



**Skyline Sacco Society Ltd v Cheboror (Civil Appeal E007 of 2023)
[2024] KEHC 9074 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9074 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CIVIL APPEAL E007 OF 2023
RB NGETICH, J
JULY 25, 2024**

BETWEEN

SKYLINE SACCO SOCIETY LTD APPLICANT

AND

MOSES K. CHEBOROR RESPONDENT

(Being an Appeal against an order of Hon.A.C.towett S.P.M delivered on 30th March 2023)

JUDGMENT

1. The Respondent filed suit before the Eldama Ravine Law Courts but subsequently withdrew it before the matter proceeded for hearing but defence had been filed. The trial court allowed withdrawal of the suit with no orders as to costs. The Appellant being aggrieved with the Ruling of the Honourable trial magistrate filled a memorandum of appeal dated 13th April,2023 listed the following grounds of appeal: -
 - i. The learned trial magistrate erred in law and in fact by failing to give costs to the Defendant now the Appellant.
 - ii. The Learned trial magistrate erred in law and in fact by failing to consider that the suit was defended.
 - iii. The learned trial magistrate erred in law and in fact by not giving orders as to costs.
 - iv. The learned trial magistrate erred in law and in fact by failing to apply the correct principles, that costs follow the event as per section 27 of the *[civil procedure Act](#)*.
 - v. The learned trial magistrate erred in law and in fact by failing to note that the Defendant was entitled to being awarded costs having filed a defence.



- vi. The learned trial magistrate erred in law and in fact by not considering the Appellant's application for costs.
2. The Appellant prays that this appeal be allowed and this Honourable court be pleased to give orders as to costs in CMCC No. E042/22- Moses Cheboror versus Skyline Sacco Ltd and that costs of this appeal be borne by the Respondent. On 24th January, 2024, this court gave directions for this appeal proceed by way of written submissions.

Appellant's Submissions

3. The Appellant submits that in view of the above background, the only issue for determination before this court is whether the trial court was justified in denying the Appellant costs of the suit and argue that it is a settled position in law that costs follow the event; that the successful party is entitled to recover reasonable costs of the action; that in ordinary circumstances, the victor shall be awarded costs of the suit subject to the discretion of the judge. That the practice is to reimburse the defendant the costs incurred in defending or preparing to defend the matter and relied on the Court of Appeal case of Supermarine Handling Services Ltd V Kenya Revenue Authority [2010] eKLR.
4. And further submit that the Appellant was forced to file defence against a suit that failed to substantiate its claims and incurred costs in the form of legal fees, having consulted a law firm during the suit and filed multiple pleadings. That the appellant did not act in a way that led to filing of the suit and was therefore entitled to full costs upon the withdrawal of the suit.

Respondent's Submissions

5. The Respondents submits that the appellant filed the present appeal premised on section 27 of the [Civil Procedure Act](#) which provides as follows:-
 - 27(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 give all the necessary directions for the purposes aforesaid and the fact that the court 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 direct.
6. The Respondent relied on the case of Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd this court held as follows:

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event It is well recognized that 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.
7. That in writing on the same subject Mr. Justice (Retired) Kuloba stated as follows:-

“Costs are [awarded at) the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise...”



8. The Respondent submit that the trial court addressed the issue of cost and even awarded cost where the court felt it was worth considering in the case circumstances. That costs are neither an entitlement nor a tool to penalize a party as correctly indicated.
9. The Respondent further submit that in determining the issue of costs, the court generally looks at the conduct of the parties, the circumstance that led to the proceeding's and the stage at which the proceeding's are terminated. The court may not only consider the conduct of the party but also what led to the litigation and eventually the consequences of the award of costs.
10. On whether substantive grounds have been raised to question discretion, the Respondent submits that that the provision has been the subject of several judicial pronouncements and relied on the case of *Supermarine Handling Services Ltd vs. Kenya Revenue Authority Civil Appeal No. 85 of 2006*, and in the case of *Nedbank Swaziland Ltd verses Sand lie Dlamini Na (144/2010) [2013] SZHC30 (2013)* in which Maphalala J. referred to the holding of Murray C J In the case of *Levben Products VS Alexander Films (SA) (PTY) Ltd 1957(4) SA 225 (SR) at 227*, who stated as follows:-

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold in the first place, the award of costs is a matter in which the trial Judge is given discretion (Fripp vs Gibbon & Co., 1913 ADD 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to a conclusion arrived at.....In the second place, the general rule is that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

