



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CIVIL APPEAL NO. E011 OF 2023

PERIS WANJIRA KIRUGI.....APPELLANT
VERSUS
JAN JAPAN (K) LIMITED.....1ST
RESPONDENT
STANLEY MURIUKI GACHINGIRI.....2ND RESPONDENT

RULING

Brief background

- [1] The Appellant lodged the present Appeal challenging the Judgment delivered on 8th December 2022 in Kerugoya CMCC No. 76 of 2020. The Appeal, however, did not proceed beyond the preliminary stage. No directions under Section 79B of the Civil Procedure Act were issued and no Record of Appeal was filed.
- [2] Prior to the admission of the present Appeal for hearing, the Appellant filed a Notice of Withdrawal dated 18th November, 2024 seeking to withdraw the Appeal with no orders as to costs, the trial court Judgment having already been fully settled.
- [3] The Respondent agreed to the withdrawal of the Appeal but sought costs of the suit. The parties could not agree on the issue of costs and thus the Court on 27th January, 2026 directed the parties to submit on costs.

Appellant submissions

Whether the Appeal should be marked as withdrawn with no orders as to costs

- [4] The Law on Costs 5. Section 27(1) of the Civil Procedure Act provides:

***“Subject to such conditions and limitations as may be prescribed...
the costs of and incidental to all suits shall be in the discretion of the***

court... and the court shall have full power to determine by whom and out of what property and to what extent such costs are to be paid...”

[5] While the general rule is that costs follow the event, the same provision expressly grants the Court discretion to order otherwise.

[6] The Supreme Court in *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* [2014] eKLR held that:

“The award of costs would normally be guided by the principle that ‘costs follow the event’... However, the vital factor in setting the preference is the judicious exercise of discretion by the court...”

[7] The Court emphasized that costs are not automatic and must be awarded based on the circumstances of each case, and whether the circumstances that led to the withdrawal of the Appeal warrant awarding costs. The stage at which proceedings are withdrawn is a relevant factor in the exercise of discretion on costs. In *Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another* [2016] eKLR, the Court outlined factors to consider in awarding costs, including: *“the court is entitled to look at inter alia (i) the conduct of the parties, (ii) the subject of litigation, (iii) the circumstances which led to the institution of the proceedings, (iv) the events which eventually led to their termination, (v) the stage at which the proceedings were terminated, (vi) the manner in which they were terminated, (vii) the relationship between the parties and (viii) the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of the Constitution. In other words the court may not only consider the conduct of the party in the actual litigation, but the matters which led to the litigation, the eventual termination thereof and the likely consequences of the order for costs.”*

[8] The Appellant moved the Court for withdrawal of the Appeal at a very preliminary stage. The Record of Appeal had neither been prepared nor filed, the Appeal had not been admitted for hearing, and no directions had been taken. This demonstrates that the matter had not crystallized into substantive appellate proceedings warranting the incurring of significant costs. Consequently, the appellant urges the Court to mark the Appeal as withdrawn and make no orders as to costs, as the withdrawal has been necessitated by the full satisfaction of the decree and not by any fault on the part of the Appellant.

2nd Respondent submissions

[9] Section 27(1) of the Civil Procedure Act provides that the award of costs is in the discretion of the court, with the general principle being that "costs follow the event" unless the Court, for good reason, orders otherwise. This discretion must, however, be exercised judiciously. It is the Respondent's contention that he is entitled to costs, as the Appellant filed the instant Appeal despite being aware that the Respondent herein had commenced a declaratory suit against the Appellant Insurer. Despite this, the Applicants insisted on filing the instant Appeal.

[10] It is further the contention of the Respondent that he had to instruct advocates to represent his interest and defend the instant Appeal and thus incurred costs. The Respondent relies on the case of *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another*, supra, as to the factors to be considered in awarding costs include the conduct of the parties, the stage at which the proceedings were terminated, and the broader constitutional goal of promoting reconciliation and accountability pursuant to Article 159(2)(c) of the Constitution. The respondent submits that he was served with the Memorandum of Appeal, sought the services of his Advocates on record paid for those services and the said Advocates appear to represent him before the Honourable Court diligently. It is thus only fair that the Respondent herein recovers the costs he spent in the instant Appeal.

Issue

[11] Whether costs should be awarded for the withdrawn appeal.

Analysis

[12] The law governing the award of costs is principally found under Section 27(1) of the Civil Procedure Act, which provides that:

“Subject to such conditions and limitations as may be prescribed... the costs of and incidental to all suits shall be in the discretion of the court, and the court shall have full power to determine by whom and out of what property and to what extent such costs are to be paid...”

[13] The provision establishes two guiding principles. First, the award of costs is a matter within the discretion of the Court. Second, the general rule is that costs follow the event, unless the Court for good reason orders otherwise.

[14] The Supreme Court in *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* {2014} eKLR emphasized that while the general rule is that costs follow the event, the Court retains a wide discretion which must be exercised judiciously and not mechanically, and held that “***Costs follow the event but the court has discretion to determine otherwise depending on the circumstances of the case.***”

[15] As observed in *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another* [2016] KEHC 7064 (KLR), the factors to be considered in awarding costs, include the conduct of the parties, the stage at which the proceedings were terminated, and the broader constitutional goal of promoting reconciliation and accountability pursuant to Article 159(2)(c) of the Constitution.

[16] In the present case, it is not disputed that the Appeal was withdrawn at a preliminary stage. The record shows that the Appeal had not been admitted for hearing under Section 79B of the Civil Procedure Act; no Record of Appeal had been filed; and no directions had been taken. The withdrawal was occasioned by the full settlement of the decretal sum, which rendered the continuation of the Appeal unnecessary. The merits of the appeal were not determined.

[17] However, the Respondent argues that he had already been served with the Memorandum of Appeal and had to engage counsel to protect his interests in the matter. Consequently, he incurred legal costs.

[18] The Court accepts that although the Appeal did not proceed to substantive hearing, the filing of the Appeal necessitated the Respondent to instruct advocates and respond to the proceedings. The Court in *Party of Independent Candidate of Kenya v Mutula Kilonzo & 2 Others* [2013] eKLR, observed that ***a successful party*** should ordinarily be compensated for costs incurred in defending proceedings unless there are compelling reasons to deny such costs.

[19] In the circumstances of this case, the Court considers that it cannot be said that there was a successful party as only the Memorandum of Appeal was filed indicating the intention of the appeal and the grounds therefor but the Record of Appeal was not filed and the appeal was not set down for hearing. The decretal sum was settled separately upon a declaratory suit, and the merits of the appeal were not determined and, therefore, there is no determination of the ***successful*** party in the dispute.

[20] The appeal became moot upon the settlement of the decretal sum in the judgment appealed from. The event of a withdrawal of ***moot*** proceedings must be considered differently from the event of a ***successful*** appeal where the merits of the

parties' respective case are finally determined by the Court. In addition award of Costs must not be used in manner to discourage parties from seeking remedy in the constitutionally ordained process of the Court in its various levels.

ORDERS

[21] Accordingly, for the reasons set out above, the Court finds that the appeal shall be marked withdrawn with no orders as to costs.

[22] File closed.

Order accordingly.

DATED AND DELIVERED THIS 12TH DAY OF MARCH 2026.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. Kathigiu for Mr Magee for the Appellant.

Mr. Kipngetich for the 2nd Respondent.