REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT MALINDI

CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.

CIVIL APPEAL NO. 52 OF 2015

BETWEEN

HARRY JOHN PAUL ARIGI…….....…..1ST APPELLANT

JOAN ZAWADI KAREMA…….....…2ND APPELLANT

RENSON JUMA THOYA…….....……..…..3RD APPELLANT

AND

THE BOARD, KENYA PORTS AUTHORITY……....…….....…1ST RESPONDENT

THE MANAGING DIRECTOR,KENYA PORTS AUTHORITY…2ND RESPONDENT

GENERAL MANAGER, BOARD & LEGAL SERVICES

KENYA PORTS AUTHORITY……..……3RD RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Mombasa (Emukule, J.) dated 2nd June 2015

in

HC PETITION NO. 24 of 2015)

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JUDGMENT OF THE COURT

Although this appeal was uncharacteristically heard on two separate days, shorn of all embellishment and semantics, the cut and dry issue involved is fairly simple and straight forward: it is whether the High Court ***(Emukule, J.),*** erred by setting aside the appellants' notice of withdrawal of ***Constitutional Petition No. 24 of 2015*** and directing that the petition be set down for hearing on priority basis. In our

view, the appellants' protracted submissions and arguments boil down to the contention that they have an unfettered constitutional right to withdraw their petition, as and when they wish without let or hindrance by the learned judge. In the circumstances of this appeal, they claim that they were particularly justified in withdrawing the petition in the manner they did because the learned judge was biased against them. The respondents on the other hand contend that the notice of withdrawal of the petition was in breach of the ***Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013***, ***(the 2013 Rules)*** in bad faith and an abuse of the process of the court, which justified the learned judge's decision to set it aside.

The background to the orders giving rise to this appeal, and which partly explains why the hearing of the appeal was so unduly muddied, muddled and prolonged, is a valuable but contested transaction initially worth ***Kshs 700 million.*** By an agreement dated 18th December 2014 the appellants, in their capacity as trustees of the ***Kenya Ports Authority Retirement Benefits Scheme, 2012***, agreed to purchase from a vendor known as ***Kikambala Development Company Limited*** 20 parcels of land measuring in area 5 acres each, in Kikambala, Kilifi County. The agreed purchase price for each parcel was ***Kshs 7 million***, so that in all the appellants agreed to purchase 100 acres for Kshs 700 million. According to the appellants, the purpose of the purchase was *"to diversify the investment of the trust funds"* following local benchmarking study of two similar retirement schemes. In furtherance of the transaction and upon the signing of the sale agreement, the appellants paid to the vendor's advocates Kshs 70 million being 10% deposit of the purchase price. Subsequently and on the advise of the retirement scheme managers and actuaries, the transaction was scaled down to ***60 acres (12 parcels)*** at a total purchase price of ***Kshs 420 million***. A deed of variation was prepared to that effect.

Soon however the transaction ran into serious headwinds after the respondents, and in particular the 1st respondent as the founder or sponsor of the retirement scheme, raised questions regarding the rationality, viability and benefit of the transaction to members of the scheme. On 6th April 2015 the 2nd respondent informed the appellants in writing that it was suspending the transaction pending a thorough forensic audit of the same.

Evidently not amused by the turn of events, and in a bid to salvage and conclude the transaction, the appellants, on 17th April 2015, filed in the High Court in Mombasa ***Constitutional Petition No. 24 of 2015*** alleging violation of their unspecified constitutional rights. In addition to justifying the transaction, the appellants contended that under the Kenya Ports Authority Retirement Benefits Scheme, 2012 they had, as the trustees, the absolute discretion to manage the scheme and to invest any money forming part thereof without interference from the founder or sponsor or its employees. Accordingly they prayed for declarations to that effect and a permanent injunction to restrain the respondents from interfering or meddling in the transaction.

