



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**[CORAM: MRIMA, J.]**

**CIVIL APPEAL NO. 62 OF 2017**

**DANIEL APONDI ODONGO.....APPELLANT/RESPONDENT**

**-VERSUS-**

**GORDON OTIENO ATINGA.....RESPONDENT/APPLICANT**

***(Being an appeal from the judgment and decree by Hon. C. M. Kamau, Senior Resident Magistrate in Rongo Senior Resident Magistrate's Civil Suit No. 127 of 2015 delivered on 12/05/2017)***

**RULING**

1. The Appellant herein, **Daniel Apondi Odongo**, preferred an appeal against the decision rendered on 12/05/2017 in *Rongo Senior Resident Magistrate's Civil Suit No. 127 of 2015*. A Memorandum of Appeal was filed on 07/06/2017. The Record of Appeal was later filed on 21/08/2017.
2. The Appellant also filed a Notice of Motion dated 13/10/2017. The application sought a stay of execution of the impugned judgement pending the hearing and determination of the appeal.
3. The application was opposed by the Respondent herein, **Gordon Otieno Atinga**. He filed a Replying Affidavit on 17/10/2017. The application was amicably settled *vide* a consent letter signed by both parties and filed in Court on 19/12/2017.
4. Directions on the hearing of the appeal were then given. The parties proposed and this Court sanctioned the disposal of the appeal by way of written submissions. Counsels for the Respondent duly filed their submissions on 30/01/2018. They also filed a List of Authorities. The Appellant did not file any submissions.
5. On 05/07/2018 the Appellant's Counsel filed a Notice of Withdrawal of the Appeal. It was dated 03/07/2018. The Notice indicated that the Appellant had withdrawn the appeal with no orders as to costs. The contents of the Notice were adopted as an order of this Court by the Deputy Registrar on 24/07/2018. The appeal was accordingly marked as closed.
6. The Notice was allegedly served upon the Respondent's Counsels on 23/08/2018.
7. On 19/03/2019 the Respondent filed a Notice of Motion dated 18/03/2018. The application sought the following orders: -
  1. **THAT the Honourable Court be pleased to set aside its Order of wholly withdrawing the appeal herein and sister file number 64 of 2017 (with no orders as to costs) without a written consent by both parties.**
  2. **THAT consequent upon prayer 1 above being granted, the Honourable Court be pleased to reinstated the suit and admit it for mention for directions.**
  3. **THAT costs of this application be in the cause.**
8. The application was supported by the Affidavit of **Ouma Andrew Silver**, an Advocate of the High Court of Kenya practicing as such in the name and style of Messrs. Khan & Associates. The Affidavit was sworn on 08/03/2019.
9. The Appellant opposed the application. He filed a Replying Affidavit on 029/04/2019. The Affidavit was sworn on the even date.
10. This Court approved the hearing of the application by way of written submissions. Both parties duly complied. The Respondent's main

contention was that whereas the Appellant was at liberty to withdraw the appeal, the Respondent was entitled to costs. He posited that he had undertaken several steps towards the prosecution of the appeal and as such he was entitled to costs. Three persuasive decisions were referred to in support of the submissions.

11. Opposing the application, the Appellant submitted that the threshold for setting aside the order which sanctioned the withdrawal of the appeal had not been reached. He contended that there was no evidence of fraud, misrepresentation or concealment of material facts on his part. He further contended that since the orders sought were discretionary the Respondent ought to have approached the Court with clean hands. However, it was submitted that the Respondent acted to the contrary by misleading the Court that he was not aware of the withdrawal of the appeal despite receiving a copy of the Notice on 23/08/2018.

12. The Respondent was further faulted of laches. It was contended that it took the Respondent 9 months to file the application after it had been served with the Notice. The Supreme Court decision in *Nicholas Kiptoo arap Korir Salat v IEBC & 7 Others SC. APP. No. 16 of 2014* was cited for the position that *'a party's right to withdraw a matter before Court cannot be taken away....All that a Court can do is to make an order as to costs where it is deemed appropriate.'* The Court was hence urged to dismiss the application with costs.

