



**Agot v Agot (Environment and Land Appeal E004 of 2022)
[2023] KEELC 16305 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16305 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E004 OF 2022
AY KOROSS, J
MARCH 16, 2023**

BETWEEN

BENARD OMBOKE AGOT APPELLANT

AND

STEWART JALANG'O AGOT RESPONDENT

RULING

Background

1. The appellant who was then represented by the firm of Mulinge Ochieng & Co. Advocates filed a memorandum of appeal dated 17/01/2022. Shortly, he filed a notice to act in person dated 31/03/2022. A few days later on 5/04/2022, he filed a notice of withdrawal of appeal. On the scheduled mention date of 18/5/2022, he did not turn up. At the behest of the respondent's counsel, the court adopted the notice of withdrawal as an order of the court with costs to the respondent.
2. In the course of taxation proceedings, he filed the instant notice of motion dated 1/12/2022. This motion is the subject of this ruling.

Appellant's case

3. This court was moved pursuant to the provisions of Sections 1A, 1B, 3, 3A, 63 (e) and 79 (G) of the *Civil Procedure Act* and Order 25 Rule 1 and Order 51 Rule I of the *Civil Procedure Rules*. The appellant sought the following reliefs from this court;
 - a. Spent.
 - b. That the assessment of the respondent's bill of costs dated 23/05/2022 be stayed pending the hearing and determination of this motion, further court orders, directions and/or proceedings.



- c. That the appeal which was withdrawn on 5/04/2022 be and is hereby reinstated.
 - d. That in the alternative and/or without prejudice to the 3rd relief, the applicant be granted leave to file a fresh appeal out of time within such period as may be prescribed by this honourable court.
 - e. That the costs of the motion be in cause.
4. The motion is based on the grounds set out on its face and on the supporting affidavit sworn by the appellant dated 1/12/2022.
 5. The appellant deposed inter alia; because of illness, he was constrained to withdraw the appeal and because he had recovered, he was ready and willing to prosecute the appeal.
 6. In opposition, the respondent by the firm of Odongo Awino & Co. Advocates filed a replying affidavit sworn on 9/12/2022 in which he made several depositions. A withdrawn appeal was incapable of reinstatement. The withdrawn appeal and submissions dated 12/10/2022 showed the appellant was of sound mind. The medical records tendered to court did not show the appellant was incapacitated.

Appellant's submissions

7. By counsel Mr. Jaoko, the appellant filed his written submissions dated 9/12/2022. In it, counsel contended the appellant had been admitted in hospital from February to May 2022 and for the reason the appellant did not want to delay the court process, he withdrew the appeal.
8. Counsel argued that pursuant to the provisions of Section 75G of the *Civil Procedure Act*, this court could grant leave for an appeal to be filed out of time and by virtue of Order 25 Rule 1 of the *Civil Procedure Rules*, a plaintiff could withdraw a suit. Counsel identified four issues for this court's determination: (a) reinstatement of the appeal or the grant of leave to appeal out of time (b) order for stay of proceedings (c) whether justice can still be done and, (d) whether appellant would be prejudiced.
9. On the 1st issue, counsel averred the decision to reinstate a suit fell on the court's discretion and asserted the guiding principles were settled in the case of *Ivita v Kyumbu* (1984) KLR 441 where the court stated thus when it was confronted with an application to dismiss a suit for want of prosecution: -

‘The test applied by the courts in an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and, if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the Plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the court.’

10. Counsel argued that because the subject matter of the appeal was a family dispute and there was no inordinate delay in filing the instant motion, the reliefs sought should be granted. He relied on the case of *Catherine Kigasia Kivai v Ernest Ogesi Kivai & 4 Others* (2021) eKLR where the court held as follows when it was dealing with an application for reinstatement of a suit: -

‘I am not entirely convinced by the arguments put forward by the plaintiffs to explain her non-attendance in court as and when required, and generally her failure to have the matter prosecuted since 2018 when it was filed. I will, however, only so as to give her a second chance, allow the application, and reinstate her suit.’



