



REPUBLIC OF KENYA



**Sioge v Gilanis Supermarket Ltd (Civil Application E079 of 2021)
[2023] KECA 177 (KLR) (17 February 2023) (Ruling)**

Neutral citation: [2023] KECA 177 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E079 OF 2021
FA OCHIENG, LA ACHODE & WK KORIR, JJA
FEBRUARY 17, 2023**

BETWEEN

THOMAS MOGERA SIOGE APPLICANT

AND

GILANIS SUPERMARKET LTD RESPONDENT

(Being an application to be deemed as withdrawn; the Notice of Appeal against the decision of the Employment and Labour Relations Court at Nakuru (H. Wasilwa, J.) dated 23rd September, 2021 in ELRC Cause No. 357 of 2017)

RULING

1. Before us is a notice of motion dated December 7, 2021 and supported by the affidavit of the applicant sworn on even date. The application is brought under rule 3(1) & (2), 3A and 3B of the [Appellate Jurisdiction Act](#), as well as rules 1(2), 82(1) & (2) and 83 of the [Court of Appeal Rules, 2010](#). The applicant seeks two orders, namely, that the notice of appeal dated 1st October 2021 and lodged in this court on 5th October 2021 be deemed to have been withdrawn by the respondent. And second, that the cost of this application be borne by the respondent.
2. The application is supported by the grounds on its body and the supporting affidavit sworn by the applicant together with annexures thereto. In summary, it is the applicant's averment that he sued the respondent in Nakuru ELRC Cause No. 357 of 2017, Thomas Mogera Sioge vs. Gilanis Supermarket Ltd. That on September 23, 2021, the Employment & Labour Relations Court (ELRC) at Nakuru entered a judgment in favour of the applicant against the respondent thereby awarding him Kshs. 115,487, together with costs of the suit, plus interest. That the respondent being dissatisfied with that judgment, lodged a notice of appeal dated October 1, 2021 before this court on October 5, 2021, but failed to serve the same upon the applicant. He argues that this is in violation of Rule 82(1) of the [Court of Appeal Rules, 2010](#).



3. The applicant further avers that the respondent, upon filing the said notice of appeal has not taken any further step thereby leading to the lapse of time prescribed under rule 82(1) of the *Court of Appeal Rules, 2010* for instituting an appeal. And that as a result of the violation of rule 82(1) of the *Court of Appeal Rules, 2010*, the respondent is now barred by rule 82(2) of *Court of Appeal Rules, 2010* from invoking the provisions of rule 82(1) of the *Court of Appeal Rules, 2010* to institute an appeal. He therefore prays that the notice of appeal be struck off the record, thereby formally bringing to an end the proceedings before this Court.
4. The application is opposed through the replying affidavit of Kevin Nam sworn on September 29, 2022. It is averred for the respondent that this application is frivolous, vexatious and an abuse of the Court process and should therefore be dismissed. It is also the respondent's case that soon after the judgment of September 23, 2021, the respondent settled the decretal sum of Kshs. 115, 487 in full and considered the matter fully settled. That without informing the respondent nor seeking instructions from the respondent, the advocate on record then, M/s Murimi, Ndumia, Mbago & Muchela, lodged a notice of appeal dated October 1, 2021 before this court on October 5, 2021. That the respondent only got to know about the existence of the said notice of appeal when it was served with this application. Further, the respondent also pointed out that they were served with this application on September 9, 2022 despite the application having been filed on December 9, 2021. The respondent asked that the mistake of their previous advocates should not be visited upon them and that the court do mark the notice of appeal as withdrawn without any order as to costs.
5. Counsel for the applicant filed a supplementary supporting affidavit in response to the replying affidavit by the respondent. Counsel asserted that this application is properly grounded in law and is competently before this Court. He also pointed out that the settlement of the decretal sum was done on July 14, 2022, which was seven (7) months after the judgment was issued. Counsel told this Court that he served the respondent's advocates, M/S Murimi, Ndumia, Mbago & Muchela, with the application on 16th December, 2021, and that service upon the respondent in person was merely out of abundance of caution.
6. In their submissions dated October 15, 2022, counsel for the applicant identified two issues for determination by this Court. Regarding the first issue of whether the notice of appeal should be deemed as withdrawn, counsel urged that rule 83 of the *Court of Appeal Rules, 2010* is couched in mandatory terms on what happens when an appeal is not lodged before the lapse of 60 days after filing of a notice of appeal. Counsel referred us to the decision of this court in *Mae Properties limited vs. Joseph Kibe & another* [2017] eLKR, and submitted that the timelines appointed for doing certain things and taking certain steps are indispensable for the proper adjudication of appeals. Counsel therefore prays for an order deeming the respondent's notice of appeal dated October 1, 2021 as withdrawn. He also submitted that the intended appeal has also been overtaken by events since the respondent had already satisfied the decretal sum.
7. The second issue counsel submitted on is with regard to who should bear the costs of this application. Counsel urged that under rule 83 of the *Court of Appeal Rules, 2010*, the party in default is liable to pay the costs arising from the notice of appeal, to any persons who had been served with the said notice. Counsel referred us to the Supreme Court decision in *Jasbir Singh Rai & 3 others vs. Tarlochan Singh Rai & 4 others* [2014] eKLR, which reiterated the principle that costs follow the event. Based upon that decision, the applicant submitted that the respondent should pay the costs of this application.
8. The respondent's submissions are dated October 19, 2022. The respondent identified two issues for determination, namely, whether they should be bound by the notice of appeal filed without their consent; and second, who should bear the costs of this application. On the first issue, counsel submitted



