



REPUBLIC OF KENYA



KENYA LAW
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Itolondo v Vice Chancellor of Kenyatta University (Civil Application E487 of 2023) [2024] KECA 1747 (KLR) (6 December 2024) (Ruling)

Neutral citation: [2024] KECA 1747 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E487 OF 2023
FA OCHIENG, JA
DECEMBER 6, 2024**

BETWEEN

DR WILFRIDA ITOLONDO APPLICANT

AND

THE VICE CHANCELLOR OF KENYATTA UNIVERSITY RESPONDENT

(Being an application to strike out the Notice of Appeal arising from the Ruling of the Employment and Land Court at Nairobi (S. Ruto, J.) dated 14th April 2023 in ELRC Petition No. 153 of 2022)

RULING

1. The application before me is dated 24th October 2023. The applicant, Dr. Wilfrida Itolondo sought the striking out of the Notice of Appeal dated 25th April 2023, for the reason that the said notice failed to adhere to the provisions of Rule 82 of the Court of Appeal Rules.
2. The respondent herein, who was the Vice Chancellor of Kenyatta University had lodged a Preliminary Objection, asserting that the trial court lacked jurisdiction to hear and determine the petition that had been filed by the applicant.
3. By a ruling delivered on 14th April 2023, Hon. Lady Justice Stella Ruto dismissed the preliminary objection, prompting the notice of appeal dated 25th April 2023.
4. After the lapse of literally six months, the applicant felt that the matter had stalled for too long, as she could not appreciate why the respondent had not yet filed the intended appeal.
5. The applicant wrote to the learned Deputy Registrar of this Court, expressing her frustrations, due to what she deemed as unwarranted delays.



6. Ultimately, the applicant wrote to the Deputy Registrar on 26th June 2024, providing information in the following terms:

“I wish to inform you that most of the prayers in the aforementioned petition have been overtaken by events, and so it will be an exercise in futility to it (sic!) in its current state. As a consequence, I have already written a withdrawal letter of the Petition, to the Deputy Registrar of the Employment and Labour Relations Court. (Copy attached).

In that context, I write to inform you that I am also withdrawing the above-mentioned Application. As a consequence, I will not be party to some appeal in the Court of Appeal at Nairobi, COACA No. E999 of 2023.”

7. The letter was copied to Messrs Njoroge Regeru & Co. Advocates, who represent the respondent in this application.

8. It is notable that in her letter addressed to the Deputy Registrar of the Employment and Labour Relations Court, the applicant expressed herself as follows;

“However, due to some developments at the Court of Appeal, I am very apprehensive that the Appeal may never be determined anywhere in the near future, which is the intention of counsels for the respondent.

Secondly, there is a change in leadership at Kenyatta University, and so most of the prayers have been overtaken by events and others may not be implementable because of the delay.

I would prefer that I officially withdraw the Petition in court unless you see it otherwise. I am representing myself in this matter.”

9. After receipt of the applicant’s communication, the Deputy Registrar of this Court caused the application to be listed for mention on 4 the respondent was represented by Ms. Mathangani, learned counsel.

10. On the material date, the applicant was present, in person, whilst the respondent was represented by Ms. Mathangani, learned counsel.

11. The applicant duly informed the court that she was withdrawing the application.

12. Ms. Mathangani advocate informed the court that the respondent had no objection to the withdrawal of the application. However, the respondent requested the court to award costs to them.

13. Rule 54 of this [Court’s Rules](#) provides as follows:

“(1) An applicant may, at any time, apply to the Court for leave to withdraw an application and such application to withdraw may be made informally and heard by the Registrar where the issue of costs is not contested.

2. Where the issue of costs is contested under sub-rule (1), the application to withdraw shall be heard by a single judge or by the Court if it is raised on the date of the hearing.

3. Where the withdrawal of an application is sought under this rule, each party shall have the right to be heard.”



14. Ordinarily, costs follow the event. However, the court has the discretion to determine whether or not to award costs, subject to the manner in which the proceedings had been conducted. Of course, at all times when the court is called upon to exercise its discretion, the same must be done judiciously. The Supreme Court in *Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others* [2014] eKLR stated thus:

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent- to the actual process of litigation.”

15. In this case, the court has not been called upon to determine the application. The applicant made a choice, to withdraw the application, as the same had been overtaken by events.

16. The reasons advanced by the applicant for her decision are largely attributable to the pace at which the proceedings before this Court moved. As a consequence of the slow pace, the Petition had largely been overtaken by events.

17. In *Farah Awad Gullet vs CMC Motors Group Limited* [2018] eKLR, this Court stated that:

“The position in law is that costs are at the discretion of the court seized of the matter with the usual caveat being that such a discretion should be exercised judiciously, meaning without caprice or whim and on sound reasoning. (See *Githiaka vs Nduriri* [2004] 2 KLR 67). Secondly, that a court can only withhold costs either partially or wholly from a successful party for good reasons to be shown.”

18. In the circumstances, I hold the view that it would be prejudicial to the applicant to condemn her to pay costs, yet she has found herself in the position complained of, due to circumstances beyond her control.

19. In this event, I find that justice demands that each party will bear their own costs of the application.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER, 2024.

F. OCHIENG

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

Deputy Registrar.

