



REPUBLIC OF KENYA



**Kieleko v Ndung'u alias Margaret Wangari Ngugi & another (Civil Appeal E176 of 2022)  
[2025] KEHC 12666 (KLR) (Commercial and Tax) (24 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 12666 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL APPEAL E176 OF 2022**

**F GIKONYO, J**

**JULY 24, 2025**

**BETWEEN**

**PAULINE MWIKALI KIELEKO ..... APPELLANT**

**AND**

**DOROTHY WANJIRU NDUNG'U ALIAS MARGARET WANGARI  
NGUGI ..... 1<sup>ST</sup> RESPONDENT**

**ERIC THEURI & COMPANY ADVOCATES ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling is on whether the appellant is entitled to the costs of the appeal that was settled through a consent recorded on 25<sup>th</sup> June 2024.

**Appellant's Submissions**

2. The appellant submitted that they are entitled to the costs of the appeal as it was resolved wholly in her favour. Citing Section 27(1) of the *Civil Procedure Act*, she argued that costs should follow the event, and in this case, the "event" refers to the successful resolution of the appeal in her favour.
3. The appellant relied on *Republic v Rosemary Wairimu Munene, Ex-Parte Applicant v Ibururu Dairy Farmers Co-operative Society Ltd* [2014] eKLR, for the proposition that costs follow the event not to penalize the losing party but to compensate the successful party for the effort involved.
4. The appellant highlighted that before the settlement, the respondents contested the appeal, requiring her to attend multiple court sessions, file documents, and pursue the matter. She added that it was only upon her initiative to settle out of court that the matter was resolved. Therefore, she urged that awarding costs would be fair and consistent with legal principles.



5. The appellant relied on *Orix Oil (Kenya) Limited v Paul Kabuu & 2 Others* [2014] eKLR, where the court held that if a consent does not specifically address costs, the successful party is entitled to them. She asserted that since the consent here is silent on costs, the court ought to exercise its discretion and award her costs of the appeal.

## **2<sup>nd</sup> Respondent's Submissions**

6. The 2<sup>nd</sup> respondent submitted that although the general principle is that costs follow the event, this does not apply automatically where a matter is settled by consent. It relied on *Munyaka Kuna Company Limited v Herman Kimani & 6 Others* [2018] eKLR, where the court held that a consent cannot be interpreted to mean that one party has succeeded.
7. The 2<sup>nd</sup> respondent also relied on *Rufus Njuguna Miringu & Another v Martha Murithi & 2 Others* [2012] KEHC 3314 (KLR), where the court stated that even if a settlement appears to favour one party, it remains a mutual agreement and costs should be borne by both parties unless expressly stated otherwise.
8. The 2<sup>nd</sup> respondent underlined that in the present case, the parties mutually agreed to a settlement, following which it complied by remitting Kshs. 1,500,000/-. That by this settlement, the appeal was rendered moot, and both parties succeeded, the appellant's claim was paid, and the dispute was compromised. Therefore, it would be unjust to penalise either party by awarding costs to the other.
9. The 2<sup>nd</sup> respondent further pointed out that in MCC No. E10704 of 2021, which gave rise to the appeal, the lower court dismissed the suit and awarded it costs. That, therefore, it is illogical, they argue, for the appellant to now demand costs on appeal after being the losing party in the lower court.
10. In addition, the 2<sup>nd</sup> respondent highlighted that it had a pending application to strike out the appeal, which became hypothetical upon settlement. It contended that it would be unjust to saddle them with costs where the matter was resolved through mutual agreement.
11. The 2<sup>nd</sup> respondent concluded by urging the court to find it prudent and fair that each party bears its costs in the appeal.

## **Analysis and Determination**

12. I have considered the submissions by both sides.
13. Costs of any action, cause or other matter or issue shall follow the event unless the court shall for good reason otherwise order. Section 27 of the *Civil Procedure Act*
14. The court's power to award costs is discretionary. However, the discretion must be exercised judicially based on principles. Regard is paid to the unique circumstances of the case.
15. Some of the guiding principles, were set out by the court in *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR, as follows:-
  - 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. how 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.”
16. The circumstances of this case are that the appeal was settled by consent in favour of the appellant, who has been paid Kshs. 1,500,000/- by the 2<sup>nd</sup> respondent. The consent does not specify who is to be awarded the costs. This matter turns on whether the general rule that costs shall follow the event is applicable where a matter is settled by consent. The parties have taken divergent positions on the issue.
17. In Rufus Njuguna Miringu & Another v Martha Murithi & 2 Others [2012] KEHC 3314 (KLR), cited by the 2<sup>nd</sup> respondent, the court held that:-
- “consent cannot be interpreted to mean that one or the other party has succeeded in a suit. Even if in the present case such settlement has worked out in the Defendants’ favour, the successful determination of the dispute is still attributable to both the Plaintiffs and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.”
18. However, in Orix Oil (Kenya) Limited v Paul Kabeu & 2 Others [2014] eKLR, cited by the appellant, the court held that: -
- “From the consent judgment above, the Plaintiff was awarded costs to be agreed or taxed. ... In any event, even if costs had not been awarded the court should have been guided by the law that costs follow the event, and the Plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied the costs or the successful issue was not attracting costs. None of those deviant factors are present in this case and the court would still have awarded costs to the Plaintiff, which I do.”
19. In Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] KEHC 7064 (KLR), the court also noted that:-
- “The said section in my view does not make distinctions between determinations made by consent or on courts own determination or withdrawals.”
20. From case law, determination by consent of the parties is not excluded from application of the principle that costs follow the event. Except, however, the discretion of the court will be guided by among other things; how the settlement was arrived at, circumstances leading to the settlement, the specific wording of the settlement on costs, if at all, the need to promote alternative justice systems under article 259 of the Constitution and respect resolutions by the parties, the conduct of the parties.
21. The 2<sup>nd</sup> respondent argued that it would be unjust to penalise either party by awarding costs. Thus:-
- “the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.” Rufus Njuguna Miringu & Another v Martha Murithi & 2 Others [2012] KEHC 3314 (KLR)
22. It would be most unfair and unjust for a party to take another through elaborate litigation making such party to incur huge and unnecessary costs or expenses; and wish away compensation by way of



costs, unless the parties otherwise state in their settlement. Parties are advised to state their agreement on costs even if it leaves it for determination by the court.

23. The consent is silent on costs. The record confirms that the 2<sup>nd</sup> respondent contested the appeal, requiring the appellant to attend multiple court sessions and file documents. Therefore, I find that it is fair and just for the 2<sup>nd</sup> respondent to pay the appellant's costs.
24. Accordingly, I order that the 2<sup>nd</sup> respondent pay the appellant's costs of this appeal to be agreed or taxed by the Deputy Registrar.
25. By this order, this file is closed.

**DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE  
APPLICATION THIS 24<sup>TH</sup> DAY OF JULY, 2025**

**F. GIKONYO M**

**JUDGE**

In the presence of: -

1. Ms. Cheruto for Appellant
2. Ms. Kiunga for 2<sup>nd</sup> respondent
3. No appearance for 1<sup>st</sup> respondent
4. CA Kinyua