Hot on the heels of the petition, the appellants took out a motion on notice under certificate of urgency seeking conservatory orders to, *inter alia*, restrain the respondents from *"intruding, obstructing, hindering, meddling, getting involved in or in any other manner whatsoever interfering"* with the transaction and from appointing auditors, forensic auditors, accountants, experts or any other person for purposes of undertaking forensic audit of the transaction. On 21st April 2015, after hearing the appellants' advocate *ex parte*, the High Court, ***(Muya, J.)*** granted conservatory orders as prayed and restrained the respondents from interfering with the transaction for a period of 14 days. The court further directed the appellants to take a date for *inter partes* hearing of the application at registry on priority basis.

On 4th May 2015 the respondents, having been served with the appellants' application, filed their own Notice of Motion in the High Court, also under certificate of urgency, seeking among other reliefs an order vacating the interim orders granted by Muya, J. on 21st April 2015 and conservatory orders to stop the appellants from concluding the transaction pending the hearing and determination of the dispute. The respondents claimed that the appellants had obtained the orders of 21st April 2015 in bad faith and without full disclosure and that the members of the scheme stood to suffer substantial losses and damage should the transaction be hurriedly concluded. The respondents also challenged the competence of the petition and motion, contending among other things that the appellants had failed to specify their

constitutional rights that had been violated by the respondents and the manner in which they had been violated.

The advocates for the parties appeared before Emukule, J. on 4th May 2015 when he adjourned the two applications for simultaneous hearing on 12th May 2015. As regards the transaction, the learned judge directed that the *status quo* be maintained, meaning that it was not to be completed pending the hearing and determination of the applications.

When the parties appeared before the learned judge on 12th May 2015 as scheduled, the appellants had the previous day filed a motion for leave to amend their petition and motion to, among other things, address the challenges raised by the respondents regarding the competence of the pleadings. The appellants requested that their application for leave to amend be heard first, to which the advocate for the respondents objected on the grounds of late service of the application and lack of opportunity to take instructions and respond to the same. Ultimately the learned judge adjourned the hearing of the application for amendment to 26th May 2015 to give the respondents' advocate time to take instructions and file responses, if any. He further extended the order made earlier for the maintenance of the status quo regarding the transaction.

By 26th May 2015 when the parties next appeared before the learned judge, the scenario had fundamentally changed, as it later transpired, because the appellants believed that the learned judge was biased against them. Firstly, on 15th May 2015 the appellants had filed ***"A Notice of Withdrawal of Petition"*** by which they purported to wholly withdraw the petition and all the applications filed therein. Secondly, on the same day, the appellants filed against the respondents ***Mombasa High Court Civil Suit No. 64 of 2015***. The pleadings and the remedies sought in the fresh suit were virtually word for word what the appellants had sought in the petition that they had purported to withdraw. Thirdly and still on the same day, the appellants' advocate appeared under a certificate of urgency before a different judge of the High Court ***(Kasango, J.)*** and obtained *ex parte* orders similar to those that they had obtained before Muya, J., restraining the respondents from interfering with the transaction. Lastly on 20th May 2015, Petition No 24 of 2015 was placed before the Deputy Registrar who purported to endorse the appellants' notice of withdrawal of the petition.

Come 26th May 2015 and the purportedly withdrawn petition was still listed before Emukule J. The appellants' advocate took the view that there was no petition before the court, the same having been effectively withdrawn. In the alternative, he orally sought leave of the learned judge to withdraw the petition, contending that the same was the property of the appellants and that their right to withdraw it could not be curtailed.

The respondents on the other hand, took a different view arguing that the purported withdrawal of the petition was in breach of the 2013 rules; that the Deputy Registrar did not have jurisdiction to sanction withdrawal of the petition; that in view of the filing of HCCC NO. 64 of 2015 immediately thereafter, the purported withdrawal of the petition was in bad faith and an abuse of the process of the court; that the petition involved matters of public interest and could not be withdrawn at the appellants' sole discretion; and that in the circumstances the appellant's oral application for withdrawal of the petition was not merited.

