



REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU

CIVIL CASE NO E110 OF 2023

AGNES NDINDA MBALUKA T/A

MMAWO.....PLAINTIFF

VERSUS

SIDIAN BANK LIMITED.....1ST DEFENDANT

REGENT AUCTIONEERS.....2ND DEFENDANT

RULING

THE SUBJECT

The suit herein was withdrawn or marked as settled on 3/9/2025. This was after the parties indicated that the plaintiff had since fully serviced the loan. The plaintiff urged the court to close the matter with no orders as to costs but the defendants requested for an order for payment of costs by the plaintiff. The parties were given time to reach a compromise but none was reached. It was then directed that they file submissions on the issue of whether costs should be paid and by whom. The submissions were duly filed.

MAIN ISSUE FOR DETERMINATION

The main issue for determination is whether cost of the suit are payable and if so, by whom.

THE PLAINTIFF'S SUBMISSIONS

The plaintiff submitted that the issue of costs is at the discretion of the court. She further submitted that the suit was necessitated by the fact that the defendants repossessed and advertised for sale a motor vehicle that had been registered in the name of the plaintiff and 1st defendant. Thus was based on an asset finance agreement between the plaintiff and the 1st defendant. The plaintiff attempted to justify why she filed the suit by purporting to adduce evidence in the form of submissions. I will disregard that bit of the submissions. The plaintiff argued that it is the defendants who should be condemned to pay costs as it was their illegal actions that led to the filing of the suit. That the plaintiff also incurred costs in instituting and prosecuting the matter, and as such, it would be unfair to condemn her to pay costs to the defendants. The plaintiff urged the court to order that costs be in the cause. I believe the plaintiff meant to say that each party should bear their own costs. The plaintiff relied on the authority of *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR*.

THE DEFENDANTS' SUBMISSIONS

The defendants submitted that they filed a defence in response to the suit and that at the time of filing suit, the loan was still in arrears. That the defendants have incurred costs in the suit and are therefore entitled to compensation. The defendants contended that it is trite law that costs follow the event and this principle is not meant to penalize the losing party but to compensate the successful party for the trouble taken in prosecuting or defending the case. The defendants argued that the plaintiff dragged them to court for more than two years only to eventually settle the loan and withdraw the matter. That the defendants are therefore entitled to costs incurred in defending the suit. The defendants urged the court to award them costs. They relied on the authorities of *PACIS INSURANCE COMPANY LTD v FRANCIS NJERU NJOKA [2018] eKLR* and *Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others [2014] eKLR*.

ANALYSIS AND DETERMINATION

I have considered the submissions by the parties as well as the applicable law. 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.

(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.”

From the foregoing, two principles emerge:

- 1) The court retains the discretion on whether or not to award costs and by whom and to what extent such costs are to be paid;
- 2) Costs follow the event unless the court orders otherwise, for good reason.

While interpreting section 27 of the Civil Procedure Act, Odunga J (as he then was) in the case of *Joseph Oduor Anode v Kenya Red Cross Society [2012] eKLR*, held:

“Whereas this Court has the discretion when awarding costs, that discretion must, as usual, be exercised judicially. The first point of reference, with respect to the exercise of discretion is the guiding principles provided under the law. In matters of costs, the general rule as adumbrated in the aforesaid statute [the Civil Procedure Act] is that costs follow the event unless the Court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words, where the Court decides not to follow the general principle, the Court is enjoined to give reasons for not doing so. In my view, it is the failure to follow the general principle without reasons that would amount to arbitrary exercise of discretion ...” [emphasis supplied].

In *Halsbury’s Laws of England, 4th edition Re-Issue (2010), Vol 10*, para 16, it is stated that:

“The Court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice” [emphasis supplied].

In *Rai & 3 others v Rai & 4 others* [2014] KESC 31 (KLR), the Supreme Court held that:

“So the basic rule on attribution of costs is: costs follow the event. But it is well recognized that this principle 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 suit. In Justice Kuloba’s words [Judicial Hints on Civil Procedure, at p 94]:

‘[T]he object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure.. .Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action.’

The Supreme Court further observed 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. That 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.

The Supreme Court in the same case further held:

“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.”

This matter was not heard on merit. It cannot therefore be said that there is a successful party in the strict sense of the phrase. Although the plaintiff cleverly used the phrase, “marked as settled”, the effect was a withdrawal of the suit as the plaintiff had serviced the loan in full and her motor vehicle had been returned to her years ago. Order 25 rule 3 of the Civil Procedure Rules provides:

“Upon request in writing by any defendant the registrar shall sign judgment for the costs of a suit which has been wholly discontinued, and any defendant may apply at the hearing for the costs of any part of the claim against him which has been withdrawn.”

It is the plaintiff who dragged the defendants to court. It is not in doubt that the defendants incurred costs in engaging counsel and in court fees. It is also agreed that the plaintiff had not serviced the loan fully when he instituted the suit. The suit has been in court for over two years. The motor vehicle which was the subject of the suit was released to the plaintiff at an ex parte stage even before the defendants were served. The plaintiff obtained temporary orders of injunction against the defendants. She dragged the matter in court and I suspect it was for purposes of buying time to clear the loan balance.

Had the plaintiff serviced the loan as was required, we would not be here right now. In all fairness, I see no reason as to why the defendants should be denied costs of the suit. I have no grounds not to follow the general rule that costs follow the event. In the authority of *Pacis Insurance (supra)*, the court held:

“A party having been caused by the other to participate in a suit, is entitled to costs incurred in the event the party instituting the suit decides to withdraw it unless parties agree otherwise or Court on exercising its discretion decide otherwise after giving the parties opportunity to submit on costs. In the instant case, the suit was withdrawn after hearing date was set. Defendant had engaged an Advocate to defend the suit. Defendant is therefore expected to have incurred expenses and is entitled to costs expended.”

DISPOSITION

In view of the foregoing, I award costs to the defendants. The same shall be borne by the plaintiff. Parties are at liberty to agree on the costs payable and if there is no agreement, the defendants shall follow the procedure laid down under Order 21 rule 9A through to 9D of the Civil Procedure Rules.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 10TH DAY OF
DECEMBER, 2025.**

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.