

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
COMM. APPEAL NO. E212 OF 2024

BETWEEN

LAWRENCE MWENDA MIRITI.....
APPELLANT

AND

DUNCAN KIMANI
KAMAU.....1ST RESPONDENT
JAMES KURIA KAMAU.....2ND
RESPONDENT

(Being an appeal from the Ruling and Order of Hon. H. M. Ng'an'ga PM dated 1st August 2024 at the Magistrates Court, Milimani in Civil Case No.E1027 of 2023)

JUDGMENT

Introduction & Background

1. The Appellant filed suit against the Respondents sometime in July 2022 in the subordinate court seeking inter alia Retainment of Kshs. 430,000.00, Special damages of 861,000.00 and General damages. The Respondents entered appearance and filed a

defence together with the and an application to strike out the suit. On 2nd November 2022, the Appellant attended court and withdrew the suit with no orders as to costs and the subordinate court initially marked the suit as withdrawn with no costs. Upon learning of this order of withdrawal, the Respondents filed an application for review dated 23rd February 2023 and on 1st August 2024, the subordinate court reviewed the orders and the suit was marked as withdrawn with costs to the Respondents together with costs of that application (“the Ruling”).

2. The Appellant is dissatisfied with the Ruling and has filed the present appeal through the Memorandum of Appeal dated 13th August 2024 stating that the learned magistrate erred in law and fact by departing from the cardinal principle that the award or non-award of costs is a matter of judicial discretion and; by finding that the Respondent had demonstrated good grounds to file an application for review and as such, he seeks that the appeal be allowed, that the Ruling be set aside and that the Appellant be awarded costs of the appeal.
3. The appeal has been canvassed by way of written submissions which are on record and I have considered the same together with

the record and I will be making relevant references to them in my analysis and determination below.

Analysis and Determination

4. From the parties' submissions, the issue for determination is whether the learned magistrate acted judiciously when he varied his own orders as to costs and ordered that the Appellant bear the costs. As submitted by the parties, **section 27** of the **Civil Procedure Act** addresses the issue of 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.

5. I am in further agreement with the parties that 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.

6. 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."

7. 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)

8. 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.
9. 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.*” Under **Order 25 Rule 3** of the **Civil Procedure Rules**, “*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.*”
10. 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.*

11. The Appellant submits that the Learned Magistrate labelled the Appellant and his advocate as having acted mischievously and stolen the match, yet the court record shows the advocate acted in good faith as the wrong mention date was an inadvertent mistake and the Notice of Withdrawal was filed on the material date. That the Learned Magistrate misquoted what the Appellant's advocate said, omitting the full context including the filing of the Notice of Withdrawal on 2nd November 2022, that the Respondents took over one year to apply for review of the costs order, despite knowing the orders within two days and the Appellant had already

moved on with his life. As such, the Appellant submits that the long delay by the Respondents should not be rewarded with costs and he contends that all parties made some mistakes, therefore, the just and fair outcome is that each party bears their own costs.

12. In response, the Respondents submit that they were not in court and had not been served with the Mention Notice or the Notice of Withdrawal. They assail the appeal on technical grounds stating that the order appealed from has never been filed, contrary to **section 79G** of the **Civil Procedure Act**, that no Record of Appeal has been filed and that despite multiple court appearances and undertakings, the Appellant has never filed the same which is fatal to the appeal, leaving the court with no basis to evaluate what transpired.
13. On the merits of the appeal, the Respondents submit that no special circumstances were pleaded or proven to warrant departure from the rule that costs follow the event unless good reason orders otherwise. That the subordinate court acted judiciously as the Respondents had entered appearance and filed defence well before the withdrawal notice and they were therefore successful parties entitled to costs. They submit that

appellate courts will not interfere with a trial court's exercise of discretion unless it is clearly wrong and that there is no basis to interfere herein.

