



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NUMBER 163 OF 2012**

**AUTO SELECTION (KENYA) LIMITED.....APPELLANT**

**VERSUS**

**ANN CHERONO CHERUIYOT.....1<sup>ST</sup> RESPONDENT**

**STEPHEN OMURO MESA.....2<sup>ND</sup> RESPONDENT**

**BENARD BARSOL.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. What should happen to the respondent's costs where an appellant withdraws an appeal? This seems to be the issue here.
2. The appellants filed this appeal by way of Memorandum of Appeal on 19<sup>th</sup> September, 2013.
3. On 7<sup>th</sup> May, 2014 the appellant filed Notice of Motion seeking orders of stay of execution pending the hearing and determination of the appeal. It was brought under Certificate of Urgency. The 1<sup>st</sup> respondent opposed the same through a Replying Affidavit sworn on 19<sup>th</sup> May, 2014. The application was argued before *Lady Justice H.A. Omondi*, who delivered her ruling on 23<sup>rd</sup> October, 2014. The application was dismissed with costs to the 1<sup>st</sup> Respondent.
4. The appellant filed another application on 19<sup>th</sup> November, 2014 for orders of review of the court's ruling of 13<sup>th</sup> November, 2014. The 1<sup>st</sup> respondent opposed the application vide Replying Affidavit sworn on 2<sup>nd</sup> December, 2014. The application was argued before *Lady Justice J. Mulwa*. She delivered her ruling on 4<sup>th</sup> February, 2016 dismissing the said application with costs to the 1<sup>st</sup> respondent.
5. On 31<sup>st</sup> October, 2017 the appellant filed  
  
"Notice of Withdrawal of Appeal" through advocates Martin, Mburu & Chempkemboi advocates.  
  
"Take Notice that the appellant herein hereby withdraws the entire appeal."
6. On 11<sup>th</sup> March, 2019, the firm of Rodi, Orege & Company Advocates filed the 1<sup>st</sup> Respondent's Party and Party Bill of Costs dated 29<sup>th</sup> January, 2019.
7. Thereafter the appellant filed the Notice of Preliminary Objection on 3<sup>rd</sup> June, 2019.

***"TAKE NOTICE that the Appellant shall raise a Preliminary Objection to have the 1<sup>st</sup> Defendants application dated 29<sup>th</sup> January, 2019 and the entire suit struck out on the grounds that;***

- 1. THAT the same is grossly incompetent, bad in law and an abuse of court process.***
- 2. THAT the same is premature and without legal basis or foundation."***

8. The 1<sup>st</sup> respondent filed her affidavit in opposition of the Preliminary Objection sworn on 23<sup>rd</sup> July, 2019, on the ground that it is frivolous, oppressive, lacks merit and a serious abuse of the process of court, that it raises no point of law and is only delaying tactic.

9. Counsel agreed to proceed by way of written submissions.

10. For the appellant it was argued that since the appeal was withdrawn and no orders **as to costs** were made, the 1<sup>st</sup> respondent could not file a Bill of Costs. It was argued that on the basis of **Section 27** of the **Civil Procedure Act**, costs follow the event.

**“S.27. Costs**

*(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.”*

That since no appeal was heard, and no orders were made there was no event upon which costs could follow.

11. For the 1<sup>st</sup> respondent it was argued that what the appellant presented as a Preliminary Objection fell far short of the definition in **Mukhisa Biscuit Manufacturing Company Limited vs West End Distributors Limited Civil Appeal Number 9 of 1969.**

*“So far I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”*

- A point of law

- Which has been pleaded or arises by clear implications out of pleadings

- If argued, may dispose of the suit

12. Does the preliminary objection raised by the appellant fit into those parameters? In the same case **Mukhisa Biscuits** above the court said:

**“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any facts has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and occasion confuse the issues. This improper practice should stop.”**

The pure point of law raised by the preliminary objection leans on the **ascertained** facts pleaded by the other side not the **ascertainable** facts.

13. What pleadings are before the court? The Bill of Costs. Is that a suit? What are the facts? The facts speak for themselves, an appeal was filed, two applications brought by the appellant were argued, rulings delivered by two judges, the appellant lost on both and costs awarded to the 1<sup>st</sup> respondent in each. How then the appellant claim there can was no event? The fact of the withdrawal of the appeal did not wish away the clear orders of the judges that the appellant was to bear the costs of the two applications which were related to the appeal. Those orders as to costs were made by the two (2) judges. They followed the two specific events of each of the applications filed by the appellant. In both of these the 1<sup>st</sup> respondent had been served, filed responses and argued the same through her counsel. Do these facts not speak clear enough to the effect that there really is no foundation for a Preliminary Objection?

14. The argument by the counsel for the appellant that there was no objection to the withdrawal of the appeal by the 1<sup>st</sup> respondent does not hold water and cannot be the basis of a Preliminary Objection neither does the argument that their appeal was never argued, or there was no order of costs regarding the appeal.

15. In the upshot, I find that this is one of those Preliminary Objections that *Sir Charles Newbold* was speaking about when he said;

*“The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase the costs and, on occasion, confuse the issues. This improper practice must stop.”*

16. The appellant’s only opportunity in my view is to face the Bill of Cost filed by the 1<sup>st</sup> respondent and deal with it.

17. The issue was really whether the Preliminary Objection has merit or not. I find it has none. The same is dismissed with costs to the 1<sup>st</sup> respondent.

**Dated, delivered and signed at Nakuru this 16<sup>th</sup> day of January, 2020.**

**Mumbua Matheka**

**Judge**

In the presence of

..... Court Assistant

Applicant .....

Respondent .....