



Case Number:	Miscellaneous Civil Application 14 of 2021
Date Delivered:	17 Jan 2022
Case Class:	Civil
Court:	Environment and Land Court at Kitale
Case Action:	Ruling
Judge:	Fred Ongarora Nyagaka
Citation:	Sifuna & Sifuna Advocates v Patrick Simiyu Khaemba [2022] eKLR
Advocates:	K. N. Macharia Advocate for the Applicant Prof. N. Sifuna Advocate for the Respondent
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Trans Nzoia
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

The information contained in the above segment is not part of the judicial opinion delivered by the Court. The metadata has been prepared by Kenya Law as a guide in understanding the subject of the judicial opinion. Kenya Law makes no warranties as to the comprehensiveness or accuracy of the information.

REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT KITALE

ELC MISC. CIVIL APPL. NO. 14 OF 2021

SIFUNA & SIFUNA ADVOCATES.....APPLICANT

VERSUS

HON. PATRICK SIMIYU KHAEMBA.....RESPONDENT

RULING

(On staying of proceedings, ruling, intervention and execution pending determination of issues in main suit)

INTRODUCTION

1. The Respondent in the main Application dated **22/07/2021**, which was for the taxation of a bill of costs, brought a Notice of Motion dated **23/9/2021**. The Motion was directed at the proceedings in the said main Application. In the Motion, he prayed for stay of both the proceedings and execution in this matter pending the determination of **Kitale ELC No. 166 of 2013**. The Application was not bought under any specific provision of the law. However, it stated that it was “under the inherent jurisdiction of this Honourable Court.” It sought the following specific Orders:-

(1) ...spent.

(2) That an order issues from this Honourable Court staying the proceedings, ruling, intervention and execution in this Misc. Application No. 14 of 2021 pending the determination of Kitale ELC No. 166 of 2013.

(3) That costs be in the cause.

2. The Application was supported by the Affidavit sworn by one Hon. Patrick Simiyu Khaemba on **20/09/2021**. It was filed on **23/09/2021**, the same date as that of filing the Motion. The Application was founded on a number of grounds which were that, this Court had inherent jurisdiction to prevent the abuse of its process; the Constitution and laws of Kenya guaranteed the right to fair trial and access to justice; the Respondent who was a former Advocate of the Applicant colluded with the **2nd** Defendant in **Kitale ELC No. 166 of 2013** to procure a certificate of taxation by means of fraud; the certificate of taxation in **Kitale ELC No. 166 of 2013** was being used as a basis for taxation in the instant Miscellaneous Application; there was animosity between the parties and defamatory averments had been made in the Respondent’s affidavits against the Applicant herein about his failure to perform marital affairs with his wives hence the Application to stay the execution of the certificate of costs in **Kitale ELC No. 166 of 2013**; the Applicant would suffer irreparable damage from illegalities and unethical conduct if the stay was not granted; and the Application had been brought without undue delay and in the interest of justice.

THE APPLICATION

3. As stated in **paragraph 2** above, the Application was supported by the Affidavit sworn by one Hon. Patrick Simiyu Khaemba on **20/09/2021**. In it he reiterated the grounds in support of the Application. At **paragraph 6** he deponed that the Respondent herein “who is my former Advocate, colluded with the Advocate for the **2nd** Defendant in **Kitale ELC No. 166 of 2013** to procure a certificate of taxation by means of fraud.” He then repeated the fact that he had challenged the said certificate of costs in **Kitale ELC No. 166 of 2013** hence the need to stay the proceedings and execution in the instant file pending the determination of that

issue in the parent file. He deponed further that in the event of the success of his prayer in **Kitale ELC No. 166 of 2013** that the Applicant (now Respondent) personally foots the costs therein because he had gone on a frolic of his own the current suit shall be baseless. He stated further that the Respondent admitted in **paragraph 38** of a Further Affidavit sworn by him in the **Kitale ELC No. 166 of 2013** that one “Diana Wabwile orchestrated the current state of affairs.” He annexed and marked as **PSK 3** a copy of said Further Affidavit.

