



REPUBLIC OF KENYA



KENYA LAW
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**Sherali v Bank of Africa Kenya Limited & 13 others (Commercial Case E342 of 2024)
[2025] KEHC 11703 (KLR) (Commercial and Tax) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11703 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E342 OF 2024**

MN MWANGI, J

JULY 31, 2025

BETWEEN

IMRAN HUSSEINALI SHERALI PLAINTIFF

AND

BANK OF AFRICA KENYA LIMITED 1ST DEFENDANT
DIAMOND TRUST BANK KENYA LIMITED 2ND DEFENDANT
NATIONAL BANK OF KENYA LIMITED 3RD DEFENDANT
SBM BANK LIMITED 4TH DEFENDANT
EQUITY BANK KENYA LIMITED 5TH DEFENDANT
CONSOLIDATED BANK OF KENYA LIMITED 6TH DEFENDANT
**PREMIER BANK KENYA LIMITED (FORMERLY KNOWN AS FIRST
COMMUNITY BANK) 7TH DEFENDANT**
HABIB BANK LIMITED 8TH DEFENDANT
STANDARD CHARTERED BANK LIMITED 9TH DEFENDANT
AFRICAN BANKING CORPORATION 10TH DEFENDANT
RISING STAR COMMODITIES LIMITED 11TH DEFENDANT
ALI BADRUDIN ALIBHAI PUNJANI 12TH DEFENDANT
ABDI ALI 13TH DEFENDANT
EQUITORIAL SECRETARIES & REGISTRARS 14TH DEFENDANT



RULING

1. The plaintiff filed this suit on 25th June 2024 vide a plaint dated 6th June 2024 and later filed a Notice of Withdrawal of Suit on 11th July 2024 under Order 25 Rule 1 of the *Civil Procedure Rules, 2010*. On 16th December 2024, Mr. Rene, learned Counsel for the plaintiff appeared before this Court and made an oral application to withdraw this suit with no order as to costs. The said application was instantly canvassed by way of oral submissions.
2. Mr. Rene, learned Counsel for the plaintiff submitted that this suit was withdrawn on 11th July 2024 before any of the parties herein had entered appearance. He relied on the Supreme Court case of *Rai & 3 others v Rai & 4 others* [2014] KESC 31 (KLR) in support of the principle that costs follow the event. He confirmed that he had sworn and filed an Affidavit of Service showing that all the defendants save for the 13th defendant were physically served with the Notice of Withdrawal on 11th July 2024. He however acknowledged that there was late service in respect to the 13th defendant who was served with the said Notice on 13th December 2024.
3. Ms Nyamu, learned Counsel for the 11th & 12th defendants confirmed that they received the plaintiff's Notice of Withdrawal of Suit on 13th December 2024 via email. He stated that although they had not yet filed their documents in response to this suit, they had already prepared them by the time the Notice of Withdrawal was served.
4. Ms Kadima, learned Counsel for the 2nd defendant submitted that they filed their Notice of Appointment on 23rd July 2024 and only became aware of the Notice of Withdrawal on 25th September 2024 while uploading their defence. Although she sought an order for costs for the work undertaken, she acknowledged that the Notice of Withdrawal had been served on their client, but they were unaware of it at the time.
5. Mr. Kisinga, learned Counsel for the 4th defendant submitted that they entered appearance in this suit on 28th July 2024. He asserted that in the background, they had reviewed the documents filed by the plaintiff and had prepared and filed a draft replying affidavit in response to the plaintiff's application dated 6th June 2024. Counsel acknowledged that the Notice of Withdrawal had been served on their client.
6. Mr. Mulaku, learned Counsel for the 5th defendant submitted that they entered appearance in this suit on 12th July 2024. He denied that the Notice of Withdrawal was served on their firm but acknowledged that their client, the 5th defendant, had been served with the said Notice. Counsel sought for an order for costs of entering appearance in this suit.
7. In a rejoinder, Mr. Rene submitted that the Advocates for the parties herein were improperly seeking costs in respect of a suit that had already been withdrawn under the provisions of Order 25 Rule 1 of the *Civil Procedure Rules*. He maintained that this suit stood as withdrawn effective 11th July 2024, pursuant to the Notice of Withdrawal of Suit filed on that date.

Analysis and determination.

8. Upon consideration of the application by the plaintiff's Counsel and the submissions by Counsel for the plaintiff and Counsel for the 2nd, 4th, 5th, 11th & 12th defendants, the issue that arises for determination is whether this suit should be marked as withdrawn with no orders as to costs.



