

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
COMM. CASE NO. E125 OF 2025

BETWEEN

**JOHN NDERITU MUOTIA T/A
NAIROBI UPPERHILL HOTEL.....
.....PLAINTIFF**

AND

**NATIONAL BANK OF KENYA
LIMITED.....1ST DEFENDANT**

**KEYSIAN AUCTIONEERS.....2ND
DEFENDANT**

**FRED OTIENO.....3RD
DEFENDANT**

RULING

1. The Plaintiff filed a Notice of Withdrawal dated 11th September 2025 evincing his intention to withdraw the suit in its entirety including the Complaint, and the Notice of Motion application all dated 25th February 2025. The 1st and 2nd Defendants now seek a judgment on costs in respect of the withdrawn suit in their favour.

2. **section 27** of the **Civil Procedure Act** addresses the issue costs in part as follows:

27. Costs

(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.

3. The Supreme Court, in **Rai & 3 others v Rai & 4 others [2014] KESC 31 (KLR)** fortified the principle that costs follow the event when it held:

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.

4. The Supreme Court in **Rai(supra)** further held that:

[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.”

5. The issue whether a Court can order for costs upon withdrawal of a matter was settled in the Supreme Court case of **Ochanda (Suing on his Behalf and on Behalf of 996 Former Employees of Telkom Limited) v Telkom Kenya Limited [2014] KESC 7 (KLR)** in which Ibrahim, SCJ held:

I do hold the view that a prospective appellant is at liberty to withdrawal a Notice of appeal at any time before the Appeal has been lodged and any further steps taken. No proceedings have commenced strictly. I am also of the view that just like under the Civil Procedure Rules or Court of Appeal Rules, the right to withdrawal or discontinue proceedings or withdraw a notice of Appeal respectively

ought to be allowed as a matter of right subject to any issue of costs which can be claimed by the respondents if any."(Emphasis provided)

6. From the above authorities of the apex court of the land and **section 27** of the **Civil Procedure Act**, it can be said that a party is at liberty to withdraw its suit or application but the same was subject to costs as may be claimed by the opposing party and an award of the same, if any, is at the discretion of the court. The Supreme Court, **In re Council of Governors [2014] KESC 54 (KLR)** further held that *"a party who moves the Court to make such an order for costs has an obligation to lay a firm basis by giving sufficient reasons why he should be awarded costs."* The Defendants' request is based on **Order 25 Rule 3** of the **Civil Procedure Rules**, which 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."*
7. This court(Gikonyo J.), in **Morgan Air Cargo Limited v Evrest Enterprises Limited [2014] KEHC 8693 (KLR)** laid out the factors to be considered while determining the issue of whether to award costs or not as follows:

- 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.*

8. This matter was filed just over a year ago on 25th February 2025 together with the application of the same date and after summons were served upon the Defendants, they entered appearance and filed a response to the application by way of a replying affidavit and supplemented the same with submissions. The Plaintiff has not provided reasons as to why he chose to withdraw this suit and application but my perusal of the response by the Defendants tells me that the Plaintiff is in the habit of filing multiple suits in different courts over the same subject matter on the eve of any scheduled auction which is a clear abuse of the court process. I see no reason why the Defendants should not be awarded costs of the suit

because the Plaintiff has unnecessarily dragged the Defendants into another suit and it is possible that the Defendants have incurred costs in the process of trying to prepare their defence and responding to the vexatious application.

9. Therefore, and without belaboring on this issue, I allow the 1st and 2nd Defendants' Request for Judgment on costs of the withdrawn suit.

**DATED SIGNED and DELIVERED virtually at NAIROBI this 9th
OF MARCH 2026**

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J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. N/A for the Plaintiff/ Applicant.
2. Mr. Mutua for the Respondent.
3. Amos - Court Assistant