4. The deponent stated in **paragraph 19** of his Affidavit that it was the County (although he did not name which County Government) which instructed the Respondent to act for it in that suit, in public interest. In the next paragraph, the Applicant made deep and disturbing deposition about the Respondent being involved in dealings with his wife by providing her with comfort behind his back. He then stated that the Respondent was engaged in turning the Applicant’s wife against him. *As to why parties resorted to bringing personal and private issues into a professional or Advocate-client dispute, this Court does not know but it will not inquire into it.*

5. Nevertheless, the Applicant deponed further that he never instructed on or consented to the submissions filed by the Respondent in the bill of costs taxed. He then turned his deposition to the length of the submissions filed in response to the taxation. He stated that they were a mere one-page document designed “to do” him “in”. He stated that at no point did he ever instruct one Claire Wanyama to act for him. He then termed the Application and bill of costs herein as scandalous, an illegality and a fraud meant to be an abuse of the court process.

THE RESPONSE

6. The Respondent, learned counsel Prof. N. Sifuna, replied to the Application through an Affidavit he swore on **14/12/2021** and filed the following date. He deponed in **paragraph 3** thereof that the Application was brought merely to delay the taxation of his Advocate-Client Bill of Costs dated **22/07/2021**. He stated that the Bill of Costs proceeded by consent of both learned counsel by way of written submissions. He stated that the suit against the **1st Defendant in Kitale ELC No. 166 of 2013** was withdrawn by consent in **2014** while that against the **2nd Defendant** was dismissed in **2018**. He deponed that the only outstanding issues in that suit was the taxation of costs hence granting **prayer 2** of the instant application would be a mere academic exercise.

7. He attacked the Application as being lay for reason of not citing any provision of law it was brought under. He then repeated that the certificate of costs in issue had neither been set aside nor appealed from. He then stated that the Advocate-Client bill of costs was not time-barred because the client-Advocate relationship between the parties in **Kitale ELC No. 166 of 2013** ended on **30/08/2021** when a Notice of Change of Advocates was filed and by it counsel took the matter over from his law firm. He denied ever committing any fraud, criminality, collusion, wrong-doing or professional impropriety. He deponed that he did not need to file long sagacious submissions in the taxation of party and party costs in **Kitale ELC 166 of 2013**. He deponed that the Application dated **30/08/2021 in Kitale ELC No. 166 of 2013** was not a reference to the taxation that gave rise to the certificate of costs in issue in the instant Application.

8. At paragraph **17** he deponed that the proper way to challenge a taxation of a bill of costs was by reference and not review under **Section 80 of Civil Procedure Act and Order 45 of the Civil Procedure Rules**. He stated again that in **Kitale ELC No. 166 of 2013** the Applicant had complained about the **two Defendants** therein. He attached to his Affidavit and marked it as **Annexure NS 5** the Applicant’s witness statement in that suit so as support that fact. He then stated that the Advocates for the Applicant had brought the Application out of sheer recklessness and negligence.

9. He deponed further that one of the Applicant’s girlfriends approached him and stole his documents regarding the Applicant. He then deponed further regarding one Claire Wanyama and her involvement in the matter. He annexed to the Affidavit mobile communication between her and him on the issue he deponed to. He went on to state how on **03/09/2021** the Applicant sent the said legal officer (supposedly of the Trans-Nzoia County Government) to his office to obtain copies of pleadings relating to the **2nd Defendant’s Party and Party Costs** dated **21/07/2021**. He also deponed on how the Applicant had demanded **Kshs. 88,300,000/=** in relation to the pleadings and affidavits in both this matter and the **Kitale ELC No. 166 of 2013**.

