



Mars Logistics Limited & another v Mwangi (Suing as the legal administrator of the Estate of Judy Wanja Ng'an'ga (Deceased) (Civil Appeal E117 of 2022) [2023] KEHC 20584 (KLR) (21 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20584 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E117 OF 2022
JRA WANANDA, J
JULY 21, 2023**

BETWEEN

MARS LOGISTICS LIMITED 1ST APPELLANT

JACOB KIBET ROTICH 2ND APPELLANT

AND

JOSEPHAT WANJOHI MWANGI (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF JUDY WANJA NG'AN'GA (DECEASED) RESPONDENT

RULING

1. The single issue for determination in this matter is whether costs of this Appeal should be awarded to the Respondent after this Appeal was orally withdrawn on 28/02/2023 before the Deputy Registrar.
2. The parties filed written Submissions on the issue. While the Respondent filed its Submissions on 6/04/2023 through Messrs Kamonjo Kiburi & Co. Advocates, the Appellants filed theirs on 22/03/2023 through Messrs Nyairo & Co. Advocates.

Respondent's Submissions

3. In his Submissions, the Respondent's Counsel has referred to Section 25 of the *Civil Procedure Act* which deals with withdrawal, discontinuation and adjustment of suits and also Section 27 which deals with the Court's powers on awarding of costs. He then submitted that "costs follow the event" unless for good reason otherwise ordered. He cited the cases of *Shadrack Silla Muthama vs Kesaso Wycliffe Mengwe* [2021] eKLR, *Canyon Properties Limited & 3 Others vs Eliud Kipchichir & 2 Others* [2017] eKLR, *Kayser Investments Limited & Another vs Chinya Development Co. Limited* [2022] eKLR and *Samson ole Kisirkoi vs Maassai Mara University* [2022] eKLR in which according to Counsel, costs were awarded where Appeals, References and a Cause, respectively, were withdrawn.



4. According to Counsel, the “event” in this matter is that the Appellants realized they had no case against the Respondent and proceeded to withdraw the Appeal after the Respondent had been subjected to defending the same whilst incurring the cost of defending it and loss of precious time. Counsel added that the Court ought to exercise its discretion in favour of the innocent and vindicate the Respondent and award it costs and that award of costs is a discretionary award that is made to a successful party. He cited the cases of *Party of Independent Candidates of Kenya & Another vs Mutula Kilonzo & 2 Others* [2013] eKLR, *Republic vs Rosemary Wairimu Munene (ex parte Applicant) vs Ihururu Dairy Farmers Co-operative Society Ltd*, Judicial Review Application No. 6 of 2004 and *Cecilia Kasruru Ngayu vs Barclays Bank of Kenya Limited* [2016] eKLR and submitted that the Respondent was the successful party in the lower Court and is also deemed as the successful party in this Appeal because the Appellants withdrew it.
5. On the principle that “costs follow the event”, Counsel cited Justice (Retired) Richard Kuloba’s book, *Judicial Hints on Civil Procedure*, the Supreme Court case of *Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others* [2014] eKLR and also *DMG v EWG* [2021] eKLR.

Appellants’ Submissions

6. On his part, the Appellants’ Counsel submitted that they withdrew the Appeal given that the same had been overtaken by events, at the time of the withdrawal the Appeal had not been admitted and no directions had been given as to how to proceed with it and service of the Memorandum of Appeal, the Respondent had not been served with the Memorandum of Appeal to warrant any award on costs, a Respondent to an Appeal only becomes entitled to costs in an Appeal once the Appeal is admitted and directions given, the Respondent is not entitled to any costs as the Appeal was neither admitted as per the provisions of Section 79B of the *Civil Procedure Act* nor was the Memorandum of Appeal served upon the Respondent.
7. Counsel added that Order 42 of the *Civil Procedure Rules* gives an elaborate procedure on how Appeals should be handled right from the moment a Memorandum of Appeal is filed to when the Appeal is set down for hearing, without admission of an Appeal and service thereon the Respondent had no role to play in the Appeal and therefore entitled to costs. Counsel submits that although the Respondent claims that he was the one who moved the Court by fixing a Mention date before the Deputy Registrar and therefore entitled to costs, this position is misplaced in law since the Appeal had not been admitted and directions given, by law there was no Appeal to warrant the fixing of a Mention date. He cited the case of *Muli Mutiso vs Mbithi Ndolo and Another* [2008] eKLR and *Timothy Musyimi Wambua vs Joseph Ngove* [2009] eKLR.
8. On the principle that “costs follow the event”, Counsel submits that the Appeal had not been admitted and the Respondent had not been served with the Memorandum of Appeal therefore the event which the Respondent could ask for costs had not crystallized. He cited the Supreme Court decision in *Sonko v Clerk, County Assembly of Nairobi City & 12 Others* (Petition 14 (E021 of 2021) [2022] KESC 17 (KLR) (19 May 2022).

