

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NYERI**  
**CIVIL APPEAL NO. E033 OF 2024**

**JOSEPH      NGUCHU      NJERU.....**  
**APPELLANT**

**VERSUS**

**ALICE KIRIGO GICHINA**  
(Suing as the legal representative of the estate of the late  
JAMES GICHINA (Deceased).....)

**RESPONDENT**

**JUDGMENT**

1. This is an appeal from the Ruling and order of the Hon. Kibiru, Chief Magistrate, delivered on 22.05.2024, arising from Nyeri CMCC No. 171 of 2010. It raises only one issue; that the suit had abated, hence the judgment ought to be set aside.
2. Judgment had been delivered by the Hon. W. Kagendo on 31.10.2017. There was no application to set aside the said judgment. The appellant sought to have the suit declared to have been abated after judgment was delivered. Humongous submissions were written, the tenor of which, the court does not find it necessary to regurgitate in this judgment. The question of abatement is a matter to be raised during the pendency of a suit. There was no pending suit before the Hon. Kibiru. Abatement cannot be raised after horses have bolted.

The court was being invited to sit on appeal from the decision of Hon. W. Kagendo.

3. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
4. This court's the jurisdiction to review the evidence should be exercised with caution. In the cases of **Peters vs Sunday Post Limited [1958] EA 424**, the court therein rendered itself as follows:

It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...

5. In cases where parties proceeded by way of submissions, the court has the same status as the court below as regards the evidence tendered. In the case of **Sugut v Jemutai & 3 others** (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR Kiage JA stated as doth: -

I have carefully considered those rival submissions by counsel in light of the record and

the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the Court of Appeal Rules 2010; *Selle Vs Associated Motor Boat Co* [1968] EA 123). I do accord due respect to the factual findings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half-way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge.”

6. In the case of **Bushasha Lucheri v Joseph Langat Sitienei & Another** [2012] KEHC 304 (KLR), the court posited as hereunder:

The plaintiff having died latest 18 November 2009, it is discernable that more than one year has lapsed without any application for substitution being made. The suit has therefore abated. In fact, a careful reading of Order 40 Rule 3(2) reveals that the suit automatically abates by operation of law and it is not necessary to make

an application to have the suit marked as abated. Rule 3(2) only makes provision for an application by the defendant for costs of an abated suit. Nevertheless, it is not uncommon, and neither is it out of place, for the defendant to seek an order to have a suit marked as abated.

7. *Ipsa facto*, there is a provision for expenses, and once given, it is a matter to be dealt with in the suit. Any *ex parte* order can only be dealt with within a suit. It cannot be that, after judgment is given, the question is raised.
8. The appellant relied on the case of **Joseph Karobia Gicheru v Michael Gachoki Gicheru** [2011] KECA 165 (KLR), where the court of appeal [VISRAM, KIAGE & ODEK, JJA.] posited as follows:

Where a court or a tribunal embarks on the hearing and proceeds to determine a dispute over which it has no jurisdiction, the entire proceedings are empty of legal life and are null and void ab initio. No amount of acquiescence by any party to the conduct of such proceedings and no measure of consent by parties, no matter how express or deliberate, could confer upon such court or tribunal such jurisdiction. The proceedings and orders are nullities and of no legal effect from inception and remain so to the end.

We accept as sound the observation by Kuloba R in Judicial Hints on Civil Procedure (Law Africa) at P 65 on the effect of lack of jurisdiction;

“If a court has no jurisdiction, its judgments and orders, however precisely certain and technically correct, are mere nullities, and not only voidable.

[T]hey are void and have no effect either as estoppels or otherwise, and may not only be set aside at any time by the court in which they rendered, but be declared void by every court in which they may be presented. It is well established law that jurisdiction cannot be conferred on a court by consent of parties and any waiver on their part cannot make up for the lack of jurisdiction. That being so, the point of jurisdiction may properly be taken in an appellate court. *Lucie-Smith J. in Seid bin Seif Vs. Shariff Mohammed Shatry* [1940] 19 (1) KLR 9 at 10, 27 March 1940.

We very much doubt that the learned judge properly appreciated the true nature of a jurisdictional objection. Had she done so, she would not have engaged in the rather formalistic repudiation of the point raised on the merely technical and procedural basis that the matter had not been raised on the appellant’s grounds of appeal before her and parties are bound by their pleadings. We are quite clear in own mind that a nullity cannot be converted into a validity on the basis of a default of pleadings.

9. The postulations are correct to the extent that the court cannot confer jurisdiction on itself or by craft. Indeed, in the case of **Samuel Kamau Macharia & another v Kenya**

**Commercial Bank Limited & 2 others [2012] eKLR**, the Supreme Court stated as doth: -

“This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011*. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

10. The court below was not dealing with the jurisdiction of the court hearing the matter, but the question of abatement. This was dealt with earlier and not challenged in the hearing. In the circumstances, I do not find fault with the learned Chief Magistrate’s decision. The only order that is proper to issue is to dismiss the appeal for lack of merit.

11. The issue of costs is governed by Section 27 of the Civil Procedure Act, which provides as follows:

**(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.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

12. The next question is on costs. These are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR)** had this to say:

**It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs**

**either partially or wholly from a successful party for good cause to be shown.**

13. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR**, as follows:

18. It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.

22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this

particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

14. In the circumstances, the respondent is entitled to costs. A sum of Ksh 75,000/= will suffice.

Determination

15. In the upshot, I make the following orders: -

- a) The appeal is dismissed.
- b) The Respondent shall have costs of Ksh. 75,000/=.

**DELIVERED, DATED and SIGNED at NYERI on this 15<sup>th</sup> day of December, 2025.** Judgment delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE  
JUDGE**

**In the presence of: -**

Mr. Muthigani for the Appellant

Ms. Muchai for the Respondent

Court Assistant - Michael