that a party can only be bound by the actions of his/her advocate if the said actions were as a result of their instructions. Further, it is the respondent's submission that in the absence of instructions to their advocate, liability should not be extended to the respondent. Counsel referred us to the High Court decision of *National Bank of Kenya Ltd vs. E. Muriu Kamau & another* [2009] eKLR; and this court's decision in *Wilfred N. Konosi t/a Konosi & Co. Advocates vs. Flamco Ltd* [2017] eKLR to buttress this position. The respondent submits and maintains that the notice of appeal was filed without their instructions and that they were indeed satisfied with the judgment of the ELRC.

9. On the question about who should bear the cost of this application, counsel submitted that the respondent remains an innocent party in this application and that the alleged liability or inaction arises out of the actions of its former advocates which were not borne of its instructions. Counsel relied on this court's decision in *Christopher Muriithi Ngugu vs. Eliud Ngugu Evans* [2016] eKLR and urged us to hold that the mistakes of an advocate should not be visited on the client. Counsel submits that the notice of appeal should be marked as withdrawn, and each party bear its own costs.
10. We have given due consideration to the application herein, the response and the submissions by both parties. This application raises two issues that calls for our determination, namely, whether the notice of appeal should be marked as withdrawn, and who should bear the cost of this application.
11. Both parties are in agreement, that the notice of appeal dated October 1, 2021 and lodged on October 5, 2021 be marked as withdrawn. Consequently, the notice of appeal dated October 1, 2021 and which was lodged on October 5, 2021 is hereby marked as withdrawn.
12. The only issue is who should bear the cost of this application. In this regard, Rule 83 of the *Court of Appeal Rules*, 2010 provides as follows:

“If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.” (Emphasis ours)

13. As per Rule 83, the ordinary cause regarding the cost of an application such as the one before us would be to have the respondent pay the costs. However, the issue of award of costs remains a discretionary matter which the courts are required to exercise judiciously. The Supreme Court in *Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & 4 others* [2014] eKLR stated as follows with regards to award of costs:

[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. (Emphasis ours)

(22) Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this court in other cases.”



14. From the dictum of the Supreme Court above, it follows that prior to the award of costs, which ordinarily should follow the event, this court must also consider the circumstances prevailing in the particular case. In this case, the respondent has distanced itself from ever instructing their former advocates, M/S Murimi, Ndumia, Mbago & Muchela, to lodge the notice of appeal. It is further a point of agreement between the parties that the respondent was personally served with the application months after it was lodged. The applicant also averred that they were never served with the notice of appeal. During the period pending the hearing and determination of this application, the respondent paid the decretal sum in full.
15. It appears obvious to us that the respondent could not have filed a notice of appeal when it had accepted the judgment of the trial court. We therefore hold the considered view that the respondent's advocates had lodged the notice of appeal without instructions from the respondent.
16. Nonetheless, it cannot be doubted that ordinarily an advocate is deemed to have apparent authority from his client. It is for that reason that third parties are not normally required to first ascertain whether or not an advocate had actual authority from his client before they can proceed with transactions.
17. Looking at the chain of events in the case before us, it is unlikely that the respondent would settle the decretal amount of the judgment of the court and then proceed to file a notice of intention to appeal. It may well be that the respondent was not in fact privy to the filing of the notice of appeal and therefore the event did not flow from the conduct of the respondent but from its previous counsel. It is not however, for us to speculate on the nature of the relationship between the respondent and its advocate. Of note is that the notice of appeal was filed on behalf of the respondent, by their advocate then on record, whether or not the said advocate was acting contrary to the respondent's wishes. This court finds therefore, that it would be unfair to burden the applicant with the cost, when he is not the one who initiated the still-born appeal.
18. Consequently, the notice of motion dated December 7, 2021 is allowed and we order that the notice of appeal dated October 1, 2021 and filed on October 5, 2021, be and is hereby deemed as withdrawn.
19. The respondent shall bear the cost of this application.

DATED AND DELIVERED AT NAKURU THIS 17TH DAY OF FEBRUARY, 2023.

F. OCHIENG

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