Analysis & Determination

9. I have considered the parties’ Submissions together with the authorities supplied.



10. The discretion of the Court to grant or withhold costs is guided by Section 27 of the *Civil Procedure Act* which provides, inter alia, 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 who 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”

11. In connection to the above, in *Party of Independent Candidates of Kenya versus Mutula Kilonzo & 2 others*, HC EP No. 6 of 2013, quoted by the Respondent, Hon. Lady Justice L. Mutende observed as follows:

“It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs is a matter in which the trial judge is given discretion But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place, the general rule that costs should be awarded to the successful party, is a rule which should not be departed from without the demonstration of good grounds for doing so.”

12. It is therefore clear that costs are at the discretion of the Court but with the usual caveat that such discretion should be exercised judiciously, meaning, without caprice or whim and on sound reasoning. Secondly, a Court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

13. In this instant Appeal, the same was filed on 15/08/2022 and withdrawn on 28/02/2023. It was therefore in Court for only about 6 months. It is also true that at the time of the withdrawal, the Appeal had not yet been admitted and thus no directions had been given on how it was to be canvassed. Service of the Memorandum of Appeal upon the Respondent had also not been effected. Technically therefore, no proceedings had not yet taken off.

14. In opposing the Application, the Appellant cited the case of Supreme Court in *Sonko v Clerk, County Assembly of Nairobi City & 12 others* (Petition 14 (E021) of 2021) [2022] KESC 17 (KLR) (19 May 2022) (Ruling). In the case, while dealing with a similar scenario as herein, the Court had the following to say:

“Having so stated, we note from the record that the petition was withdrawn before the respondents had filed any responses or substantive submissions to the appeal save for the 7th respondent who filed a notice of preliminary objection. The appeal, at the time of withdrawal was not ripe for hearing. While applying the principle in *Jasbir Singh Rai* that costs normally follow the event, has an event to which costs would follow materialized? The answer is in the negative. Such an event has not happened. We note that the applicant’s



appeal did not proceed as the occurrence of the event that would have led to the applicant being successful crystallized as the 11th respondent was sworn in as Governor of Nairobi County. We therefore come to the conclusion that each party shall bear its costs before this court.

15. The Appellant also cited the decision of Hon. Justice I. Lenaona (as he then was) in *Timothey Musyimi Wambua v Joseph Ngove* [2009] eKLR, in which, in dismissing an Application for award of costs as a consequence for withdrawal of an Appeal at the High Court, stated as follows:

- “7. As I understand it before an appeal can be heard there are certain procedural steps to be taken. They are;
- i. the filing of a Memorandum of Appeal signed in the same manner as a pleading – Order XLI Rule 1 of the Civil Procedure Rules.
 - ii. particulars of the appeal shall be entered in the register of appeals – order XLI Rule 8(1).
 - iii. the appeal is placed before a judge for admission or rejection under section 79 B of the *Civil Procedure Act*.
 - iv. if the judge admits the appeal then “the register shall notify the Appellant who shall serve the Memorandum of Appeal on every respondent” - Order XLI Rule 8A.
 - v. not less than 21 days after service of the memorandum of appeal, the registrar shall list the appeal for giving of directions by a judge in Chambers - Order XLI Rule B (1).
 - vi. thereafter the appeal is set down for hearing once the judge is satisfied that all the documents listed in Order XLI Rule 8 B (4) have been served on either party; processes regarding security for costs etc have been given; and service of notice of the day for hearing of the appeal has been served on the Respondent in the manner set out by Order XLI Rule 10A (11).
8. In the instant case the Respondent has exhibited a Memorandum of Appeal (annexture JN2) and a stamp bearing his advocate’s name and the words “recieved” (sic) and the date “2.3.05” and the argument made is that service was effected on that day. Whatever importance the Respondent attachés to that document it cannot be said that service was effected because as I have shown above, no proper service of a memorandum of appeal can be made before admission of an appeal for hearing. I maintain the holding in *Muli Mutiso vs Mbithi Ndolo & another*, HCC.A 120/2003 (Mks) that:

“without admission of an appeal and service thereon there is yet no role for the Respondent save perhaps in an interlocutory application say for stay of execution pending appeal. Costs in such a case would be limited to those interlocutory matters and not the Appeal per se. If a Respondent enters the Appeal, fixes it for mention for an unclear purpose and then the Memorandum of



Appeal is withdrawn, he cannot claim costs. I say so because as yet he has no role to play in it. The matter is for the judge and the Appellant who can take action on it without the Respondent.”

9. I should extrapolate by stating further that rejection of an appeal under section 79B of the *Civil Procedure Act* is a crucial step because once there is rejection, there is nothing more to be done and the Respondent may not even be aware of the existence of the Appeal. Any Respondent who gets wind of it and purports to enter the fray cannot claim any costs in the end because he would have had no lawful role in the appeal.
10. Similarly therefore in the instant case, I have seen the record and there is no sign at all that the Appeal was placed before any judge for admission or rejection under section 79B of the Act. When therefore the Appeal was withdrawn, no party save the Appellant was lawfully supposed to be in the picture and whether or not the Respondent obtained a copy of the Memorandum of Appeal was irrelevant. Until proper service was made on him, he could not enter the fray and upon withdrawal claim costs. The Notice of withdrawal was properly worded and to hold otherwise would have been a mistake and/or error in view of the record as it stands.
11. That being the case, the Applicant is properly within the purview of Order XLIV (1) of the Civil Procedure Rules and I am entitled to review the orders issued on 27.7.2007, set them aside and finally order that the Appeal herein be marked as withdrawn with no orders as to costs.”
16. I am persuaded by the logic and reasoning in the said authorities and wholly embrace it.
17. I note that the authorities cited by the Respondent are in respect of Appeals, References or Causes which, unlike herein, were withdrawn after substantial legal proceedings had already taken place. In the circumstances, the cases are easily distinguishable from the scenario herein where the Respondent had not yet been placed into the position of having to defend the Appeal.
18. In fact, the only pleading filed in this Appeal before the withdrawal is the 2-page Memorandum of Appeal. Not even a Notice of Appointment or Notice of Address of Service had been filed by the Respondent and no Memorandum of Appeal had as yet been prepared nor served, the lower Court file had also not yet even been transmitted to this Court for “admission”. Further, as I had already observed, the Appeal was withdrawn only 6 months after it was filed. I note that the “services rendered” and “work done” referred to by the Respondent were basically those that were rendered in the lower Court case before the matter reached this appellate Court. Needless to state, computation, award of costs and/or remuneration for services rendered before the lower Court is a preserve of that lower Court.
19. I am a fervent and passionate supporter of Alternative Dispute Resolution mechanisms as they greatly assist in decongesting and reducing the “perennial headache” of Court backlog. Where, as herein, a party opts to withdraw litigation at such an early stage before the Respondent is put in a position of incurring legal costs and spending time to defend it, the Courts should commend and in fact, encourage, not “punish”, such litigants. Awarding costs against a party withdrawing litigation at such an early stage goes against the spirit of Article 159(2)(c) which aggressively promotes Alternative Dispute Resolution.
20. I should not be misunderstood to be stating that costs should never, in any circumstances, be awarded against a party who withdraws an Appeal, far from it. On the contrary, I appreciate that it is trite law



that “costs follow the event” and therefore where an Appeal has been withdrawn at a late stage, after substantial litigation has been expended and as a result, the Respondent has been caused distress and agony and caused to incur expenses and spend time in defending the same, the Court should by all means not hesitate to exercise its discretion and award costs.

21. As aforesaid, the reason why I do not find it just to award costs herein is because the Appellant withdrew the Appeal at a very early stage before the Respondent could even reach the stage of defending it.

Final Orders

22. In the premises, I issue the following orders:
- i. The Respondent’s prayer to be awarded costs of this withdrawn Appeal is declined.
 - ii. This Appeal having been withdrawn on 28/02/2023, I make no order on costs.
 - iii. This file is now marked as closed.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 21ST DAY OF JULY 2023

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WANANDA J. R. ANURO

JUDGE