13. What is before me for determination is fairly straight-forward. I do agree that a party who wishes to withdraw a matter cannot be curtailed. The other party may be entitled to costs in appropriate instances.

14. In this case the Respondent took steps towards the hearing of the main appeal. He opposed the application for stay of execution and also filed submissions and a List of Authorities on the main appeal. Such steps would ordinarily entitle a party to costs in the event the matter was withdrawn.

15. A Court in dealing with an application to set aside its own orders must address itself to *inter alia* the law, the nature of the order sought to be set aside, the effect of the setting aside the order and the peculiar circumstances of the case.

16. Returning to the case at hand, the law allows the withdrawal of an appeal. (See the *Nicholas Kiptoo arap Korir Salat* case (supra). The order sought to be set aside was not a consent of the parties. In that case the Deputy Registrar ought to have sought directed service of the Notice upon the Respondent with a return date. The Registrar would have then accorded the Respondent an opportunity to at least respond to the aspect of costs. Depending on the response the Registrar would then have made appropriate orders. The unilateral adoption of the Notice as an order of the Court without hearing the Respondent therefore contravened the Respondent's right to fair hearing under **Article 50(1)** of the **Constitution**.

17. Be that as it may, the Respondent's conduct must as well be interrogated. The Respondent did not deny that it was served with the Notice of Withdrawal of the appeal on 23/08/2018. The Respondent hence knew of the withdrawal as contended. However, on 01/12/2018 the Respondent allegedly wrote to the Court to find out the position of the judgment in the appeal which was to be delivered 6 months earlier, that is on 28/06/2018. I have carefully looked at the copy of the letter dated 01/12/2018. It is annexed and marked as Exhibit 'OAS-3' in the affidavit in support of the application. The copy does not bear the Court's receipt stamp on it. I have also looked through the record and did not find the original or a copy of the said letter. There is no minute in the record of receipt of the alleged letter neither was a response made by the Court. With such state of affairs, I can only find that the alleged letter was never delivered to the Court if at all it was authored as alleged.

18. There is also the time the Respondent took to file the application. It took the Respondent 9 months to do so. Having been made aware of the withdrawal of the appeal in August 2018 the Respondent ought to have acted with speed if at all he had any objection to such a withdrawal. I now see the letter dated 01/12/2018 as an attempt to bridge the time gap. Disappointingly, the attempt did not aid the Respondent.

19. The Respondent did not even respond to the issue of delay when it was raised by the Appellant. **Article 159(2)(b)** of the **Constitution** calls for expedient determination of matters in Courts. To that end the **Constitution** raised equity in **Article 10(2)(b)** to one of the national values and principles of governance. One of the principles of equity is that *'equity aids the vigilant and not the indolent.'*

20. The conduct of the Respondent in receiving the Notice of withdrawal and not timeously raising any objection made the Appellant to reasonably believe that the withdrawal was not contested. The Respondent is then estopped *vide Section 120* of the **Evidence Act, Cap. 80** of the Laws of Kenya from renegading on such a position.

21. By placing the Respondent's right to be heard before the adoption of the Notice of Withdrawal of the appeal and the Respondent's conduct as revealed above side by side, I find that the constitutional calling for expedient dispensation of justice overrides the Respondent's right to be heard. The Respondent is guilty of laches and cannot enjoy the liberty of opening up litigation as and when he so deems fit.

22. The upshot is that the peculiar circumstances of this case are not for the application. The application was clearly an afterthought. There was also an attempt by the Respondent to misled the Court on the alleged Respondent's letter dated 01/12/2018. The application is for rejection. It is hereby dismissed with costs. The costs are assessed at Kshs. 20,000/=. The matter is accordingly marked as closed.

23. Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 15<sup>th</sup> day of October 2019.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open court and in the presence of: -**

**Mr. Ouma** Counsel instructed by the firm of Messrs. Khan & Associates Advocates for the Original Respondent/Applicant.

**Mr. Odongo** Counsel instructed by the firm of Messrs. Mose, Mose & Millimo Advocates for the Original Appellant/Respondent.

**Evelyne Nyauke** – Court Assistant