9. It is not disputed that the plaintiff filed this suit on 25th June 2024 and on 11th July 2024 he filed a Notice of Withdrawal of Suit of even date. Upon perusal of the Case Tracking System (CTS), it is evident that by the time the said Notice was being filed, none of the parties herein had entered appearance and/or filed any pleadings in opposition to this suit.
10. The plaintiff's Notice of Withdrawal was pursuant to the provisions of Order 25 Rule 1 of the *Civil Procedure Rules, 2010* which states that –

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 discontinuance or withdrawal shall not be a defence to any subsequent action.
11. This Court notes that Counsel for the 2nd, 4th & 5th defendants confirmed that their clients were personally served with the plaintiff's Notice of Withdrawal of Suit on 11th July 2024. It is well established that prior to a party entering appearance either personally or through an Advocate, service of pleadings must be effected upon the individual directly. Therefore, in the absence of an alternative address for service, and without the defendants' Advocates having filed Notices of Appointment or entered appearance, the plaintiff had no way of knowing whether the defendants had instructed Counsel to act on their behalf in this suit. The plaintiff was therefore justified in serving the Notice of Withdrawal of Suit directly on the defendants. It was then incumbent upon the defendants to inform their Advocates that the suit had been withdrawn as at 11th July 2024, and there was no need to file Notices of Appointment, enter appearance, or prepare and file any responses to this suit.
12. In view of my observation and the assertions made by Counsel for the 2nd, 4th & 5th defendants that they had reviewed the documents filed by the plaintiff and that they had prepared and filed documents in response to the plaintiff's application dated 6th June 2024 and a defence to the plaintiff's suit, thereby entitling them to an order for costs, have no probative value and cannot be used to persuade me to award them costs of this suit.
13. Having acknowledged personal service of the Notice of Withdrawal before they entered appearance in the suit, any action they took thereafter was done after the suit had been withdrawn. In the premise I am not persuaded that the 2nd, 4th & 5th defendants are entitled to an order for costs given the withdrawal of the suit.
14. In respect to the 11th & 12th defendants, the plaintiff's Affidavit of Service sworn on 13th December 2024 by Mr. Hans Oichoe, an Advocate of the High Court of Kenya and learned Counsel for the plaintiff indicates that they were not served with the Notice of Withdrawal of Suit until 13th December 2024, when the Notice was served on their Advocates on record. It is however noteworthy from the CTS, the Court record and the annexures attached to the plaintiff's Affidavit of Service sworn on 13th December 2024 that the firm of Mwaniki Nyamu & Company Advocates filed its Notice of Appointment with instructions from the 11th & 12th defendants on 16th & 30th October 2024. Subsequently, parties appeared in Court on 30th October 2024 when it was brought to the attention of Counsel for the 11th & 12th defendants that the plaintiff had on 11th July 2024 filed a Notice of Withdrawal of the suit.
15. In light of the above, I am of the considered view that although the plaintiff's Notice of Withdrawal of Suit was formally served upon Counsel for the 11th & 12th defendants in December 2024, their Counsel on record was already aware of its existence as at 30th October 2024. It is also worth noting that while Counsel for the 11th & 12th defendants claim that they had prepared their documents in response



to the suit and application prior to being served with the Notice, no evidence has been presented to substantiate the said assertion.

16. Section 27 of the Civil Procedure Act provides for costs for suits in the following terms-

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.”

17. Costs are awarded at the discretion of the Court, and they will normally follow the event, unless the Court or Judge shall for good reason order otherwise. In the case of Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR the Court when addressing the issue of costs stated as follows -

I find useful guidance in the following passage from the Halsbury's Laws of England; 4th Edition (Re-issue), {2010}, Vol.10. para 16

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice” (Emphasis added).

Writing on the same subject Mr. Justice (Retired) Kuloba in his book Judicial Hints on Civil Procedure, 2nd Edition, (Nairobi) Law Africa) 2011, page 94 stated: -

“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...”

18. When a suit is withdrawn before the defendant enters appearance, no leave of the Court is required and costs do not automatically follow. For this reason, I am not persuaded that the defendants herein are entitled to an order for costs of the suit especially so, because the suit was withdrawn way before they entered appearance and/or filed Notices of appointment.

19. The upshot is that this suit is hereby marked as withdrawn with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF JULY 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:-



Mr. Isaac Rene for the plaintiff

Mr. Agutu holding brief for Mr. Chacha Odera for the 2nd defendant

Mr. Isinga for the 4th defendant

Mr. Odhiambo holding brief for Mr. Moriasi for the 5th defendant

Ms B. Wokabi – Court Assistant.

