



**Oduor Opalo & Co. Advocates v Dena (Appeal E005 of 2024)
[2024] KEELRC 1419 (KLR) (16 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1419 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
APPEAL E005 OF 2024**

**M MBARŪ, J
MAY 16, 2024**

BETWEEN

ODUOR OPALO & CO. ADVOCATES APPELLANT

AND

ALFRED SIFA DENA RESPONDENT

*(Being an appeal from the ruling and decree of Hon. N. Makau dated 13
February 2024 in Malindi Miscellaneous Civil Application No. E001 of 2023)*

JUDGMENT

1. The appellant filed this appeal following a ruling delivered on 13 February 2024 in Malindi Miscellaneous Civil Application No E001 of 2024. The appellant faulted the trial court on the grounds that the subject application should have been dismissed for being res judicata but instead made a finding that the respondent was owed Kshs 88, 804 as taxed on 15 September 2023 which was sitting on appeal from its own decision. That the trial court had failed to address the preliminary objections by the appellant and hence arrived at an erroneous ruling.
2. The respondent is acting in person and replied to the appeal by way of Replying Affidavit and aver that the trial magistrate applied the correct principles of law and fact in the ruling delivered on 13 February 2024 and the appeal should be dismissed with costs.
Parties attended court on 13 March 2024 to take hearing directions.
3. On 20 March 2024, parties attended court to take hearing directions. The appellant applied to withdraw the appeal.
4. The respondent agreed to the withdrawal of the appeal subject to payment of his costs.
5. There was no agreement on the question of costs. The matter was taken out for parties to agree on the issue of costs or to file written submissions where there was no agreement to allow the court to address.



The appellant filed a Notice to Withdraw the Appeal on 19 March 2024.

The respondent filed his written submissions on 16 April 2024.

6. The hearing was scheduled for 24 April 2024. Only the respondent attended.
7. On the issue of costs, the respondent submitted that the appellant was paid 62,072 through Mpesa to the mobile phone 07111...467 registered in the name of Michael Opalo. The respondent followed up the payment with an email to the law firm on 29 June 2023. This was payment towards the taxed amount. These communications were within the knowledge of the appellant at the time of filing this appeal. To proceed with the appeal is an abuse of process and the respondent is entitled to costs.

Determination

The appellant moved the court with its appeal.

8. The court issued directions on the issue of contested costs where the appellant was desirous of withdrawing the appeal. The appellant simply filed the Notice to Withdraw the Appeal with total disregard for the court's directions.
9. As noted above, the respondent is acting in person. This is not cause for the appellant to abandon the appeal after the respondent has made himself available to the court to address the matter to a conclusion.
10. As this is the appellant's appeal and no longer wishes to proceed with it, such right must be protected. However, great caution must be taken not to abuse the court process by filing frivolous matters and upon the truth coming out, file a notice to withdraw. Choices have consequences.
11. The respondent has faithfully attended court as directed. He is entitled to costs.
There was attendance on 13 March 2024;
Attendance on 20 March 2024;
Attendance on 24 April 2024;
And judgment on 16 May 2024.
12. In total, for the four (4) court sessions, the court finds a cost award of Kshs 40, 000 all-inclusive a just award.
13. Accordingly, the Notice of Withdrawal of Appeal dated 13 March 2024 is affirmed on the condition that the appellant shall pay the respondent costs assessed at Kshs 40, 000 all inclusive. These costs are to be paid within 30 days after which, the same shall accrue interests at the court rate.

DELIVERED IN OPEN COURT AT MALINDI ON THIS 16 DAY OF MAY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant:

..... and