SUBMISSIONS

10. When the Application came up for consideration, the Court directed that it be disposed of by way of written submissions. The Applicant relied on his dated **05/10/2021** and filed on **08/10/2021**. On **20/12/2021** the Respondent filed his dated **17/12/2021**. On

20/12/2021 when the Application came up for mention to confirm the filing of the submissions and taking a date for ruling, learned counsel for the Applicant made an oral application to be permitted to highlight the submissions. The Application was strenuously opposed but the court summarily ruled on it. It granted each side chance to highlight its submissions briefly. They did.

DETERMINATION

11. I have considered the written submissions by both learned counsel. I have also made due analysis of the oral submissions made on **20/12/2021**. I have carefully read the Application, its grounds and the affidavit in support thereto together with the Affidavit in response. I have also considered both statutory and case law applicable.

12. I note, and as stated briefly at **paragraph 4** above, that both the Applicant and Respondent herein at some point veered off the issues at hand and plunged into personal attacks on each other. They also raised irrelevant issues especially on each other's private lives and those of the other individuals not before the Court. I state that because this is not a matrimonial arena or forum where such thorns and thistles can be in issue. Thus, this Court will not venture into such issues while determining this Application. What went into the parties' and other people's private lives and involvement should not be used for whipping this Court's emotions or trying to influence its thinking otherwise than through the lenses of justice. Therefore, I steer off those murky waters of private life and frame the issues herein. I am of the view that the following are the legal and factual issues that commend to me for determination:

(a) Whether this Court should stay the proceedings and execution herein pending determination of Kitale ELC No. 166 of 2013.

(b) Who bears the costs of this Application"

13. I start by analyzing each issue separately as hereunder:

(a) Whether this Court should stay the proceedings and execution herein pending determination of Kitale ELC No. 166 of 2013

14. In order for the Court to arrive at the conclusion on whether or not to stay the proceedings and execution herein, it had to look at whether or not there was a nexus between the instant (Miscellaneous Civil) Application No. **14** of **2021** and **Kitale ELC No. 166** of **2013**. The Court noted that the Miscellaneous Civil Application No. **14** of **2021** was filed on **27/07/2021** vide a Notice of Motion dated **22/07/2021**. The Motion was for the taxation of the Advocate-Client Bill of Costs dated **21/07/2021**. The Bill was filed by the law firm of M/S Sifuna & Sifuna Advocates against one Hon. Patrick Simiyu Khaemba. The basis for the Application was that the said Hon. Patrick Simiyu Khaemba was a former client of the firm.

15. An analysis of the pleadings herein shows that the Bill of Costs arose from instructions given to the Applicant (now Respondent) by one Hon. Patrick Simiyu Khaemba to act for in **Kitale ELC No. 166** of **2013**. In that matter he was the Plaintiff. The suit was between the said Hon. Patrick Simiyu Khaemba and Kenya Electricity Transmission Co. Ltd (**KETRACO**) which was the **1st** Defendant and Kenya Power and Lighting Company Ltd the **2nd**. When that matter was concluded and the law firm for the Plaintiff therein removed from the record by a Notice of Change of Advocates, the Respondent sought to tax his Advocate-Client Bill of costs against his former client. Clearly there was a nexus between the two matters. This then turns me to the instant Application.

16. In brief, both the oral and written submissions reiterated each party's case as given in summary above. In addition, the Applicant, one Hon. Patrick Simiyu Khaemba, submitted between **paragraphs 7** and **11** inclusive that he did not instruct "Mr. Sifuna Advocate" (*sic*) to act for him personally and that he did not instruct him to sue the **2nd** Defendant in **Kitale ELC No. 166** of **2013**. However, he submitted that he was awarded (in that suit) **Kshs. 300,000/=** as thrown away costs as against the **1st** Defendant. His learned counsel submitted that the consent signed by Mr. Sifuna (*sic*) that led to the award of costs against the **1st** Defendant was illegal and without any instructions from his client and no consent was signed on behalf Hon. Patrick S. Khaemba so that he could be off the hook regarding the **2nd** Defendant's costs. He further submitted at paragraph **10** that "Mr. Sifuna (*sic*) pocketed the **Kshs. 300,000/-** and more and never told Hon. Patrick Simiyu Khaemba who was his client at the time", and at paragraph **11** that having not been satisfied with the money he had been "bribed" now came to "ravenously...consume his client Hon. Patrick Simiyu Khaemba by demanding over **Kshs. 19,000,000/=**."

