

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NO. E155 OF 2024

**HOTEL
LIMITED.....APPELLANT/RESPONDENT**

WATERBUCK

VERSUS

VICTOR KIBET SIELE.....RESPONDENT/APPLICANT

RULING

1. By a Notice of Motion dated 31st May, 2025, and expressed under Order 51 and Order 52 Rule 2 of the Civil Procedure Rules, 2010, the Respondent/Applicant sought the following Orders:-

1) *The Honourable Court be pleased to order payment by the appellant of the costs of HCCA/E155/2024: Hotel Waterbuck Limited vs Victor Kibet Siele to the Respondent.*

2) *Cost of this application be provided for.*

2. The application is premised on the grounds set forth on the face of the Application and supported by the Affidavit of the Respondent, sworn on even date. He states that the Office of the Data Protection Commissioner made a determination on 18th June 2024 in ***Complaint No. 0478 of 2024: Victor Kibet Siele vs Hotel Waterbuck Limited***, in which the Respondent herein was directed to compensate the Applicant in the sum of Kshs. 500,000/- for using the Applicant's image on its website for commercial gain.

3. Subsequently, on 16th July 2024, the Appellant filed this current appeal, being ***HCCA/E155/2024: Hotel Waterbuck Limited vs Victor Kibet Siele***, to appeal against the determination of the ODPC dated 18th June 2024. In response, he immediately instructed his advocates on record, M/S Hussein & Omar Advocates LLP, to come on record and file appropriate pleadings in the Appeal.

4. However, before they could file a response to the Appeal, they were notified on 29th July 2024, that the Appellant filed a Notice of Withdrawal of even date seeking to discontinue/withdraw this Appeal and served the same upon the Respondent.
5. He states that withdrawal/discontinuance of appeals is governed by Order 52 Rule 9 of the Civil Procedure Rules, 2010, which provides that an Appellant under Section 62(1) or section 73(1) of the Act may at any time discontinue his appeal by filing a Notice of Discontinuance and serving it on every party to the appeal and on the society. (2)Where an appeal has been discontinued under sub-rule (1), it shall be treated as having been dismissed with an order for the payment by the appellant of the costs of and incidental to the appeal.
6. He states, therefore, that the net effect of the Appellant's Notice of withdrawal dated 16th July 2024 is that the current Appeal ought to be dismissed with an order for payment by the Appellant of the costs.
7. Accordingly, he is filing the current application to seek the costs of the current appeal, the same having been dismissed.
8. The Appellant opposed the Application vide its replying affidavit sworn on 30th June, 2025, by Davies Kinyanjui, one of the directors of the Applicant. He states that the appeal serialised as ***HCCA/E/155/2024: Hotel Waterbuck Limited v Victor Kibet Siele*** intending to disturb the decision of the **Office of the Data Protection Commissioner (ODPC) in Complaint No. 0478 of 2024: Victor Kibet Siele v Hotel Waterbuck Limited dated the 18th day of June, 2024** was subsequently withdrawn by their Advocates vide the filing of a Notice of Withdrawal dated the 29th day of July, 2024.
9. He states that the Appellant/Respondent's election to withdraw the appeal was made in good faith and the same was borne from the necessity of ensuring that parties are not shouldered with exorbitant and massive amounts of costs.

10. He states that neither the record of appeal had been filed by the Appellant/Respondent nor any grounds of opposition thereto raised by the Respondent/Applicant herein. Thus, the proposed appeal was still in its infancy, and the same had not been admitted and set down for hearing.
11. He admits that, while the Notice of Appeal had been served upon the Respondent/Applicant's Counsel on record, the former had not entered any response thereto and/or was yet to receive instructions from the Respondent/Applicant to enter such response.
12. That, in light of the foregoing, it defeats reason for the Respondent/Applicant to enter an Application seeking the payment of costs when no resources were expended by the former in response to the proposed appeal before its withdrawal.
13. Further, that the question of costs is a discretionary one and the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of each particular case, while being guided by ends of justice.
14. He states that the question of costs being a discretionary one, the extant Application mischievously purports to countermand and/or supplant such discretion donated upon the Court by section 27 of the Civil Procedure Act to determine the question of costs generally.
15. It is his case that the subject Application grossly militates against and fails to observe the rules attendant to the granting of party and party costs as the Respondent/Applicant cannot be heard to pray for costs when the extant proposed Appeal was never admitted by the Honourable Court nor set down for hearing.
16. He states that the instant Application is a dishonest scheme by the Respondent/Applicant to extract costs from the Appellant/Respondent despite failing to file any response and/or filing any documents in relation thereto.