By his ruling dated 2nd June 2015, the learned judge held that the purported withdrawal of the petition was irregular, null and void. He accordingly set aside the notice of withdrawal and directed, as we have said earlier, that the petition be set down for hearing on priority basis. Aggrieved by the ruling, the appellants filed a Notice of Appeal on 8th June 2015 and ultimately the appeal now before us.

The appellants' appeal was premised on 14 grounds of appeal contained in the memorandum of appeal. Those grounds are anything but concise and are unduly overlapping. As this Court has stated time and again, learned counsel must pay due regard to ***rule 86(1)*** of the ***Court of Appeal Rules*** which demands that the memorandum of appeal must be concise and without argument or narrative. (See ***WILLIAM KOROSS V. HEZEKIAH KIPTOO KOMEN & 4 OTHERS CA. NO. 223 of 2013 (ELDORET)*** and

***ANDREW PETER NGIRICHI & ANOTHER V. WANJE MASHA WANJE*, CA. NO. 17 of 2015 (MALINDI)**. In our estimation, all the 14 grounds of appeal raise only 3 issues, namely whether:

> ***(i) The appellants were justified, by reason of violation of their constitutional rights and on account of bias on the part of the learned judge, to withdraw the petition;***
>
> ***(ii) The learned judge erred by failing to follow binding precedent from the Supreme Court; and***
>
> ***(iii) The learned judge erred by holding that public interest was involved in the appellant's petition.***

Urging the first broad ground of appeal, ***Mr. Tindika,*** learned counsel for the appellants questioned the record kept by the learned judge contending that he had not accurately recorded counsel's arguments and submissions. For example, he submitted, although he addressed the court at length on 4th May 2015, the record did not reflect that address and even omitted reference to his application for extension of the interim orders granted by Muya, J. Learned counsel further submitted that from the record, the learned judge placed more emphasis on the submissions by counsel for the respondents than on his submissions.

It was counsel's further view that the learned judge did not, in the ruling, consider his submissions and that the record and the ruling did not rhyme because the latter addressed issues that were not captured in the former. By way of example it was argued that the ruling addressed extension of the interim orders as well as the charge of bias that the appellants had laid against the learned judge, yet the same were not reflected in the recorded submissions. Contending that the High Court was a court of record, counsel urged us to find from the manner in which the record was kept that the learned judge was biased against the appellants and to hold that they were justified in withdrawing their petition.

In Mr. Tindika's view, another indicator of the learned judge's bias against the appellants was that he had expressed the view that as drawn, the constitutional petition did not raise any constitutional issues. That fact, it was submitted, made the appellants conclude that they would not get justice before the learned judge, thus further justifying the withdrawal of the petition on account of the his bias.

Pressing the issue further, Mr. Tindika submitted that the manner in which the learned judge conducted the proceedings amounted to judicial violation of the appellants' constitutional rights, in particular ***Article 20*** by which the Bill of Rights binds all persons and state organs; ***Article 21*** by which it is the fundamental duty of all state organs to observe, respect, protect, and promote the rights and freedoms in the Bill of Rights; ***Article 25*** by which the right to a fair trial cannot be limited; ***Article 27*** which guarantees equality before the law and the right to equal protection and benefit of the law; ***Article 47*** which guarantees the appellants the right to fair administrative action; and ***Article 50*** which guarantees them the right to fair trial. In light of the alleged violation of the above rights by the learned judge, we were urged to find that the appellants were entitled to withdraw their petition as they did and that the learned judge was in error in setting aside the notice of withdrawal.

On the second ground of appeal regarding the alleged failure by the learned judge to follow binding precedent from the Supreme Court, Mr. Tindika submitted that by dint of ***Article 163(7)*** of the Constitution, all courts in Kenya, save the Supreme Court are bound by decisions of the Supreme Court. Relying on the ruling of the Supreme Court in ***NICHOLAS KIPTOO ARAP KORIR SALAT V. IEBC & 7 OTHERS, SC APPLICATION NO. 16 OF 2014,*** counsel submitted that the apex Court has determined that a party's right to withdraw a matter before the court cannot be taken away and that subject to payment of costs, a court cannot bar a party from withdrawing his matter. We were accordingly invited to hold that the learned judge had erred by failing to follow precedent from the Supreme Court, which was not only binding, but was also directly on the issue before him.