17. I have singled out above the **five (4)** paragraphs of the Applicant's submissions for the reasons I state hereafter. Up to this point in the regard to the said submissions, I point out that they are but the strangest submissions I have come across in my tenure on the

Bench. I say so because, within a span of only five sentences that form them, learned counsel (or to say, the Applicant) denied severally that his client (or /he) instructed the Respondent to Act for him in **Kitale ELC No. 166 of 2013** and stated again and again that his client actually instructed the said law firm to act for him. What a set of submissions!

18. It appears, from the submissions and depositions by the Applicant, that with regard to the payment of the costs of **Kshs. 300,000/=** being the award in the suit against the **1st** Defendant, Hon. Patrick S. Khaemba was a (loyal) client of the Respondent - he has no problem with that at all. It also appears that to the extent that a consent that would have absolved one Hon. Patrick S. Khaemba from the payment of costs in favour of the **2nd** Defendant in the **Kitale ELC No. 166 of 2013** should have been entered into by the Respondent law firm he was a client: he would have had no issue thereto. Absent of those, Hon. Patrick S. Khaemba was not a client of the Respondent law firm. This is a sad form and content of argument by the Applicant. Furthermore, I have read paragraph **38** of the Further Affidavit marked and annexed as **PSK 3** to the Affidavit sworn by Patrick Khaemba on **20/09/2021** which he alluded to. I find no admission in it by the Respondent that one Diana Wabwile brought about the issues being contested herein. All that was deposed therein was a fact that the said Diana Wabwile, then the legal officer of the (unspecified) County, went to the Respondent's offices and asked for copies of the pleadings and documents in relation to **Kitale ELC No. 166 of 2013** and she was given them to take them to her boss, the Governor, Hon. Patrick Khaemba. That has nothing to do with whether or not the said Governor gave instructions on his behalf or that of the County Government of Trans Nzoia County.

19. In my view by the instant Application this Court was being engaged in an academic discourse about the existence or otherwise of instructions by the said Hon. Patrick S. Khaemba while the issues were plain. From his own Affidavit sworn on **23/09/2021**, at paragraphs **6** and **22**, the said Hon. Patrick Simiyu Khaemba deposed that the Respondent was his "former Advocate" in **Kitale ELC No. 166 of 2013** and that he put "in flimsy submissions so that his friend the counsel for the 2nd Defendant could get out as much as possible from the taxation orchestrated by the Advocates for the 2nd Defendant and the Applicant who was supposed to protect my interests as his then client."

20. It then defeats reason and logic that the Applicant stated on oath that he employed the Respondent law firm in the matter and at the same time deny on oath the same issue. This borders on perjury. In any event, the said Hon. Patrick Simiyu Khaemba signed and dated **2/12/2013** a copy of a Witness Statement marked as **Annexure NS 5** of the Affidavit sworn by Prof. Nixon Sifuna on **14/12/2021**. In the statement, filed in **Kitale ELC 166 of 2013**, it indicates that the said Hon. Patrick S. Khaemba had issues with both **KETRACO** and Kenya Power and Lighting Company Ltd. Moreover, at paragraphs **2** and **3** of the statement, the Applicant stated in part that the construction site which gave rise the institution of **Kitale ELC No. 166 of 2013** was then being done on land that adjoined his and only separated by barbed wire. Further, he stated that on his said farm he had a large dairy unit, and he informed the contractors that he objected to the project, and so on. He cannot approbate and reprobate!