17. He urges this Court not to penalise the Appellant for withdrawing the subject appeal since the said withdrawal was made in good faith and with the intention to ensure that parties herein are not shouldered with a costly and emotionally draining hearing process.
18. Consequently, since the Respondent/Applicant did not expend any resources in defending and/or opposing the subject Appeal, and that subject withdrawal was made in good faith to save precious judicial time and enable the Honourable Court to focus on equally demanding cases, it would be unjust and unfair to have him benefit from a process that it did not participate in. He thus prayed for the dismissal of this Application.
19. In a rejoinder vide a Further Affidavit sworn on 21st July, 2025, the Applicant states that the legal proceedings began when the **Office of the Data Protection Commissioner (ODPC)** issued a determination in **Complaint No. 0478 of 2024** on 18th June, 2024, awarding him **Kshs. 500,000** against Hotel Waterbuck Limited.
20. Following this decision, the Hotel filed a Memorandum of Appeal on 16th July, 2024. In response, he engaged the services of **M/s Hussein & Omar Advocates**, who filed a Notice of Appointment on 18th July, 2024, after receiving extensive instructions to defend the appeal.
21. He states that the trajectory of the case shifted when the Appellant filed a Notice of Withdrawal on 29th July, 2024. Siele asserts that this withdrawal was not made in good faith, but was instead a calculated attempt to delay his receipt of the awarded funds by filing multiple, overlapping suits. Specifically, that after attempting to withdraw the appeal, the Hotel initiated **Judicial Review E011 of 2024**, which the Hon. J.M. Nang'ea ultimately struck out on 5th May, 2025.
22. He states that despite the original appeal remaining technically active, the Hotel then filed **Miscellaneous Application No. E183 of 2025** on 19th May, 2025, seeking fresh leave to appeal the ODPC's decision.

23. He contends that these actions constitute an abuse of the court process. He refutes claims that no costs have been incurred, noting that his advocates have conducted extensive research and incurred significant instruction fees. Consequently, he requests that the Court exercise its discretion to ensure the Appellant bears the full costs of the appeal.

Applicant/ Respondent's Submissions

24. The Applicant identified one issue for determination, that is, **whether the Respondent/Applicant should be granted the costs of the appeal.** The Applicant contends that since the Appellant voluntarily moved to terminate the proceedings, the responsibility for the resulting legal expenses must be formally assigned.

25. The Applicant relies on **Order 52 Rule 9 of the Civil Procedure Rules, 2010**, which dictates the effects of withdrawing an appeal. They argue that under this rule, any discontinued appeal is treated as dismissed, carrying an automatic implication that the Appellant must pay the costs incidental to the appeal. This is supplemented by **Section 27 of the Civil Procedure Act**, which grants the Court discretion over costs but establishes the proviso that costs should follow the event, meaning the successful party (or the party remaining after a withdrawal) should typically be indemnified.

26. To support the costs, follow the event principle, the Applicant cites the case of **Joseph Oduor Anode vs Kenya Red Cross Society, Nrb HCCC No. 66 of 2009 [2012] eKLR**, where Odunga, J(As he then was) observed thus:-

“...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 ...”

27. He further cites the book, *Judicial Hints on Civil Procedure*, 2nd Ed. (Nairobi; Law Africa 2011) at page 94, where Mr. Justice (Rtd) Kuloba observed-

“Costs are [awarded at] the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise: Chamilabs v. Lalji Bhimji and Shamji Jinabhai Patel, High Court of Kenya, Civil Case No. 1062 of 1973.”

28. Further, he cites Wanjiru v Kombo (Civil Appeal E207 of 2023) [2024] KEHC 7679 (KLR) where Helene R. Namisi, J observed thus:-

“The basic rule, therefore, is that the successful party is awarded costs and that this rule should not be departed from without the exercise of good grounds for doing so...”

29. Further still, the Respondent cited DGM v EWG [2021] eKLR, where Charles Kariuki J stated instances where the Court could depart from the general rule as follows:-

“Any departure from this trite law can only be for good reasons which the Supreme Court in Jasbir Singh Rai & Others vs Tarlochan Rai & Others [2014] eKLR noted includes public interest litigation since in such a case, the litigant is pursuing public interest as opposed to personal gain.”

30. The Applicant contends that the Appellant’s sequential actions, withdrawing the present appeal, initiating a Judicial Review, and subsequently filing a miscellaneous application for leave to appeal out of

time, constitute a calculated strategy executed in bad faith. This trajectory is characterised as a classic instance of forum shopping and a gross abuse of the court process, intentionally designed to obstruct the Applicant from realising the fruits of the original determination.

31. The Applicant reiterates that before the withdrawal, he had entered an appearance, conducted extensive legal research on the merits of the appeal, and the administrative costs of printing and serving documents. Accordingly, the Appellant must be directed to pay the costs of both the appeal and the current application to ensure the Applicant is not unfairly penalised for a suit the Appellant chose to abandon.

Respondent/Appellant's Submissions

32. The Appellant argues that the Respondent's application for costs is unmerited and should be dismissed. They contend that the withdrawal of the appeal was done in good faith to spare both parties from exorbitant legal costs and an unnecessarily protracted hearing process. Crucially, the Appellant highlights that the appeal was in its infancy stage, since the record of appeal had not been filed, the appeal had not been admitted for hearing, and the Respondent had not yet filed any grounds of opposition or even entered a formal response.

