



**Akram & another v Akram & 5 others (Family Appeal  
E004 of 2023) [2024] KEHC 4887 (KLR) (7 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4887 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
FAMILY APPEAL E004 OF 2023**

**G MUTAI, J  
MAY 7, 2024**

**BETWEEN**

**ZAINAB AKRAM ..... 1<sup>ST</sup> APPELLANT**

**SHADIA AKRAM ..... 2<sup>ND</sup> APPELLANT**

**AND**

**HINDU AKRAM ..... 1<sup>ST</sup> RESPONDENT**

**KHADIJA AKRAM ..... 2<sup>ND</sup> RESPONDENT**

**ABDULWAHID AKRAM ..... 3<sup>RD</sup> RESPONDENT**

**SWABAHA AKRAM ..... 4<sup>TH</sup> RESPONDENT**

**ASWILA AKRAM ..... 5<sup>TH</sup> RESPONDENT**

**MOHAMED AKRAM ..... 6<sup>TH</sup> RESPONDENT**

**RULING**

1. Vide a Notice of Withdrawal of Appeal dated 20<sup>th</sup> March 2024, the Appellants evinced a desire to withdraw the instant appeal. Through their counsel they sought to have the appeal marked as withdrawn with no orders as to costs. The oral application in respect of costs was argued before me on 30<sup>th</sup> April 2024.
2. Mr. Lewa, learned counsel for the Appellants, submitted that after filing the Notice of Withdrawal of the Appeal, they served the same on the counsel on record for the Respondents, MPL Advocates LLP. Upon being served the said advocates served Mr. Lewa with Written Submissions in opposition to the appeal. Mr. Lewa stated that Mr. Mureithi, in an email response, vide which the submissions were attached, indicated that he would be seeking to recover the costs of the appeal.



3. The Appellant’s counsel urged that the proposed withdrawal was made in good faith with a view to expediting the hearing of the Mombasa High Court P&A No 113 of 2021; *In the Matter of the Estate of Akram Amrani Mohamed (deceased)*, which is pending before this Court. He submitted that the Appellants shouldn’t be penalized for seeking to expedite the succession cause so that the same could be determined once and for all, more so since the parties have been in various Courts since 2012. The Court was referred to section 27 (1) of the *Civil Procedure Act*.
4. Mr Lewa further submitted that given the fact that the submissions were filed after he had served the Notice of Withdrawal, the service of Written Submissions was a dishonest scheme by counsel for the Respondent to cause the Appellants to be condemned to pay costs even after the appeal was withdrawn, which costs it was submitted, they didn’t deserve to get. It was thus urged that this being a family matter, each party should bear own costs.
5. Mr. Mureithi, learned counsel for the Respondents, opposed the application. Counsel began by giving the history of the matter. He urged that, on his client’s behalf, he attended Court on 8th June, 26th July, 12th September, 17th October, 11th December 2023, 19th January, 21st March and 22nd April 2024. Further, the Appellants filed an application, which his clients opposed by filing a preliminary objection, which this Court dismissed, whereupon they filed a Replying Affidavit.
6. Counsel for the Respondents further submitted that the instant appeal is voluminous, consisting of 414 pages. He urged that this Court gave directions regarding the filing of written submissions on 19<sup>th</sup> January 2024. The directions set out specific timelines within which parties were to comply. His firm prepared written submissions and it was only after they were informed of the proposal to withdraw the appeal that they advised the Appellants’ counsel that they had done so.
7. It was contented that the appeal was filed in bad faith to derail the administration of the estate. Counsel urged that a person who comes before a Court of equity must come with clean hands. Although he conceded that costs aren’t ordinarily payable in the Family Court, he urged that in the circumstances of this case, where in his view, the appeal was used as a sword to abuse the Court process, the discretion granted to the Court under section 27 of the *Civil Procedure Act* shouldn’t aid the Appellants. Mr Mureithi proposed that costs follow the event, which, in his view, is that the Appellants, by withdrawing their appeal, had not succeeded in their appeal and should, therefore, pay costs to the 1<sup>st</sup> and 4<sup>th</sup> Respondents who had incurred costs defending themselves from a spurious appeal. Reliance was placed on the case of *DGM v EWG* [2021]eKLR in which C. Kariuki, J, in a matrimonial matter, awarded costs on the grounds that it would be unfair to deny the successful party his costs.
8. In response, Mr. Lewa submitted that as the appeal had been withdrawn, there was no winner or loser. He urged that the Respondents did not file any application before this Court but that all applications were in respect of Mombasa High Court P&A No 113 of 2021 *In the Matter of the Estate of Akram Amrani Mohamed (deceased)*. The said matter is now pending before me. He further submitted that I had determined the issue of costs in each of the applications that came up for determination. In the circumstances, counsel reiterated that each party should bear its own costs.
9. Section 27 of the *Civil Procedure Act* provides as follow: -