21. Nowhere in the said Witness Statement did the Applicant state that he wrote it on behalf of the County Government of Trans Nzoia or that he objected to the construction on the subject parcel of land referred to in the official capacity as the Governor of the County. The issues stated therein were in relation to his person as a private individual. Moreover, **Annexures NS 6 (a)-(e)** referred to suit **Kitale ELC No. 166 of 2013** and the totality of the communication in them was to the effect of the said Applicant having instructed the Respondent to act for him in the suit. These were issues not disputed by the Applicant herein. It did not require rocket science to discern from these facts that suit No. **Kitale ELC 166 of 2013** was filed by the Respondent herein against the Defendants therein on the instructions of the Applicant herein.

22. This then leads to the question as to whether this Court should or should not stay the proceedings and execution herein pending the determination of **Kitale ELC. No. 166 of 2013**. In order to make that finding the Court asked itself why and whether or not the answer thereto would yield a positive result. The answer lay in an analysis of the pleadings in the instant Application. The Application was based on the grounds that a certificate of taxation of costs issued in **Kitale ELC No. 166 of 2013** on which the taxation herein was grounded had been obtained by fraud and or collusion, its validity was challenged that suit, the Applicant was not a client of the Respondent herein yet who represented the Plaintiff in **Kitale ELC No. 166 of 2013**.

23. In regard to the existence or otherwise of Advocate-Client relationship between the Respondent and Applicant herein respectively in **Kitale ELC No. 166 of 2013**, I already found (above) that it is beyond peradventure that it existed. I need not go over the analysis thereon once more. The relationship came to an end on **30/08/2021** when the Respondent was removed from the record in that suit by way of a Notice of Change of Advocates filed and served on him and other parties.

24. The remaining point to consider was whether there was any outstanding issue in **Kitale ELC No. 166 of 2013** that would warrant the prayer sought herein. The main prayer was for the court to stay proceedings and execution herein "pending the

determination of **Kitale ELC No. 166 of 2013**" (*emphasis mine*). I considered the submissions of both counsel on the issue. I also considered the status of **Kitale ELC No. 166 of 2013**. From the record in **Kitale ELC. No. 166 of 2013**, the suit against the 1st Defendant was determined by withdrawal by consent on **24/09/2014** through which the Plaintiff was awarded costs in the sum of **Kshs. 300,000/=**. The suit against the 2nd Defendant was determined by way of dismissal for want of prosecution on **18/10/2018**. Although the Court did not specifically state that costs would be for the 2nd Defendant, it did not also state specifically that the dismissal was with no order as to costs or that each party would bear its own costs. In any event the order of the Court was clear as to which prayers were granted. The Court stated that **prayers 1 and 2** of the Application dated **16/10/2017** were granted as prayed.

25. What was **prayer 2** of the Application" The prayer was that "costs for the application be provided for and the suit be granted to the 2nd defendant." Clearly that meant that by granting the prayer, the Court was clear that the costs of the Second Defendant's suit were payable by the Plaintiff.

26. While it may appear to the casual reader that the Court became *functus officio* upon the consent between the 1st Defendant in that suit and the Plaintiff and the dismissal of the suit against the 2nd Defendant therein, it is not so because the question of the interpretation on and the payment of costs therein had been called into question by the Application dated **30/08/2021**. Although obvious, as to whether or not costs were to be due from the Plaintiff, it was a matter to be determined in the parent file, that is to say, **Kitale ELC No. 166 of 2013**. It would appear to me that the Applicant herein wanted the Court to make a finding in that suit on what the Court meant on **18/10/2017** by granting prayer 2 of the Application dated **16/10/2017** which was to the effect that "the costs of the Application be provided for and the suit be granted to the second defendant" and it will do that at the right time if the relevant Application is prosecuted. This was because to make a determination of the same herein would render findings on the issues raised in the Application dated **30/08/2021** annexed to the Applicant's supporting affidavit as **PSK 2** overtaken by events. That would be where a robust discussion on payment or otherwise of costs of the suit would be.