11. On the 2nd issue, counsel argued the stay of taxation would not prejudice any party and to buttress his position, he relied on the case of *PMM v JNW* (2020) eKLR.
12. On the 3rd issue, counsel argued that by the provisions of Article 48 and 50(1) of the *Constitution*, the appellant had a right to access justice and was entitled to fair hearing. On the last issue, he contended the appeal had high chances of success.

Respondent's submissions

13. Mr. Odongo filed the respondent's submissions which were dated 11/01/2023. Counsel identified 4 issues for this court's determination; (a) whether the court was functus officio (b) whether the appeal was capable of being reinstated (c) whether the appellant was entitled to the relief of leave to appeal out of time and, (d) whether the appellant was entitled to an order for stay of taxation proceedings.
14. On the 1st issue, counsel argued the adoption of the withdrawal of the appeal rendered this court functus officio because there was nothing capable of being reinstated. Counsel relied on the case of *Raila Odinga & 2 Others v Independent Electoral and Boundaries Commission & 3 Others* 2013 eKLR where the apex court cited the case of *Jersey Evening Post Limited Vs Al Thani* (2002) JLR 542 at 550 as follows: -

‘...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...’

15. On the 2nd issue, counsel contended Order 25 Rule 1 of the *Civil Procedure Rules* was premised on discontinuance of suits and once withdrawal had been put in motion and become effective, it is incapable of reinstatement. Counsel relied on several persuasive authorities including *Priscilla Nyambura Njue v Geovhem Middle East Ltd; Kenya Bureau of Standards (Interested Party)* [2021] eKLR where the court stated thus: -

‘Certain consequences arise from the withdrawal which prevent a party from revoking the withdrawal. The withdrawal is complete or effective as soon as it takes place. The right to revoke the withdrawal can only be allowed by the legislature by expressly providing so in the rule and not by the courts. In the same vein, the rules do not confer the court with power to reinstate a suit once withdrawn. Order 25 Rule 1 provides that the withdrawal shall not be a defence to any subsequent action. Before me is not a subsequent action, but the same suit.’

16. On the 3rd issue, counsel argued it was not feasible for the appellant to seek an extension to file an appeal out of time in these proceedings.
17. On the last issue, counsel argued that a taxation was incapable of stay and to this end, he relied on the decision of *Deposit Protection Fund v Roseline Njeri Macharia* (2006) eKLR. Counsel urged this court to disallow the motion.

Analysis and determination

18. I have carefully considered the motion, grounds, affidavits and submissions and the issues falling for determination are: -
 - a. Whether a withdrawn appeal is capable of reinstatement.
 - b. If (a) is in the negative, whether this court should grant leave to the appellant to file an appeal out of time without settling costs.



a) Whether a withdrawn appeal is capable of reinstatement

4. I concur with both counsels that the legal provision for withdrawal of an appeal or suit is premised on Order 25 Rule 2 of the [Civil Procedure Rules](#) which states as follows: -

- ‘(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 the 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 1 shall apply to counterclaims.’

20. A clear reading of this provision of law does not envisage a situation where a withdrawn appeal or a suit can be reinstated. Once a notice of withdrawal was filed by the appellant, it terminated all proceedings against the respondent from the date it was served upon the respondent’s counsel.

21. The respondent’s counsel did not disclose the date he was served with the notice of withdrawal and from the proceedings, this court deduces it was terminated on 18/5/2022 when counsel notified court he had been served with a notice of withdrawal. The case of [Babati Shee Mwafundi v Elijah Wambua](#) [2015] eKLR cited with approval the book of Stuart Sime “*A Practical Approach to Civil Procedure*” 9th edition where the author stated:

‘Notice of discontinuance takes effect and brings the proceedings to an end as against each defendant, on the date it is served upon the defendant.’

22. I concur with the decision of [Priscilla Nyambura Njue v Geovhem Middle East Ltd; Kenya Bureau of Standards \(Interested Party\)](#) (Supra) that was cited by the respondent’s counsel which has been applied in a line of court decisions including [Babati Shee Mwafundi v Elijah Wambua](#) (Supra) and [Charles Kiptarbei Birech v Paul Waweru Mbugua & another](#) [2021] eKLR.