Regarding the relevance of the 2013 rules in the withdrawal of constitutional petitions, learned counsel submitted that being procedural rules and subsidiary legislation, the same cannot override the Constitution and therefore may not constrain the appellants' right to withdraw their petition. In any event, counsel added, if any notice was required before withdrawal of the petition, there was no requirement that

such notice had to be in writing and that sufficient notice was duly given when he applied orally for leave to withdraw the petition on 26th May 2015.

On the last ground of appeal, it was contended that the learned judge erred when he held that the appellants' petition was public interest litigation so as to justify the order setting aside the notice of withdrawal of the petition. In counsel's view, the petition was not public interest litigation and did not involve any issue of public interest beyond the interests of the Kenya Ports Authority, two of its officers, and trustees of its retirement scheme. In addition, it was submitted that the parties did not address the question whether or not the petition was a matter of public interest.

Opposing the appeal, ***Mr. Khagram,*** learned counsel for the respondents submitted that the only issue in the appeal was whether the appellants had properly and procedurally withdrawn their petition. As far as counsel was concerned, all the other issues raised by the appellants and in particular the learned judge's alleged bias and violation of the appellants' constitutional rights were mere red herrings calculated to obfuscate and confuse the real issue.

The proceedings before the High Court, Mr. Khagram submitted, were not commenced under the ***Civil Procedure Act*** and the ***Rules*** made thereunder. Rather what was before the court was a petition for enforcement of fundamental rights, which, by reason of being a special procedure, is governed by the 2013 rules. ***Rule 27***, it was argued, regulates withdrawal of constitutional petitions and makes it clear that a petition can only be withdrawn with the leave of the court upon prior notice to the court and the respondent.

To the extent that the appellants did not comply with rule 27, it was contended, there was no effective withdrawal of the petition and the learned judge therefore did not err in setting aside the appellants' purported notice of withdrawal. In the respondent's view, even the Deputy Registrar's purported endorsement of the notice of withdrawal did not cure the defect since the Deputy Registrar has no role under rule 27. Mr. Khagram urged that in the circumstances of this case the purported withdrawal of the petition was in bad faith and the filling of HCCC No 64 of 2015 when Petition No 24 of 2015 had not been properly withdrawn was an abuse of the process of court resulting in two suits between the same parties, on the same dispute and seeking the same remedies. In any event, counsel added, the endorsement by the Deputy Registrar did not take place until 20th May 2015, five days after the appellants had filed HCCC No 64 of 2015 and obtained interim orders.

Relying on the ruling of the High Court in ***PETER MAKAU MUSYOKA & OTHERS V. THE PERMANENT SECRETARY, MINISTRY OF HEALTH & OTHERS, HC PETITION NO. 305 OF 2012 consolidated with HC PETITION NO. 34 OF 2013***, it was submitted that a constitutional petition can only be withdrawn with leave of the court and that in granting or refusing such leave, the court considers the effect of the withdrawal, including on public interest. In this case, it was submitted that the learned judge had properly found that the petition involved much more than the interests of the applicants and affected the rights and interests of many other Kenya Ports Authority pensioners who risked losing their pension dues in an unproductive and self-serving white-elephant project. Further, it was asserted, the vendors in the transaction were not the registered owners of the properties that the appellants were intending to purchase, thus further exposing pensioner's dues to great risk. In the circumstances, it was contended, the learned judge had properly declined to grant the appellants leave to withdraw the petition in public interest.

Also relied upon by the respondents was the judgment of this Court in ***BEIJING INDUSTRIAL DESIGNING RESEARCH INSTITUTE V LAGOON DEVELOPMENT LTD, CA NO. 1 OF 2015*** for the proposition that while the courts will respect the wish of a party to withdraw his or her suit, it will nevertheless not allow withdrawal if it amounts to an abuse of the process of the court.