27. The Court was careful to avoid that discussion. But when, during the oral submissions counsel insisted on submitting on the issue, the Court sought to know from them specifically whether they wanted it to also determine in this matter on the existence or otherwise of Advocate-Client relation in **Kitale ELC No. 166 of 2013**. That was because the issue had a bearing on whether costs or not were payable. Both counsel submitted that it was an issue that arose by necessary implication. That is why I dealt with it as above.

28. In regard to whether the Court became *functus officio* in all the issues in **Kitale ELC No. 166 of 2013** when the suits against the two Defendants therein came to an end, this Court was of the view that it became *functus officio* did but not in all respects. There were consequential issues that had as of necessity to be determined after the Court concluded the matter on merits. It therefore follows that such issues as to costs and execution thereof would and did ordinarily remain in the province of the Court to determine even after the merits of the case had been settled.

29. On this issue, I am guided by the Court of Appeal case of **Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR**. In it the Court stated that;

"The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in JERSEY EVENING POST LTD VS AI THANI [2002] JLR 542 at 550, also cited and applied by the Supreme Court;

"A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available."

30. Also, I rely on **Petition 5, 4 and 3 of 2013 (Consolidated) - Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR** where the Supreme Court held "That order has not been acted upon or perfected,... We are, therefore, satisfied, and accordingly hold, that the Court is not functus officio, and that we do have jurisdiction to entertain the proceeding before us."

31. Until perfection of all issues in a matter, the Court does not become *functus officio* in all of them. Thus also, the holding in the persuasive case of *Bellevue Development Company Limited v Vinayak Builders Limited & another [2014] eKLR* guides this Court. In it the Judge stated that;

“.....care should be taken not to inadvertently or otherwise overstretch the application of the concept of functus officio; for, in all senses of the law, it does not foreclose proceedings which are incidental to or natural consequence of the final decision of the court such as the execution proceedings including contempt of court proceedings, or any other matter on which the court could exercise supplemental jurisdiction. Therefore, in determining whether the court is functus officio one should look at the order or relief which is being sought in the case despite that judgement has already been rendered by the court”.

32. It is trite law that the award of costs by courts is discretionary. But **Section 27** of the **Civil Procedure Act** makes it more obvious than not that costs will follow the event. The Applicant argued in **paragraph 19** of his Supporting Affidavit that suit that gave rise to the taxation whose certificate of costs bore the instant taxation was instituted by the County and was a public interest suit. While making the finding above on whether or not there was a nexus between this matter and **Kitale ELC No. 166 of 2013**, I noted and indicated who the parties were in the both. With due respect, the County (Government of Trans Nzoia) was not a party in the **Kitale ELC No. 166 of 2013**. It should not be dragged into the matter, especially since the matter concluded on merits. The witness Statement and a plethora of the documents given as annexures to the Replying Affidavit herein showed that the Respondent/Applicant instructed the law firm of M/S Sifuna and Sifuna Advocates, in his individual or private capacity, to act for him in **Kitale ELC No. 166 of 2013**. What remained to be made clear in that matter is whether or not party and party costs were payable as against the suit against the **2nd** Defendant therein.

33. It was submitted in **paragraph 8** of the Applicant’s written submissions that there was no court order that awarded costs to the **2nd** Defendant. I stated above that **prayer 2** of the Application that dismissed the suit against the Second Defendant was granted by the Court. Even then, the law is clear regarding an award of costs. The Proviso to **Section 27** of the **Civil Procedure Act** reads as follows: *“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.”* The law therefore provides that costs shall follow the event unless the Court or judge for good reason orders otherwise. By way of comparison of the record in **Kitale ELC No. 166 of 2013** and facts therein to the Proviso, when the suit against the **2nd** Defendant was dismissed, the Court did not order that costs do not follow the event. It therefore follows that they actually followed the event: the dismissal of the suit by the Plaintiff against the **2nd** Defendant even if it did not write down as such and even if it could have not granted **prayer 2** of the Applicant. But that was not the case: I repeat, **prayer 2** was granted. Thus, the Plaintiff cannot run away from that fact and claim collusion or fraud on that point.

