



**Kwale International Sugar Company Limited v Ndutumi Auctioneers (Environment and Land Appeal E003 of 2023) [2025] KEELC 649 (KLR) (17 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 649 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT AND LAND APPEAL E003 OF 2023  
LL NAIKUNI, J  
FEBRUARY 17, 2025**

**BETWEEN  
KWALE INTERNATIONAL SUGAR COMPANY LIMITED ..... APPELLANT  
AND  
NDUTUMI AUCTIONEERS ..... RESPONDENT**

**RULING**

**I. Introduction**

1. What is before the Honourable Court for its determination is a rather straight forward oral application made by the Learned Counsel for the Respondent – Advocate Nyange on 29<sup>th</sup> January, 2025 on being awarded costs upon the withdrawal of an appeal. The said application was vigorously opposed by Learned Counsel, Advocate Njuru for the Appellant herein.
2. The brief background of this matter is that the appeal herein was instituted by the Appellant Ndutumi Auctioneers before this Court. It was an appeal against the order of Hon. Kiongo Kagenyo [RM] in Kwale Case No E136 of 2023 delivered on 14<sup>th</sup> July, 2023 and 23<sup>rd</sup> August, 2023 in favour of the Respondent. Simultaneously to preferring the appeal, the Appellant filed a Notice of Motion application dated 24<sup>th</sup> August, 2023. Subsequently, upon granting directions, on 29<sup>th</sup> April, 2024 the Honourable Court delivered its Ruling.
3. When the matter came up for directions over the appeal on 29<sup>th</sup> January, 2025, Counsel for the Appellant Mr Njuru made an oral application for withdrawal of the appeal. He stated that the appeal had been overtaken by events and the Respondent had never filed any response to the appeal. That the withdrawal would not be prejudicial to the Respondent.
4. Mr Nyange for the Respondent in a brief rejoinder informed the court that while he was not opposed to the withdrawal of the appeal but on condition that they be awarded costs. He stated that despite



having not contested the appeal, the matter was closely related to ELCAPPEAL No 001 of 2023 which has been active. That costs follow the event and which they were entitled to.

## II. Submissions

5. On the material date, the Honourable Court directed that the oral application be dispensed off by way of written submissions within given stipulated timeframe. Unfortunately, by the time of penning down this Ruling the Court had not yet accessed the submissions. Nonetheless, it served to render its Ruling on its own merit on 17<sup>th</sup> February, 2025.

## III. Analysis & Determination

6. The court has carefully considered the oral application of the Counsels herein, the relevant provision of *the Constitution* of Kenya, 2010 and statutes. To reach an informed, fair and reasonable the Honourable Court has singled out only one issue for its determination – “Whether the Appellant’s withdrawal of the appeal should be subject to payment of costs to the Respondent.
7. The main substratum in this matter is two – fold – withdrawal of an appeal and the awarding of Costs. The Honourable will examine them from a legal point of view. To begin with, all matters of appeals emanating from the Lower Courts to this Court are governed by the provisions of Sections 79A, B, C, D, E, & G of the *Civil Procedure Act*, Cap. 21 and Order 42 Rules 1 to 35 of the Civil Procedure Rules, 2010. Unfortunately, none of these provisions make a provision for the withdrawal or discontinuation of an Appeal.
8. Be that as it may, the Honourable Court will seek refuge from the provision of Order 25 Rules 1, 2 & 3 of the Civil Procedure Rules, 2010. The provision of Order 25 1, 2 and 3 of the Civil Procedure Rules, 2010 provides as follows:
  - “ 1. At any time before the setting down of the suit for hearing the Plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinue or withdrawal shall not be a defence to any subsequent action.
  2.
    - (1) Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn, upon the filing of a written consent signed by all parties.
    - (2) Where a suit has been set down for hearing the court may grant the Plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just.
    - (3) The provisions of this rule and rule I shall apply to Counter - Claims.
  3. 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.”



