



REPUBLIC OF KENYA



KENYA LAW
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**Kyania & another v Kaloki (Civil Appeal E144 of 2024)
[2025] KEHC 10599 (KLR) (17 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10599 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS**

CIVIL APPEAL E144 OF 2024

RC RUTTO, J

JULY 17, 2025

BETWEEN

BRIAN KYANIA 1ST APPELLANT

ZIPPORAH WANJIKU NJOROGE 2ND APPELLANT

AND

RUTH KALOKI RESPONDENT

*(An appeal from the ruling and order of Small Claims Court at Machakos
(M. Thirabu, R.M.) delivered on 13th May 2024 in SCCC No.E1079 of 2023)*

RULING

1. When this matter was called out on 4th March 2025, counsel for the appellants, sought to have the appeal marked as withdrawn with no orders as to costs citing that the appeal had been overtaken by events. Counsel for the Respondent did not oppose the withdrawal, but sought that the costs of this appeal be awarded to the Respondent. In light of these submissions, the Court marked the appeal as withdrawn and directed parties to address the issue of costs. It is this issue that now forms the substratum of the present ruling.
2. In their submissions dated 28th March 2025, the appellant submitted that they filed a memorandum of appeal dated 17th May 2024 challenging the ruling delivered on 13th May 2024 in Machakos SCCC No. E1079 of 2023. Subsequently, they filed a Notice of Motion dated 7th June 2024 seeking, among other reliefs, a stay of proceedings in Machakos SCCC No. E1079 of 2023 pending the hearing and determination of the intended appeal.
3. However, on 5th November 2024, the application for stay was dismissed with costs. As a result, proceedings in Machakos SCCC No. E1079 of 2023 resumed and hearing concluded with the dismissal of the respondent's claim with costs. The appellant submitted that the conclusion of the



matter before the small claims court rendered the present appeal moot hence the application for withdrawal of the appeal.

4. The appellants pointed out that since no record of appeal had been filed, and the respondent's participation was limited solely to responding to the Notice of Motion, the appeal should be marked as withdrawn with no orders as to costs. They further contended that since the respondent had been awarded costs in the application that was dismissed, those costs should be the only costs recoverable in this appeal. They fortified their submissions with two authorities: *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] KEHC 8693 (KLR) and *Butt v Rent Restriction Tribunal* [1979] KECA 22 (KLR).
5. The Respondent further argued that she should be entitled to benefit from the Appellants' failure to properly prosecute the appeal, noting that she had complied with the Court's directive by setting the claim for hearing within fourteen days, as ordered in the ruling delivered on 5th November 2024. The respondent filed written submissions dated 4th March 2025, in which she also outlined the background of the matter. She submitted that the appellants failed to settle the costs awarded in the application, which in her view demonstrated a disregard towards court directions. She submitted that she ought to benefit from the appeal's incompetency since she set the claim for hearing within fourteen days as ordered by the court in its ruling of 5th November 2024. Citing section 27 (1) of the *Civil Procedure Act* and the decisions in *Shah Ramji Punja v Peter Wanjala Kilwake* [2007] eKLR and *Stephen Mugao Nkungu v Julia Wanja Muchege* [2021] eKLR, the respondent submitted that costs follow the event. Hence, since the appellants elected to withdraw their appeal, they were deserving of an order for costs. In any event, no reasons had been advanced why they appeal ought to be withdrawn with no orders as to costs.
6. As earlier noted, this ruling arises from the Appellants' application to withdraw their appeal. The undisputed facts are that the Appellant filed a Memorandum of Appeal dated 17th May 2024, challenging the ruling delivered on 13th May 2024 in Machakos SCCC No. E1079 of 2023. Subsequently, they filed a Notice of Motion dated 7th June 2024, seeking, among other reliefs, a stay of proceedings in the said matter pending the hearing and determination of the intended appeal. In response, the Respondent filed a replying affidavit sworn on 12th June 2024.
7. On 5th November 2024, this Court dismissed the Appellants' Notice of Motion with costs. In the same ruling, the Court directed the Respondent to prosecute her claim in Machakos SCCC No. E1079 of 2023 within fourteen days. The matter proceeded to hearing, culminating in the dismissal of the Respondent's claim with costs.
8. Section 27 (1) of the *Civil Procedure Act* provides:

“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.”



9. In the case of DGM v EWG [2021] eKLR Civil case no E002 of 2021, the court while addressing the issue of cost 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.

10. Similarly 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.”

11. The court further provided the factors that should be taken into consideration when determining the costs of suit. This included;

- 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*.

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.”

12. In the present case, I note that the Appellants never filed a record of appeal. After the dismissal of their application on 5th November 2024, no further steps were taken to prosecute the appeal. The matter remained dormant until when the Court on its own motion listed it for mention, prompting the appellant to act.

13. While the Appellants failed to actively pursue the appeal, the Respondent also did not take any steps to have the appeal dismissed for want of prosecution. It is also worth noting that the Respondent was already awarded costs in the application to which she had filed a response.

14. Given that no substantive progress was made in the appeal and that the Respondent has already been compensated for her participation in the interlocutory application, I find that awarding further costs would not be justified in the circumstances.



15. Accordingly, I exercise my discretion under Section 27(1) of the *Civil Procedure Act* and make the following orders:

- a. There shall be no order as to costs in respect of the appeal.
- b. The Respondent is at liberty to pursue the costs awarded in the ruling of 5th November 2024.
- c. File closed
- d. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 17TH DAY OF JULY 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....Appellant

.....Respondent

Selina Court Assistant