33. The Appellant relies on Section 27 of the Civil Procedure Act, emphasising that the award of costs is a discretionary power of the court. While the general rule is that costs follow the event, the Appellant argues this is a judicial discretion that must be exercised based on the specific facts of the case. They maintain that awarding costs to a Respondent who never filed any process and did not participate in the proceedings would be unjust.

34. In support of its case on the principle of the Court's discretion as to the award of costs, the Appellant cites the case of **Punchlines Limited v Joseph Mugo Kibaria, Boniface Kilonzo Kisilu, Moses Muinde John, Henry Muoki Kitila, Jackson Muteti Mwongo, Benson Wabwile**

Onyisio, Linus Omenta Gesicha, George Antony Kabue, Moses Kikwau David, Henry Muhanji Lugano & Jamen Ichuliza Chadaka

[2018] KECA 217 (KLR), where the Court of Appeal cited with approval the High Court in the **Party of Independent Candidates of Kenya versus Mutula Kilonzo & 2 others, HC EP No. 6 of 2013**, on the issue of costs as follows:-

“It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs is a matter in which the trial judge is given discretion But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, is a rule which should not be departed from without the demonstration of good grounds for doing so.”

35. Further, he cited the Supermarine Handling Services Ltd V Kenya Revenue Authority [2010] Keca 373 (KLR) where the Court of Appeal held that:-

“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. See Section 27 (1) of the Civil Procedure Act. In the case Devram Dattan v Dawda [1949] EACA 35 it was held,- “It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts...If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of the sufficiency of those grounds for this purpose is entirely a matter for

the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance.”

36. In Conclusion, the Appellant submits that because the Respondent expended no resources and filed no response before the withdrawal, there is no justification for compensation. Consequently, the Appellant urges the Court to apply the overarching purpose of costs, which is to indemnify for actual expenditure, and dismiss the Respondent's application with costs.

Analysis and Determination

37. From the material presented before this Court, the only issue for determination herein is **whether the Respondent should be paid costs for the withdrawn suit.**

38. Section 27 of the Civil Procedure Act 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.”

39. In the case of DGM v EWG (supra), CM Kariuki J, while citing the case of Morgan Air Cargo Limited v Evrest Enterprises Limited [2014] eKLR, listed the following factors for the Court to consider when handling an Application seeking payment of costs to include:-

“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.*

Noteworthy, the list is not exhaustive. In other words, the court must be guided not only by the conduct of the parties in the actual litigation, but also other matters including likely consequences of the order for costs.”

40. Applying these factors to the present case, it is not in dispute that the appeal arose from a determination of the Office of the Data Protection Commissioner delivered on 18th June 2024, in which the Applicant was awarded Kshs. 500,000 for the unlawful use of his image for commercial purposes. The Appellant, being dissatisfied with that determination, lodged the present Appeal vide Memorandum of Appeal dated 16th July 2024.
41. However, shortly thereafter, on 29th July 2024, the Appellant elected to withdraw the Appeal, which was adopted by the Court on 18th June, 2025. The Appellant/Respondent had filed a Notice of Appointment on 31st July, 2024.
42. There is nothing inherently improper in the Appellant exercising its right to withdraw the Appeal. However, the events that followed the withdrawal are of particular significance. In this case, the Appellant did not simply withdraw the appeal and bring the dispute to an end. Instead, it proceeded to institute Nakuru JR No. E011 of 2024, which was ultimately dismissed by Nang’ea J for want of jurisdiction, and thereafter filed Nakuru Miscellaneous Application No. E183 of 2025 seeking fresh leave to appeal.

43. The above sequence suggests that the withdrawal was a tactical step rather than an attempt to conclude the matter, and reflects conduct that prolonged the dispute and subjected the Applicant to repeated legal processes.
44. Bearing in mind the case of *Morgan Air Cargo Limited* (supra), the conduct of the parties, the events leading to the termination of the proceedings, and the likely consequences of the Order for costs, all weigh in favour of awarding costs.
45. Despite the early withdrawal, the Applicant continues to incur legal expenses in responding to the subsequent suits arising from the same cause. Thus, the Appellant's claim of good faith is weakened, and in the circumstances, an award of costs is justified.
46. Consequently, this Court makes the following Orders:-
- 1. The Respondent/Applicant is awarded the cost of withdrawal of the Appeal.**
 - 2. The Respondent/Applicant is also awarded costs of this application.**
 - 3. The said Costs to be taxed in the usual manner.**

Dated, signed and delivered at Nakuru this 4th Day of May, 2026.

**PATRICIA GICHOH
JUDGE**

In the presence of:

Mr. Husein for the Respondent/Applicant

Mr. Kisila for Appellant/ Respondent

Erickson, Court Assistant