



**Macharia v Insurance Regulatory Authority & 5 others; Directline Assurance Limited & 2 others (Interested Parties) (Judicial Review Miscellaneous Application E214 of 2024) [2025] KEHC 6958 (KLR) (Judicial Review) (28 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6958 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E214 OF 2024**

**RE ABURILI, J**

**MAY 28, 2025**

**BETWEEN**

**SAMUEL KAMAU MACHARIA ..... APPLICANT**

**AND**

**THE INSURANCE REGULATORY AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY FOR THE NATIONAL TREASURY 2<sup>ND</sup> RESPONDENT**

**DIRECTOR GENERAL, BUSINESS REGISTRATION SERVICE ... 3<sup>RD</sup> RESPONDENT**

**REGISTRAR OF COMPANIES ..... 4<sup>TH</sup> RESPONDENT**

**DIRECTORATE OF CRIMINAL INVESTIGATIONS ..... 5<sup>TH</sup> RESPONDENT**

**ETHICS AND ANTI CORRUPTION COMMISSION ..... 6<sup>TH</sup> RESPONDENT**

**AND**

**DIRECTLINE ASSURANCE LIMITED ..... INTERESTED PARTY**

**SUREINVEST COMPANY LIMITED ..... INTERESTED PARTY**

**TRIAD NETWORKS LIMITED ..... INTERESTED PARTY**

**RULING**

1. On 12<sup>th</sup> March, 2025, this Court heard the preliminary objection dated 18<sup>th</sup> October, 2024, seeking to have these proceedings struck out with costs on account that the application herein as filed is res judicata and res sub judice other matters which had been litigated upon before the Commercial



- Division of the High Court while other similar matters were still pending before the Commercial Division of the High Court over the same subject matter and between the same parties hereto.
2. The respondents and interested parties argued in unison that these proceedings were therefore merely intended to vex them and tire the court with a multiplicity of suits.
  3. The applicant filed the present application seeking judicial review orders against the respondents. The matter was canvassed through oral submissions by the parties with the respondents and interested parties agreeing that the matter was incompetently before this court in view of the similar or substantially similar litigation which was either determined or was pending before courts in other proceedings involving the same parties or their privies.
  4. Following the inter partes hearing of the preliminary objections and before a ruling could be delivered, the applicant elected to wholly withdraw the application. The applicant's counsel has now urged the court not to condemn his client, the applicant, to pay costs, citing as justification, an alleged non-disclosure by the client to his advocate regarding the existence of other related matters.
  5. Counsel for the applicant submitted that it was only during the course of the proceedings that he became aware of other similar or related matters, which, had he known earlier, would have influenced his advice on the institution of the present proceedings. He contends that the applicant ought not to be penalised in costs as the withdrawal was made in good faith and without malice.
  6. I have considered the submissions and the record. It is not in dispute that the respondents and interested parties filed responses to the application, in which they expressly raised the plea of res judicata and res sub judice. That issue was central to the opposition of the application. The assertion by counsel that he was unaware of the existence of other related matters is therefore not credible. The responses were served and were available to the applicant and his counsel prior to the hearing. Nothing prevented the advocate for the applicant from consulting his client on the pleas by the adverse parties. The advocate put a brave face and submitted to the hearing of the preliminary objections which he vehemently opposed claiming that there were no other similar matters filed in other courts.
  7. The general rule is that costs follow the event, and no sufficient cause has been shown to warrant a departure from that principle in this instance.
  8. The power of the court to award costs is grounded in statute. Section 27(1) of the *Civil Procedure Act* (Cap 21) provides:
  9. Section 27(1) of the *Civil Procedure Act* provides: -
    - (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 purpose 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 for good reasons otherwise" order.
  10. The statutory position is reinforced by judicial authority. In *Limuru Country Club & 6 others v Rose Wangui Mambo 15 others* [2019] KECA 101 (KLR), the Court of Appeal cited with approval the



Supreme Court of Uganda case of *Impressa Ing Fortunato Federice v Nabwire* [2001] 2 EA 383 where the Court rendered itself thus:

“The effect of section 27 of the *Civil Procedure Act* is that the Judge or court dealing with the issue of costs in any suit, action, cause or matter has absolute discretion to determine by whom and to what extent such costs are to be paid; of course, like all judicial discretions, the discretion on costs must be exercised judiciously and how a court or judge exercises such discretion depends on the facts of each case. If there were mathematical formula, it would no longer be discretion... while it is true that ordinarily, costs should follow the event unless for some good reason the court orders otherwise, the principles to be applied are- (i) under section 27 (1) of the *Civil Procedure Act*, costs should follow the event unless the court orders otherwise. This provision gives the judge discretion in awarding costs but that discretion has to be exercised judicially. (ii), a successful party can be denied costs if it is proved that but for his conduct the action would not have been brought...”

11. Again, the Limuru Country Club Case (supra), the Court of Appeal stated as follows citing with approval the decision in *Devram Manji Dattani v D. M. Manji* [1943] EACA 6, where the Court held that:

“Costs are awarded to compensate a successful litigant and not to punish an unsuccessful party. Such successful litigant can only be deprived of his costs where his conduct has led to litigation which might have been averted.”

12. In *Farah Awad Gullet v CMC Motors Group Ltd* [2017] eKLR the Court of Appeal held:

“...it is our finding that the position in law is that costs are at the discretion of the Court seized of the matter with the usual caveat being that such discretion should be exercised judiciously, meaning, without caprice or whim and on sound reasoning.”

13. In *Devram Manji Dattani v Danda* [1949] 16 EACA 35 the Court of Appeal for Eastern Africa held that costs are awarded to compensate a successful litigant and not to punish an unsuccessful party. Such successful litigant can only be deprived of his costs where his conduct has led to litigation which might have been averted.

14. The Supreme Court in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR stated as follows on the issue of award of costs:

“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.”

“[22] 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. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the applicant.”

15. Similarly, in the case of *Party of Independent Candidate of Kenya & Another v Mutula Kilonzo & 2 Others* HCEP No. 6 of 2013, it was held:

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (*Fripp v Gibbon & Co.*, 1913 ADD 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at...In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

16. Withdrawal of an application after the matter has been fully heard on the preliminary objection, and after the opposing parties have expended resources to respond and present arguments, ordinarily attracts an award of costs to the successful or prejudiced party.

17. *Supermarine Handling Services Ltd v Kenya Revenue Authority* [2010] eKLR, the Court of Appeal emphasized that:

“Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. 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 sufficiency of those grounds for this purpose is entirely a matter for the Judge to decide, and the Court of Appeal will not interfere with his discretion in that instance. “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.” It is trite law that the issue of costs is a discretionary one that is awarded to a successful party. Furthermore, this discretion must be exercised judiciously and a party cannot be denied costs unless it can be shown that they acted unreasonably.”

18. In this case, I find no exceptional circumstances or basis upon which to deny the respondents their costs. The applicant took the risk of pursuing the application notwithstanding the clear objection based on *res judicata* and *res sub judice* and having elected to withdraw it only after the conclusion of the hearing, must bear the consequences.

19. The applicant and his counsel had ample opportunity to assess the legal propriety and sustainability of the application prior to the hearing. The withdrawal of the application at such an advanced stage, after full submissions, does not entitle the applicant to avoid liability for costs.

20. Accordingly, the application having been withdrawn, I make the following orders:

- a. The chamber summons dated 20<sup>th</sup> September, 2024 is marked as withdrawn as per the Notice of withdrawal of suit dated 17<sup>th</sup> March, 2025.
- b. The *ex parte* applicant shall bear the costs of the application to be taxed and payable to respondents and interested parties who appeared and defended their respective positions on the preliminary objection.



c. Mention on 22<sup>nd</sup> July 2025 before the Deputy Registrar to confirm filing of bills of costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28<sup>TH</sup> DAY OF MAY, 2025**

**R.E. ABURILI**

**JUDGE**

