



REPUBLIC OF KENYA



**Dhiman (Sing as the Legal Representative of the Estate of Kanwal Surjit Singh Dhiman) v Shah
(Civil Application E325 of 2023) [2023] KECA 1655 (KLR) (15 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1655 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E325 OF 2023
F TUIYOTT, JA
DECEMBER 15, 2023**

BETWEEN

**MANJOYT KAUR DHIMAN (SING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF KANWAL SURJIT SINGH DHIMAN) APPLICANT**

AND

KESHAVJI JIVRAJ SHAH RESPONDENT

*(An application for the enlargement of time for the hearing and determination
of Civil Appeal No. 380 of 2023 as per the order made by Okwengu, Makhandia
& Kantai, JJA on 8th July, 2022 in Civil Application No. NAI. 317 of 2019)*

RULING

1. By a notice dated 21st August, 2023, the applicant seeks to have its application dated 17th July, 2023 withdrawn on the following grounds:-
 - a) The application was filed in the wrong case file.
 - b) The request for the appeal herein to be heard before the expiry of one year which is due by end of August 2023 will be impossible as the court is currently on recess.”
2. The applicant has filed written submissions to support the withdrawal application. In it, it is submitted that in Civil Application No. 317 of 2019, this Court had granted a stay of execution against the judgment of the superior court in HCCC 205 of 1999 on condition that the appeal would be filed within one (1) year from the date of the ruling, 8th July, 2022. The applicant contends that he however encountered delay in obtaining the typed proceedings and as such only managed to file his appeal on 30th May, 2023 and immediately filed an application dated 6th June, 2023 for enlargement of time of the orders of 8th July, 2022. Sadly, the application was erroneously listed before a single judge who



dismissed the application for want of jurisdiction on 3rd July, 2023. Subsequently the applicant filed the application now sought to be withdrawn seeking that the appeal be heard within the remaining period of the one (1) year which was due to expire towards the end of August 2023. By 21st August, 2023 the application had not been heard and the Court was already in recess and therefore the applicant thought it wise to withdraw it as it had been overtaken by events. Similarly, in the ruling of 3rd July, 2023 by Ali Aroni JA, the learned judge had noted that the applicant could file an application for review of the stay orders before the lapse of the one year. The applicant wants to take that route.

3. Vide a response dated 25th August, 2023, the respondent is not averse to the withdrawal being granted but sought to be heard on the issue of costs. The respondent similarly filed written arguments where he submits extensively on the issue. His counsel submits that although a court cannot bar a party from withdrawing a matter before court, the court can make an order as to costs where it is deemed appropriate, (see Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others [2014] eKLR). That this is in tandem with rule 54 of the Court of Appeal Rules, 2022. The respondent cites the English Court of Appeal case in Scherer v Counting Instruments Ltd [1986] 2 ALL ER 529 where that court set out the principles to consider for the award of costs. Counsel further submits that a replying affidavit was filed on 21st July, 2023 in opposition to the application of 17th July, 2023. Similarly, written submissions were filed on behalf of the respondent on 8th August, 2023. That, therefore, the applicant should recompense the respondent in costs. A sum of Kshs.68,280 is suggested as appropriate.
4. By virtue of rule 54 of our Rules, an applicant may, at any time, apply to the Court for leave to withdraw an application and as has been said time and again, a court cannot take away a party's right to withdraw a matter before it and can only make an order as to costs where appropriate (see Nicholas Kiptoo (supra)). Mindful that the substratum of the application, being enlargement of time for the hearing and determination of the appeal within one year from 18th September, 2022, was overtaken by events as the one year was due to lapse before the application could be heard, the withdrawal of the application was well advised, nay inevitable. However, the respondent spent considerable energy preparing the answer to the applications which included a response and submissions and it is only fair that there be a recompense of this effort in costs.
5. In the premises the application dated 8th July, 2023 is hereby marked as withdrawn with costs to the respondent. Costs to be taxed on the usual manner.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER 2023.

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