11. The Respondent further submit that record show that from the onset of trial court matter, there has been a series of instances where the conduct of the defendant, now appellant, has delayed the determination of the matter and argue that appellant has failed to give reasons for faulting exercise of discretion by the trial magistrate.
12. The Respondent submit that it is not true that the learned magistrate failed to apply the principles of section 27 of the *Civil Procedure Act* and it is settled that issues of costs are not an entitlement but a judicial discretion to be exercised by the court judiciously, taking cognizance of the specific conduct of the parties in the case.
13. In conclusion, counsel for the Respondent submit that contrary to the appellant grounds, record show that both counsels made submissions on the cost before the trial magistrate pronounced herself and the appellant has failed to show where judicial discretion was wrongly exercised and urged this court to find that this appeal is unmerited and dismiss with cost to the respondent.

Analysis and Determination

14. I have perused and considered the trial court record, grounds of appeal and submissions filed herein. There is only one issue for consideration which is whether the trial magistrate erred in failing to grant the appellant who was the defendant costs upon withdrawal of the suit by the Respondent who was plaintiff in the trial court. Order 25 of the Civil Procedure Rules provides for withdrawal of suits as follows:-
 - (1) At any time before the setting down of the suit for hearing, the Plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the Defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.



- (2)(1) Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn upon the filing of a written consent signed by all the parties.
- (2) Where a suit has been set down for hearing, the court may grant the Plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit and otherwise, as are just.”
15. In the case of *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 Others, Supreme Court Application No. 16 of 2014*, the Supreme Court stated as follows:-
- “A party’s right to withdraw a matter before the court cannot be taken away. A court cannot bar a party from withdrawing his matter. All that the court can do is to make an order as to costs where it is deemed appropriate.”
16. In the case of *Beijing Industrial Designing & Researching Institute vs. Lagoon Development Limited* [2015] eKLR, the court of appeal stated as follows:-
- “As a general proposition, the right of party to discontinue a suit or withdraw his claim cannot be questioned. There are many circumstances when a Plaintiff may legitimately wish to discontinue his suit or withdraw his claim. The Supreme Court of Nigeria in *Abayomi Babatunde vs. Pan Atlantic Shipping & Transport Agencies Ltd & Others SC 154/2002* identified those circumstances to include where;
- (i) A Plaintiff realizes the weakness of his claim in the light of the defence put up by the Defendant.
 - (ii) A Plaintiff’s vital witnesses are not available at the material time and will not be so at any certain future date,
 - (iii) Where by abandoning the prosecution of the case, the Plaintiff could substantially reduce the high costs that would have otherwise followed after a full-scale but unsuccessful litigation, or
 - (iv) A Plaintiff may possibly retain the right to relitigate the claim at a more auspicious time if necessary.
17. From the foregoing, a party who files suit in court has unfettered right to withdraw the suit under Order 25 Rules 1 and 2(1) of the civil procedure Rules. However, under Order 25 Rule 2(2), withdrawal of a suit requires permission of the court and the withdrawal may be subject to terms that the court considers just including payment of costs or filing of any other suit.
18. Record show that the Respondent upon filing the case had served on the Appellant who instructed an Advocate to file defence. The Advocate not only filed pleadings in court but also appeared in court to represent the Appellant. There is no doubt that the appellant had incurred costs at the time the matter was being withdrawn and it would have been fair and just for the appellant who had taken steps to defend the suit to be paid costs. The costs incurred by the appellant cannot be wished away and even though the suit had not been set down for hearing at the time of the withdrawal, costs had been incurred for processes undertaken by the appellant and his Advocate.
19. From the foregoing, I find that the trial magistrate erred in failing to ward costs to the appellant following withdrawal of *Eldama Ravine CMCC No. E042/22- Moses Cheboror versus Skyline Sacco*



Ltd are awarded to the Appellants. I therefore order that the appellant be paid costs in the trial court and this appeal.

Final Orders: -

20.

1. This appeal is hereby allowed.
2. The Respondent is hereby ordered to pay the appellant costs in Eldama Ravine CMCC No. E042/22- Moses Cheboror versus Skyline Sacco Ltd.
3. Costs of this appeal to be paid by the Respondent to the appellant.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 25TH DAY OF JULY 2024.

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RACHEL NGETICH

JUDGE

In the presence of:

Elvis & Komen – Court Assistants.

Ririi for Appellant.

No appearance for Respondent.