23. The Court of Appeal in the case of [Peter Kimani Kairu t/a Kimani Kairu & Company Advocates v Anna Marie Cassiede & another](#) [2017] eKLR was of the view that in certain exceptional circumstances, a court could invoke its residual power and reinstate a withdrawn appeal. This decision cited the case of [Benjob Amalgamated Ltd. & Another v. Kenya Commercial Bank Ltd](#), CA No. SUP. 16 of 2012) where the court held: -

‘The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice.’

24. Evaluating the circumstances of this case, the appellant has not tendered any shred of evidence to show there were exceptional circumstances to warrant this court to invoke the provisions of Sections 3 and 3A of the [Civil Procedure Act](#). The medical report he tendered shows he was an outpatient.



25. There is no evidence he was mentally incapacitated or this court had directed his appeal would be dismissed if he failed to comply with certain directions. On his own volition, he exercised his right and expressed his intention to withdraw his appeal. When he filed his submissions on the bill of costs on 13/10/2022, the issue of his medical infirmity was never raised before the deputy registrar and in paragraph 2 of those submissions, he admitted he intentionally withdrew his appeal. It is my considered view this prayer for reinstatement was an afterthought. This prayer fails.
26. The decisions of *Ivita v Kyumbu* (Supra) and *Catherine Kigasia Kivai v Ernest Ogesi Kivai* (Supra) that were cited by the applicant's counsel were distinguishable. They did not deal with withdrawal of a suit.

b) Whether this court should grant leave to the applicant to file an appeal out of time without settling costs.

27. Upon the appeal being withdrawn with costs, the respondent exercised his rights under Order 25 Rule 3 of the *Civil Procedure Rules* and filed his undated bill of costs on 23/05/2022. Both parties participated in those proceedings and filed their respective submissions before the appellant filed the instant application.
28. Order 25, Rule 4 of the *Civil Procedure Rules* provides as follows;

‘If any subsequent suit shall be brought before payment of the costs of a discontinued suit, upon the same, or substantially the same cause of action, the court may order a stay of such subsequent suit until such costs shall have been paid.’
29. The implication of this provision is that the withdrawal of the appeal was not a bar to a subsequent appeal. The Supreme Court of Kenya in *John Ochanda v Telkom Kenya Limited* [2014] eKLR when faced with an application to file an appeal out of time which was filed shortly after a withdrawal of an appeal, allowed the motion and stated: -

‘...the applicant acted in a timely manner to correct the error and that the error was accidental.’
30. The question that suffices is whether this court should allow the appellant leave to appeal out of time without settling costs.
31. By the provisions of Order 25, Rule 4 of the *Civil Procedure Rules*, this court has an unfettered discretion to order a stay of any subsequent substantially similar appeal after withdrawal or discontinuance. As is always the case, exercise of such discretion must be in accordance with the dictates of justice and will depend on the peculiar circumstances of the case.
32. I have scrutinised the record and this court has taken cognisance that the appellant and respondent have participated in taxation proceedings before the deputy registrar. Parties had filed their respective submissions and essentially, it was ripe for ruling.
33. The appellant has not satisfied this court why taxation proceedings should be stayed. In any case, as rightfully submitted by the respondent's counsel taxation of costs is incapable of stay. The respondent would be prejudiced if such leave to appeal out of time is allowed without settlement of his costs.
34. In the interests of justice, I decline to stay the taxation proceedings and I find the appellant should not to be permitted to proceed any step further on the appeal unless and until he has paid costs for the withdrawn appeal. It is the respondent who is entitled to stay and not the appellant. See *Julius Wanyama Khate v David Makheti Namianya & another* [2019] eKLR and *John Kibet Rotich v Elijah Kibet Siele* [2018] eKLR.



35. For the reasons and findings stated hereinabove, it is my finding the motion is not merited and hereby dismiss it with costs to the respondent.

36. The appellant is at liberty to move the court appropriately once he has settled the entire taxed costs.

DELIVERED AND DATED AT SIAYA THIS 16TH DAY OF MARCH 2023.

HON. A. Y. KOROSS

JUDGE

16/03/2023

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

In the Presence of:

Mr. Jaoko for the appellant

Mr. Odongo respondent

Court assistant: Ishmael Orwa

