



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mburu t/a JM Mburu & Co Advocates v Malombo t/a Robinson & Co Advocates  
(Civil Appeal E313 of 2024) [2025] KEHC 9973 (KLR) (4 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9973 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E313 OF 2024**

**J NGAAH, J  
JULY 4, 2025**

**BETWEEN**

**JOHN MBAU MBURU T/A JM MBURU & CO. ADVOCATES ..... APPELLANT**

**AND**

**ROBINSON ONYANGO MALOMBO T/A ROBINSON & CO  
ADVOCATES ..... RESPONDENT**

**RULING**

1. The appellant withdrew his appeal on 19 February 2025. The record shows that the appeal was withdrawn after the respondent filed a preliminary objection questioning the viability of the appeal. In particular, the respondent objected to the hearing of the appeal on grounds that:
  - “(i) The appellant seeks to appeal against a ruling on an application seeking recusal of the trial court, which appeal does not lie as of right under section 75 of the *Civil Procedure Act* and Order 43 rule 1 and 2 of the *Civil Procedure Rules*.
  - (ii) No leave to appeal has been sought by the appellant pursuant to order 43 rule 2 and 3 of the *Civil Procedure Rules*.”
2. Inevitably, the respondent asked for the costs of the appeal. The applicant objected to this application insisting that he should not be condemned to pay costs. This ruling is, therefore, on the question on whether the appellant should bear the costs of the appeal.
3. Whenever such a question as has been presented here arises, the first stop is, of course, section 27 (1) of the *Civil Procedure Act*, cap. 21; this provision reads as follows: -
  27. Costs



- (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.

4. Thus, a court seized of any suit has a wide discretion to determine the extent of the costs payable and to whom between or amongst the parties to the suit those costs should be paid. However, this discretion is subject to the proviso that costs will always follow the event unless, for good reason, the court orders the contrary.
5. In the circumstances of this case, the withdrawal of the appeal, is the event that the costs would follow.
6. Some of the cases where the principle that costs follow the event has been applied include *Laxmibhai v Radhabai* (1917), 42 Bom. 327, which is a decision cited with approval in *Wambugu v Public Service Commission* (1972) EA 296. The case was between two women both of whom claimed to be widows of one person. The defendant is said to have lost throughout but the trial judge, regarding the plaintiff to be more at fault, ordered the costs to come out of the estate. On appeal, the High Court upset this order as a violation of the established principle that, in the absence of misconduct, a successful party must not be burdened with costs of the unsuccessful party.
7. The other case considered in the Wambugu case (supra) was *Goodhart v Hyett* (1883), 25 ChD 182 where North J held that the plaintiffs must have costs of the action in spite of the fact that no notice before action had been given. In that case the claim was denied but both parties called witnesses; the learned judge said of the question of notice at page (192-193):

“I am very sorry to find that an action of this kind commenced without any communication to the defendant but there is no rule that a plaintiff must first apply to the defendant before bringing his action...an application to the defendant could not have defeated the plaintiffs’ object...all parties might have benefited by coming to an arrangement ... it seems to me very probable that that the suit would have been avoided altogether.

“Under these circumstances I have felt very much disposed, if I could, to say that there ought to be no costs of the action. I do not think I can do that...”
8. Although the judge in Wambugu case cited several cases, with approval, where costs were ultimately allowed to the successful party regardless of whether notices of demand were issued or irrespective of whether the cases were contested or not, he held that considering the peculiarity of the circumstances of the case before him, he would have the contesting parties bear their own costs. The learned judge, however, held that in his opinion, the fact that the respondent did not contest the case is not in itself a ground for refusal of costs but it is only a factor that can be taken into account if other good reason exists.
9. Although these cases revolved around the question whether demand notices had been served before the suits were filed, by parity of reasoning, the principle would apply to appeals as well. In the appellant’s



case, the appellant has urged that the appeal had not been admitted and, therefore, it is premature for the respondent to ask for costs. But the appeal had not only been filed and served but also the respondent had responded to it by way of a preliminary objection which, no doubt, must have influenced the appellant's decision to withdraw the appeal.

10. I am persuaded that these decisions are consistent with section 27 of the *Civil Procedure Act* which is clear that costs will always go to the successful party unless for "good reason" the court thinks otherwise. I have not found such "good reason" as why the respondent should not have the costs of the appeal. In the ultimate, I award the respondent costs of the appeal. Orders accordingly.

**SIGNED, DATED AND DELIVERED ON 4 JULY 2025**

**NGAAH JAIRUS**

**JUDGE**