“

- “(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.”

10. My understanding of the aforesaid section is that it does two things. First, it establishes the general rule that costs follow the event. Second, it grants judicial officers discretion. The discretion is twofold; a judicial officer may, for good reason, refuse to award costs to the successful party. Where costs are awarded, the quantum is at the discretion of the judicial officer. Like all discretions, the discretion regarding costs must be exercised judiciously and not whimsically.
11. I have perused the record. The Record of Appeal is indeed bulky, having 414 pages. Considerably industry would be required of a counsel to peruse and take instructions and prepare and file Written Submissions in respect of such a voluminous document. Time would necessarily have been expended in doing so. Having said that, I note that this matter was in Court on 20th July 2023 (when both parties were absent) and 13th September 2023 (when only Mr Lewa was present). Both said attendances were before the Deputy Registrar. On 17th October 2023, Ms Katama, holding brief for Mr Lewa, appeared before me. There was no attendance for the Respondent on the said date. Both parties appeared before me on 14<sup>th</sup> December 2023, 19th January and 30th April 2024.
12. The numerous appearances alluded to by Mr Mureithi in his oral submissions were, for the most part, in regard to the succession matter, as were applications and the objections he referred to. That matter is pending before me. I suspect that given how intertwined the appeal and the succession cause were, counsel made an honest mistake of mistaking attendances with respect to the succession cause as being those of this appeal.
13. Mr. Lewa objected to the submissions filed by Mr. Mureithi and averred that he was dishonest in filing them after he withdrew the appeal. Given the nature of the matter, it would not have been possible for Mr. Mureithi to file his submissions so quickly. In my view, he was able to file the submissions at the time he did, as he had already prepared them, pursuant to the directions I made, and was only waiting for the Appellants’ counsel to serve him with his so that he could file them.
14. Mr Mureithi rightly conceded, in my view, that costs are not ordinarily payable in respect of matters determined by the Family Court. That is, of course, a general rule that has taken root in Kenyan courts. Like all rules, it has exceptions. The Family Court does issue orders of costs when the circumstances demand it, for example, where a party has misused the court process.
15. Is an order of costs payable in the circumstances of this matter? In the *EGM* case (supra), in a persuasive decision, the learned judge expressed himself as follows: -

“The court must therefore ask itself what factors should be taken into consideration when determining the costs of suit. This issue was addressed by the learned judge in *Morgan Air Cargo Limited v Evrest Enterprises Limited* (Supra) to include:

- 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*."

16. In my view, costs would not be appropriate in the circumstances of this matter. This is so because this is a dispute between family members. An award of costs will not promote reconciliation between parties. In any case, the appeal was withdrawn before there was substantive prosecution so that the Succession matter could be heard and determined. Withdrawal of this matter saved precious judicial time and enabled the Court to focus on determining the dispute regarding the confirmation of the grant. I am not convinced that the appeal was filed in faith or was actuated by malice or ill will.

17. In the circumstances, I allow the Appellants' application. The appeal is withdrawn with no orders as to costs. The Court file shall be closed forthwith.

18. Orders accordingly.

**DATED AND SIGNED THIS 7TH DAY OF MAY 2024 AT MOMBASA**

**GREGORY MUTAI**

**JUDGE**

In the presence of

Mr Lewa for the Appellant;

Ms Muturi holding brief for Mr Mureithi for the Respondent; and

Arthur – Court Assistant.

