



REPUBLIC OF KENYA



**Sithole & others v Waithaka (Civil Appeal E642 of 2023)
[2025] KEHC 7459 (KLR) (Civ) (30 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7459 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E642 OF 2023

AC MRIMA, J

MAY 30, 2025

BETWEEN

RUMBIDZAI SITHOLE & OTHERS APPELLANT

AND

JOSPHAT WAITHAKA RESPONDENT

RULING

1. This ruling is on whether costs ought to be awarded in a withdrawn appeal. Whereas the Appellants held that no costs ought to issue, the Respondent posited that he was entitled to costs of the withdrawn appeal.
2. Parties filed written submissions on the issue, hence, this ruling. The submissions have been considered and their gist shall be ingrained in this ruling.
3. The issue of costs is captured in Section 27 of the [Civil Procedure Act](#), Cap. 21 of the Laws of Kenya. The provision 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.



- (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.
4. The Supreme Court has on several occasions dealt with instances where parties have disagreed on costs in a withdrawn matter. For instance, in *Petition of Appeal No. 18 of 2019, Director of Public Prosecution -vs- Michael Sistu Mwaura Kamau & 4 others* [2020] eKLR, the Apex Court presided over the contention where parties were unable to agree on costs upon withdrawal of the Petition. In determining the issue of costs, the Learned Judges gave meaning to Section 27 of *Civil Procedure Act* and in so doing referred to its earlier decision in *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* (supra) where it was observed as follows: -
- (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 Respondents 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. (emphasis added).
- ... in the classic common law style, the Courts have to proceed on a case by case basis, to identify “good reasons” for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs ...
5. In *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* case (supra) the Apex Court further observed the aspect of discretion and how it ought to be exercised. It discussed as follows: -
- ... Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.
6. After reiterating its earlier findings as reproduced in the foregoing paragraphs, the Learned Judges of the Supreme Court in *Director of Public Prosecution -vs- Michael Sistu Mwaura Kamau & 4 others* case (supra) discussed the legal position in scenarios where a party withdraws a Petition when it is ready for hearing. In ordering each party to bear its own costs, the Court stated as follows: -
9. We have considered the rival submissions and are convinced that, whereas the Appellant has withdrawn the Petition when it was ready for hearing and while the Respondents have spent time and resources preparing for the hearing aforesaid, we must agree with both the High Court and the Court of Appeal that the issues raised in the Appeal were of great public interest – i.e. the extent of powers bestowed upon the Ethics and Anti-Corruption Commission and whether corruption related offences can be initiated when the said Commission was not properly constituted and whether the President of the Republic of Kenya can direct the Commission or the Director of Public Prosecutions in the execution of their constitutional mandates. These matters transcended the specific interests of the parties and have settled in the public sphere thus attracting the public interest. An order of costs against any party would, in the circumstances, not be fair....



7. In Reference No. 1 of 2014, Council of Governors vs. Senate & another [2014] eKLR the only issue before the Supreme Court was who bears costs upon the withdrawal of a Petition before Court. In determining the issue, the Court referred to its earlier decisions and stated as follows: -
- (25) The issue whether the Court can order for costs upon withdrawal of a matter before it was settled in the John O. Ochanda v. Telkom Kenya limited, Motion Application No. 25 of 2014 in which Ibrahim, SCJ held:
- ... I do hold the view that a prospective appellant is at liberty to withdraw 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 withdraw 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....
8. The Court further discussed discretion and the obligation upon the party praying for costs as: -
- Since it (award of costs) is a discretionary power, what matters is that the same has to be exercised judicially and not whimsically. 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.
9. In the stated case, the Court made an award against the party that withdrew the application on the basis that it had abused Court process, wasted judicial time and failed his professional duty and obligation it had to the Court. For clarity, the Court observed as follows: -
- (32) The Court has reviewed its record since the time the Reference was filed until it was withdrawn. We agree with the chronological account given by the Senate. It is true that the applicant made an application for leave to amend the Reference. The same leave was given but the amendment was not done. An oral stay of proceedings application was again made. Directions were given, but again they were not heeded. The applicant then sat back and waited until the 1st Interested Party filed a Preliminary Objection and the matter was listed for hearing before a two judge bench. During the intended hearing of the Preliminary objection, the applicant then makes an application orally for withdrawal of the Reference. This conduct leaves a lot of questions to be asked by this Court on the real intent of the applicant.
10. From the foregoing discussion, it is clear that at the very core in the award of costs particularly on withdrawal of matters is the Court's discretion which must be exercised judicially. In doing so, the Court must consider several issues including the nature of the matter, the conduct of the parties, the extent of effort applied into the matter, the timing of the withdrawal, financial resources the Respondent applied in defending the case, whether the matter is a SLAPP, whether it was a public interest litigation among many other considerations. (See: Cecilia Karuru Ngayu v Barclays Bank of Kenya & another (supra).
11. The appeal was filed in 2023 and withdrawn in 2025. During the intervening period, the matter came up in Court on some few occasions as parties awaited the filing of the Record of Appeal. Given that the appeal was not a public interest litigation and the parties were engaged albeit minimally, nevertheless, the fair order that presents in the unique circumstances of this case is that the Respondent be awarded the costs of the withdrawn appeal.



12. Consequently, the following orders do hereby issue: -

- a. The Respondent is hereby awarded the costs of the withdrawn appeal assessed at Kshs. 20,000/=.
- b. File marked as closed.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF MAY, 2025.

A. C. MRIMA

JUDGE

Ruling virtually delivered in the presence of:

Mr. Maromba, Learned Counsel for the Appellants.

Mr. Chahilu, Learned Counsel for the Respondent.

Amina/Abdirazak – Court Assistants.

