seeking a temporary injunction restraining the defendants from selling by way of public auction or private treaty the property known as LR No. 5948/18 (Original Number 5948/14/13) Conversion Title Number Nairobi Block 137/1028 Karen Estate. The property had been charged as security for a loan for Kshs. 50,000,000/- as per the offer letter dated 29<sup>th</sup> March 2022.
17. In response, the 2<sup>nd</sup> defendant filed a replying affidavit sworn by its Karen Branch Manager, Redempta Ndambuki, on 7<sup>th</sup> August 2024. The core contention was that the application had been overtaken by events as the property had been advertised for sale on 8<sup>th</sup> July 2024 and sold by public auction on 18<sup>th</sup> July 2024, after the plaintiff fell into arrears.
18. In reply, the plaintiff filed a further affidavit sworn by Anne Wanjiku Wando on 11<sup>th</sup> September 2024.
19. Thereafter, the plaintiff and the 1<sup>st</sup> defendant filed written submissions dated 11<sup>th</sup> September 2024 and 27<sup>th</sup> September 2024 respectively.
20. Although the matter was withdrawn before it was set down for hearing, the plaintiff had been warned early enough that the suit has been overtaken by events. But, the plaintiff took too long to act and avoid putting the defendants into unnecessary costs. The plaintiff sustained the suit despite this knowledge; again, occupying court’s precious time.
21. The 2<sup>nd</sup> defendant instructed a legal counsel, filed advocate to enter appearance and file a replying affidavit, thus, spending time and resources on this matter. I find no reason to depart from the general rule.
22. The cumulative effect of the circumstances of the case is that, the 2<sup>nd</sup> Defendant is entitled to costs. Accordingly, the 2<sup>nd</sup> defendant is awarded costs of the suit on the appropriate scale.
23. orders accordingly.

**DATED, SIGNED AND DELIVERED THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 6<sup>TH</sup> DAY OF MARCH, 2025.**



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**F. Gikonyo M**

**Judge**

In the presence of: -

1. Ms. Akelo for 2<sup>nd</sup> respondent
2. Mayieka for Plaintiff
3. CA- Kinyua

