



**KCB Bank Kenya Limited v Morris Mugendi Karigi t/a Mugendi Karigi & Co. Advocates & another (Civil Appeal E038 of 2023) [2024] KEHC 12426 (KLR) (16 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12426 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL E038 OF 2023  
LM NJUGUNA, J  
OCTOBER 16, 2024**

**BETWEEN**

**KCB BANK KENYA LIMITED ..... APPELLANT**

**AND**

**MORRIS MUGENDI KARIGI T/A MUGENDI KARIGI & CO.  
ADVOCATES ..... 1<sup>ST</sup> RESPONDENT**

**AFRICAN MERCHANT ASSURANCE CO.LTD ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The parties herein negotiated and settled the appeal and the court marked it as settled. The 1<sup>st</sup> respondent prayed for the costs of the appeal while the 2<sup>nd</sup> respondent prayed that each party bears its own costs. The court directed the parties to file brief submissions on costs and who is liable to pay the costs.
2. The parties filed their brief written submissions.
3. The 1<sup>st</sup> respondent submitted that the appeal was settled through an out-of-court settlement hence it has been overtaken by events. That he held a decree against the appellant as a garnishee for money held on behalf of the 2<sup>nd</sup> respondent in accordance with Order 23 of the Civil Procedure Rules. That in as much as the moneys held by the appellant were allegedly insufficient to satisfy the decree, it would remain his right to execute against a lawful decree held against the appellant. He relied on the case of *Rai & 3 others v Rai & 4 others* [2013] KESC 20 (KLR) and argued that costs should follow the event as held by the Supreme Court in that case. He urged that since the respondents saved the appellant from arguing the contested appeal, each party should bear its own costs.
4. The appellant submitted that when the court issued a garnishee order absolute against it in Embu CMCC No. E075 of 2022, the 2<sup>nd</sup> respondent's account held with the appellant had funds that were locked in by other garnishee decrees, leaving a balance of Kshs 1,090.16/=. That it appealed against



the decision and then moved the court for temporary stay of execution and the 1<sup>st</sup> respondent filed a replying affidavit seeking that the stay order be vacated and the garnishee nisi be made absolute. That the appellant got ready for the appeal through research and preparing pleadings but the 2<sup>nd</sup> respondent approached the 1<sup>st</sup> respondent with a view to settle the decretal sum, including the amount set to be enforced against the appellant.

5. That this compromise between the respondents is what necessitated withdrawal of the appeal thus the 2<sup>nd</sup> respondent wants to be exonerated from incurring the costs of the appeal. It relied on section 27 of the *Civil Procedure Act* and the case of *Haraf Traders Limited v. Narok County Government* [2022] eKLR, *Rai & 3 others v Rai & 4 others* [2013] KESC 20 (KLR) and *Joseph Oduor Anode v. Kenya Red Cross Society* (2012) eKLR. It argued that costs follow the event and when the court has to depart from this rule, sufficient reasons have to be provided. It was its argument that it has incurred costs preparing for the appeal which never took off, thus it should be compensated through costs.
6. The issue for determination is who should be awarded the costs of the appeal?
7. The appeal was marked as settled, parties having reached an out-of-court settlement. The 2<sup>nd</sup> respondent, who holds a bank account at the appellant bank, reached out to the 1<sup>st</sup> respondent, the decree holder, and settled the decretal amount. The appellant claims that it has incurred costs preparing for the appeal and filing stay applications to halt execution for the decretal sum. On his part, the 1<sup>st</sup> respondent submitted that the appellant has been saved from the appeal process through the settlement which rendered the appeal unnecessary.
8. Costs are awarded through discretion of the court, which discretion must be applied judiciously. Section 27 of the *Civil Procedure Act* provides:

“(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.”

9. In the case of *Republic v. Rosemary Wairimu Munene, Ex-Parte Applicant Ibururu Dairy Farmers Co-operative Society Ltd* Judicial Review application no 6 of 2014 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.”



10. In the case of *Haraf Traders Limited v. Narok County Government* [2022] eKLR, the court considered the fact that the parties had agreed to compromise the case thus a consent was recorded. The court also noted that series of events that took place since filing of the suit and stated thus:

“Considering the entire chain of events from filing this suit up to the time the parties left the issue to the court to determine, the numerous court attendances cited above I find no reason to deny the plaintiff costs. In exercise of my discretion in order to meet the interests of justice for both parties, I award costs to the plaintiff.”

11. In the present case, the 1<sup>st</sup> respondent was awarded a decretal sum of Kshs 1,654,563.70/= against the 2<sup>nd</sup> respondent. The 1<sup>st</sup> respondent initiated garnishee proceedings against the appellant for the moneys held on behalf of the 2<sup>nd</sup> respondent and when the garnishee orders were issued, the appellant contested the same through this appeal. Since the appeal was not determined on its merits, the appellant feels shortchanged by the 1<sup>st</sup> and 2<sup>nd</sup> respondents’ decision to have the decretal amount settled out of court. Since initiation of the garnishee proceedings against the appellant, the 1<sup>st</sup> respondent has been pursuing payment and he even testified at the trial and called a witness. The 2<sup>nd</sup> respondent did not call any witnesses.

12. In fact, it seems as though the 1<sup>st</sup> respondent’s move to pursue execution is what prompted the 2<sup>nd</sup> respondent and the appellant to move with haste. The appellant sought stay of execution at the various courts and at this point in time, it has been discharged from liability since the 2<sup>nd</sup> respondent confirmed to the court that the amount was paid to the 1<sup>st</sup> respondent. It is my view that the 1<sup>st</sup> respondent deserves the costs of the appeal given his efforts to recover the decretal amount. The 2<sup>nd</sup> respondent is liable for the costs given its conduct throughout the suit. I do agree with the general rule that costs follow the event and, in this case, the appeal was rendered unnecessary due to the 2<sup>nd</sup> respondent’s move to settle the decretal amount out of court.

13. Therefore, the 2<sup>nd</sup> respondent is hereby ordered to pay the appellant’s and the 1<sup>st</sup> respondent’s costs of the appeal. For the avoidance of doubt, the appellant and the 1<sup>st</sup> respondent are entitled to costs at the ratio of 50%:50%.

14. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 16<sup>TH</sup> DAY OF OCTOBER, 2024.**

**L. NJUGUNA**

**JUDGE**

..... for the Appellant/Applicant

..... for the 1<sup>st</sup> Respondent

..... for the 2<sup>nd</sup> Respondent