9. The above provisions of the law in as far as the withdrawal of the suit is concerned is rather straightforward. The effect of this is that the suit ceases from existing and cannot be reinstated any more. In the instant case, the withdrawal of the Appeal means there is no more appeal on record. To buttress on this point, I seek solace from the cases of: “Charles Kiptarbei Birech – Versus - Paul Waweru Mbugua & another [2021] eKLR where it was held that:

“Of importance to note is that the Rules that provide for the discontinuance or withdrawal of a suit do not provide for the revocation of withdrawal notice or the setting aside of the suit. And once a suit is discontinued in whichever manner howsoever, it ceases to exist. A party cannot breathe life into it by whichever means, not even by a consent setting aside the orders of withdrawal. This is because, once a suit is withdrawn there is no party that exists in relation to that suit. The existence of a suit can be equated to the existence of light from a bulb: it only exists if there is an electric current and the gadget known as “bulb”. Once either the light or the bulb ceases to be in contact, the light goes out and in its place is darkness. The only way to get light again in that bulb is to supply current to it. The light that comes into existence again is not the continuation of the one that went out: it is new.”

And further to the case of: - “In Antony Kayaya Juma – Versus - Humprey Ekesa Khaunya & another [2004] eKLR the court held: -

“It is my humble view that a suit which has been withdrawn pursuant to Order XXIV of the Civil Procedure Rules cannot be reinstated...the law under this Order does not envisage a litigant to seek for an order of reinstatement.”

10. Flowing from above, I reiterate that following the Withdrawal of the appeal by the Learned Counsel on 29<sup>th</sup> January, 2025 signalled the end of the said suit. The suit was now comparable to a dead horse. Therefore, no matter how hard one kept flogging it no life would be breathed back to it. It was a waste of time. However, the only pending issue would be the prayer for costs envisaged under Order 25 Rule 3 of the Civil Procedure Rules, 2010 reproduced herein above and which the Court will be addressed herein below.
11. On the other hand, the aspect of awarding of Costs. It is now well established that the issue of Costs is at the discretion of Courts. Costs mean the award that a party is awarded at the conclusion of the legal action or proceedings. The provision of Section 27 (1) of the Civil Procedure Act provides as follows: -

“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.”

12. In short, costs follow the events. By events, it means the result or outcome of the event. This legal principle is supported by various decided case. In the case of: “Reids Hewett & Company – Versus –



Joseph AIR 1918 cal. 717 & Myres – Versus – Defries (1880) 5 Ex. D. 180, the House of the Lords noted: -

“The expression “Costs shall follow the events” means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it...”

13. Other cases being the decisions of Supreme Court “Jasbir Rai Singh – Versus - Tarchalan Singh” eKLR (2014) and “Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014). While in the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
14. The Appellant’s argument was that the Respondent had not filed any response to the appeal and was not therefore entitled to any costs. The Respondent on the other hand stated that this matter is closely related to ELC No 001 of 2023 which had been active. That they had been attending court despite not filing a reply to the appeal.
15. It is trite that costs follow an event unless there is a good reason stated otherwise. The Respondent was served with a copy of the appeal and as evident herein, procured the services of an advocate who even though failed to respond to the appeal but still attended court. I do not find any plausible reason as to why the Appellant should not pay costs, the fact that the Respondents counsel was present before court speaks to charges having been incurred somewhere in procuring his services. The Appellant dragged the Respondent to court and it is only fair that even though the appeal has been withdrawn, costs of the same occasioned to the Respondent are met.

#### **VI\* Conclusion & findings**

16. Consequently, after causing the analysis to the singled out issues for determination herein, the Honourable Court has arrived at the following orders:
  - a. That the filed appeal herein preferred through the Memorandum of Appeal dated 29<sup>th</sup> August 2023 be and is hereby marked as withdrawn.
  - b. That the costs of the appeal be awarded to the Respondent herein.

It is ordered accordingly.

**RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS ...17<sup>TH</sup> ...DAY OF .... FEBRUARY .... 2025**

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**HON. MR. JUSTICE L.L NAIKUNI,  
ENVIRONMENT & LAND COURT AT  
KWALE.**

Ruling delivered in the presence of: -

- a. Mr. Daniel Disii – the Court Assistant.
- b. No appearance for the Appellant.



c. Mr. Nyange Advocate for the Respondent.