14. The Respondents submit that the subordinate court found an error on the face

of the record that it had proceeded on 2nd November 2022 without ensuring the Respondents were served, that the Appellant admitted in court that the Respondents had not been served with the Mention Notice or the Withdrawal Notice. That the Learned Magistrate held this was intended to steal a match and violated natural justice and that improper service is an error apparent on the record justifying review.

15. As such, the Respondents contend that the court was perfectly entitled to review its orders, that the appeal is incompetent for not having a Record of Appeal and should be struck out with costs. Alternatively, they urge that the appeal has no merit and should be dismissed with costs.

16. Having gone through the record and submissions, I am inclined to agree with the Respondents that the appeal is indeed incompetent and should be struck out for lacking a Record of Appeal and the

order appealed from the subordinate court. The Respondent rightly cites the Supreme Court's decision in **Bwana v Bonaya & 2 others [2015] KESC 8 (KLR)** which was categorical that without a record of appeal, a court cannot determine an appeal. The record is not a mere technicality but the foundational document that vests the appellate court with jurisdiction. Further, there cannot be any valid appeal where the ruling and order against has not been filed in the record of appeal and that missing trial notes alone is sufficient ground to strike out an appeal (see **Kamba v Mogaka [2025] KEHC 14574 (KLR)**).

17. It is also correct that **Order 42 rule 13 (4) (f)** of the **Rules** requires the court to satisfy itself that the Judgment, the order or appeal which is appealed from forms part of the court record. These are supposed to be included in the record of appeal. The record of appeal is supposed to ensure documents are filed in an orderly manner complete with an index for ease of reference. This **Rule** is couched in mandatory terms and failure to comply with the same renders the appeal incompetent and ousts the jurisdiction of the court to determine the merits of the appeal. The consequence of failing to file the record is that the Judgment and the decree

appealed against is not before the court as required under **section 65** of the **Civil Procedure Act** which provides that appeal to the High Court shall lie from the decree or part of the decree of the subordinate court (see **James Murage Nguyu v RNN (Minor suing through next of friend RNK) & another [2021] KEHC 7783 (KLR)**). It is for these reasons that I find that the appeal is incompetent for want of a Record of Appeal and it is therefore struck out.

18. Assuming, arguendo, that the appeal was competent, I find that the Appellant still loses on the merits for a number of reasons. One, in this case, the Respondents had already entered appearance and filed a defence before the Appellant withdrew the case. They were the "successful party" in the sense that the suit was discontinued after they had incurred costs. The Appellant did not plead or prove any special circumstances to justify departure from the general rule that costs follow the event. Two, the subordinate court reviewed its earlier ruling after realizing there was an error on the face of the record as the Respondents had not been served with the mention notice or the withdrawal notice. The Appellant's advocate admitted this in open court and proceeding without

service violated natural justice which is precisely the kind of error that merits review and correction.

19. Three, the Appellant has submitted that the Respondents took over a year to apply for review, however, delay goes to the timeliness of the review application, not to the underlying entitlement to costs. The subordinate court still had jurisdiction to review its order, and the delay, while notable, was not raised as a bar to review in the subordinate court's ruling. The Appellant cannot raise it for the first time on appeal in a way that undoes the substantive justice of awarding costs to the party who was unfairly shut out. It is admitted that the Appellant's advocate served the wrong mention date and did not serve the notice of withdrawal. Whether characterized as "mischievous" or simply "negligent," the effect was the same: the Respondents were denied an opportunity to be heard on costs before the suit was withdrawn. The Learned Magistrate's language could have been strong, but it is not a basis for appellate intervention where the substantive decision of awarding costs was correct.

Conclusion & Disposition

20. In sum, the appeal is hereby struck out as it is incompetent for the failure by the Appellant to file the record of appeal. Alternatively, the appeal is dismissed on merit and the Appellant shall bear the costs of the appeal to the Respondents

DATED SIGNED AND DELIVERED virtually at NAIROBI this

8th DAY of MAY 2026

.....
J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. N/A for the Appellant
2. Ms. Makhokha for the 1st Respondent
3. Amos- Court Assistant