



**Mwangi v Gilanis Supermarket Limited (Civil Appeal 80 of 2021)
[2022] KECA 1386 (KLR) (15 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1386 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 80 OF 2021
FA OCHIENG, LA ACHODE & WK KORIR, JJA
DECEMBER 15, 2022**

BETWEEN

STEPHEN GITAU MWANGI APPLICANT

AND

GILANIS SUPERMARKET LIMITED RESPONDENT

(An application to withdraw the Notice of Appeal dated 1st October 2021 from the judgment and decree of the Employment and Labour Relations Court (Wasilwa J.) delivered on 23rd September 2021 in NAKURU ELRC No. 356 of 2017)

RULING

1. By notice of motion dated December 7, 2021, the applicant seeks to have the respondent's notice of appeal dated October 1, 2021 and filed in court on October 5, 2021 withdrawn. The notice was filed with the intention to appeal against the judgment of Wasilwa, J delivered on September 23, 2021. The application is brought under sections 3(1) & (2), 3A & 3B of the [Appellate Jurisdictions Act](#), rules 1(2), 82(1) and (2) and 83 of the [Court of Appeal Rules](#) and all other enabling provisions.
2. The applicant makes this application on the grounds that;
 - i. The applicant sued the respondent in Nakuru ELRC Cause No 356 of 2017; Stephen Gitau Mwangi v Gilanis Supermarket Limited
 - ii. On September 23, 2021, the superior court entered judgment in favor of the applicant, awarding him Kshs 198,000/-, costs and interest thereof.
 - iii. The respondent lodged a notice of appeal at the superior court on October 5, 2021 but did not serve the applicant



- iv. The respondent has never filed and served any letter bespeaking the proceedings
 - v. The respondent has since not instituted an appeal contrary to rule 82(1) Court of Appeal Rules and the appeal is now time-barred.
 - vi. The notice of appeal should not subsist because there is no likelihood that the respondent will institute a competent appeal.
 - vii. Therefore, the notice of appeal should be withdrawn.
3. In support of the application, the applicant swore an affidavit on December 7, 2021 reiterating the grounds of the application. He further averred that he only became aware of the notice of appeal on October 27, 2021 after attending the superior court registry to collect his notice of taxation.
 4. Opposing the application Kevin Nam, head of legal and compliance department of the respondent swore a replying affidavit on September 29, 2022 terming the application as frivolous, vexatious, and an abuse of the court process and which ought to be dismissed with costs, because the respondent had fully settled the decretal amount of kshs 198,000/-. He deposed further that the impugned notice of appeal was lodged by the firm of M/S Murimi, Ndumia, Mbago & Muchela without either instruction from, or informing the respondent and that the respondent only became aware of the notice of appeal when it was served with the present application on September 9, 2022.
 5. Mr Nam urged that in the premise, the application lacks merit and should therefore be dismissed and the notice of appeal withdrawn.
 6. The application was canvassed by way of written submissions. Counsel for the applicant filed written submissions dated October 16, 2022. Counsel cited the case of *Mae Properties Limited v Joseph Kibe & Another [2017] eKLR* and submitted that the respondent ought to have instituted the appeal within 60 days of lodging the notice of appeal in accordance with rule 82(1) of the Court of Appeal Rules, failure to which the notice should be deemed as withdrawn.
 7. Citing rule 83 Court of Appeal Rules, counsel further submitted that the respondent should bear the burden of the costs arising from the notice of appeal, because costs follow the event. To buttress this assertion, she relied on *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR*.
 8. Counsel for the respondent, Mukite Musangi & Company Advocates, filed written submissions dated October 19, 2022 in reply to the applicant's submissions and asserted that the notice of appeal was filed without the respondent's instructions and therefore, it did not bind the respondent. Counsel also urged that the respondent had already settled the decretal sum in full and therefore, the notice of appeal should be struck out for lack of instruction by the respondent. He cited the following cases in support of this argument; *National Bank of Kenya v Muriu Kamau & Another [2009]*, and *Winfred N Konosi t/a Konosi & Co Advocates v Flamco Limited [2017] eKLR*. He urged that the notice should be withdrawn, and this application dismissed.
 9. Relating to the costs arising, counsel submitted that because the previous counsel on record had acted without the instruction of the respondent, the said respondent is therefore an innocent party who should not be punished. Counsel relied on the case of *Christopher Muriithi Ngugu v Eliud Ndugu Evans [2016] eKLR*, in support of his contention. He urged the court to order that each party bear its own costs.
 10. We have carefully considered this application, each party's submissions, the authorities relied upon and the law. We note that both parties are in concurrence that the notice of appeal should be deemed



withdrawn albeit for different reasons. This court will therefore not belabor the withdrawal of the notice of appeal. The only issue left for determination is in relation to who should bear the burden of costs.

11. The applicant contends that the respondent should be liable for the costs of the notice of appeal because the notice was filed on its behalf and costs should follow the event. The respondent on the other hand alleges that the notice of appeal did not emanate through its own actions but rather, that the previous counsel on record acted without permission in lodging the notice of appeal. The respondent asserts that they fully settled the decretal amount shortly after the judgment was rendered, a contention which the applicant has not challenged. It seems that the only qualm the applicant is keen on settling is who should bear the burden of costs following the withdrawal of impugned notice of appeal.

12. The Supreme Court discussing the matter with regard to award of costs in [Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others \[2014\] eKLR](#), referred to by the applicant, rendered itself thus;

' 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. 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.'

13. The effect of the above precedent is that costs do not automatically follow the event. Liability of costs should be on a case-to-case basis, depending on the circumstances of the case and courts have the discretion to decide depending on the circumstances of each case. Considering the contention of both parties, it is prudent that this court examines the circumstances of this case before making a determination on costs.

14. The respondent has argued that the mistakes of counsel should not be visited upon it. On that issue this court in [Tana & Athi Rivers Development Authority v Jeremiah Kimigbo Mwakio & 3 Others \[2015\] eKLR](#), observed as follows;

' From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious, and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that the counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side.'

15. 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.

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.

The respondent shall bear the cost of this application.

DATED AND DELIVERED AT NAKURU THIS 15TH DAY OF DECEMBER, 2022

F OCHIENG

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JUDGE OF APPEAL

L ACHODE

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JUDGE OF APPEAL

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W KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

JUDGE OF APPEAL.