34. Courts have stated without number that costs follow the event. And where the event has been a dismissal of a Plaintiff’s suit or even abatement thereof, unless specifically otherwise stated, the Plaintiff has always been found liable. Thus, in *Re Ebuneiri Waisswa Kafuko, Kampala HCMA No. 81 of 1993 cited by Odunga J in Pet No 466 of 2014 Republic vs Kenya National Highway Authority & Others, Ex parte Kanyingi Wahome* the court held as follows:-

“The judge in his discretion may say expressly that he makes no order as to costs and in that case each party must pay his own costs. If he does not make an order as to costs, the general rule is that he shall order that he costs follow the event except where it appears to him in the circumstances of the case some other order should be made as to the whole or any part of the costs. But he must not apply this or any other general rule in such a way as to exclude the exercise of the discretion entrusted to him and the material must exist upon which the discretion can be exercised. The discretion, like any other must be exercised judicially and the judge ought not to exercise it against the successful party except for some reason connected with the case. It is not judicial exercise of the judge’s discretion to order a party who was completely successful and against whom no misconduct is even alleged to pay costs.”

35. Also in the book by Richard Kuloba, Judicial Hints on Civil Procedure, 2nd Edition, page 99 the learned author observes that, *“Thus the expression “the costs shall follow the event” means that the party who on the whole succeeds in the action gets the general costs of the action,...”* Therefore, the Court did not have to specifically order for costs after the dismissal of the suit against the **2nd** Defendant in order for them to be due from the Plaintiff to it.

36. Only one more point remains to be considered in relation to my finding about the determination in paragraph **23** above. Can the payer “pending the determination of **Kitale ELC No. 166 of 2013**” be a ground for the grant of the entire prayer" It is this Court’s view that once the suit against each of the defendants was concluded, this court became *functus officio*, but only on the merits of the

suit. Up to that point, there was no issue pending determination therein as between the parties. However, since there arose an issue as to whether or not costs were due to the 2nd Defendant and how much, those issues kept the suit alive to the extent that they had not been determined. Such were the issues contemplated in the *Telkom* case and the others cited above where the Court is not foreclosed.

37. The upshot is that the Court is yet to determine a number of post-judgment issues in **Kitale ELC No. 166 of 2013**. They include among others, although mentioned hereinabove, if costs were payable by the Plaintiff in it. Thus, the Application is merited and allowed as follows: Prayer 2 is granted to the extent that a stay of proceedings and execution herein is granted pending the determination of the Application dated 30/08/2021 filed in **Kitale ELC No. 166 of 2021**. And for proper case management purposes, since this Miscellaneous File is related to **Kitale ELC No. 166 of 2013**, it shall be mentioned alongside it, as has been in the past, to confirm if and whether the outstanding issues therein are determined.

(b) Who bears the costs of this Application"

38. Ordinarily, costs follow the event. However, for the reason that the Respondent moved the Court in this matter believing to have rightly earned costs herein following a taxation made in **Kitale ELC No. 166 of 2013**, the costs herein shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE ON THIS 17TH DAY OF JANUARY, 2022.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.

Advocates Present, in open Court

K. N. Macharia Advocate for the Applicant

Prof. N. Sifuna Advocate for the Respondent



While the design, structure and metadata of the Case Search database are licensed by [Kenya Law](#) under a [Creative Commons Attribution-ShareAlike 4.0 International](#), the texts of the judicial opinions contained in it are in the [public domain](#) and are free from any copyright restrictions. Read our [Privacy Policy](#) | [Disclaimer](#)