Lastly Mr. Khagram submitted that there was no basis for the charge that the learned judge had declined to follow binding precedent from the Supreme Court. In counsel's view, the ruling in ***NICHOLAS KIPTOO ARAP KORIR SALAT V. IEBC & 7 OTHERS*** ***(supra)*** was easily distinguishable and inapplicable in the present case because it did not involve withdrawal of a constitutional petition, which is

governed by a special regime that is provided for under the Constitution.

We have anxiously considered the appeal, the submissions of learned counsel, the authorities cited, and the law. It is common ground that the proceedings that the appellants sought to withdraw by their notice of withdrawal dated 14th May 2015 and filed in court on 15th May 2015 was a constitutional petition for enforcement of fundamental rights rather than an ordinary suit filed under the Civil Procedure Act and the rules made thereunder.

By dint of ***Article 22(1)*** of the Constitution, every person has the right to institute court proceedings claiming that a right or freedom guaranteed in the Bill of Rights has been denied, violated, infringed or threatened. As a corollary, ***Article 23(1)*** confers on the High Court jurisdiction to hear and determine applications where a party alleges denial, violation, infringement, or threat to a right or freedom guaranteed by the Bill of Rights.

Article 22(3) of the Constitution in turn makes provision for the procedure to be employed in proceedings for enforcement of fundamental rights and freedoms and for that purpose enjoins the Chief Justice to make the necessary rules of procedure. It cannot be gainsaid that inherent in Article 22 is a conscious desire that in enforcement of fundamental rights and freedoms, technicalities, formalities and expenses should be kept at a minimum. Indeed under Article 22(4) the absence of procedural rules cannot limit or otherwise inhibit the right of a person to access the court for a remedy in the event of an alleged breach or violation, or otherwise affect the power of the court to hear and determine the same. Nevertheless, the constitutional underpinning of the rules is crystal clear and not in doubt. If the rules pass muster and satisfy the overriding constitutional values set out in Article 22 (1) to (3), a litigant is obliged to follow them, otherwise there would have been no reason why, of all the documents, the Constitution itself should reserve a place for those rules.

Pursuant to Article 22(3) of the Constitution, on 28th June 2013, Vide Legal Notice No 117, the Chief Justice made the 2013 rules. Clause 3(1) of the rules provides that they shall apply to all proceedings for enforcement of fundamental rights and freedoms under Article 22. Of immediate concern in this appeal is rule 27, which provides for withdrawal or discontinuance of constitutional petitions. The rule provides as follows:

"27. (1) The petitioner may—

> ***(a) on notice to the court and to the respondent, apply to withdraw the petition; or***
>
> ***(b) with the leave of the court, discontinue the proceedings.***
>
> ***(2) The Court shall, after hearing the parties to the proceedings, decide on the matter and determine the juridical effects of that decision.***
>
> ***(3) Despite sub rule (2), the Court may, for reasons to be recorded, proceed with the hearing of a case petition in spite of the wish of the petitioner to withdraw or discontinue the proceedings."***

Rule 27 (1) (a) allows a petitioner who wishes to withdraw a petition to ***apply*** to withdraw the same after giving notice of his intention to both the court and the respondent. Clearly under that provision, the withdrawal of the petition is not automatic and is not achieved merely by notice. Under 27(1)(b) the petitioner can also discontinue the proceedings, but after obtaining the leave of the court. If there ever was any doubt from rule 27(1) that the leave of the Court is required before a constitutional petition may be withdrawn, Rule 27(2) puts the matter beyond dispute by stating that the court shall decide on the matter ***"after hearing the parties to the proceedings"***. The role of the court in the withdrawal of a constitution petition is reinforced by Rule 27(3), whose effect is that notwithstanding the petitioner's wish to withdraw the petition or to discontinue the proceedings, the court may for reasons to be recorded, still proceed to hear and determine the petition.

We are satisfied that the right of a petitioner to withdraw a constitutional petition is circumscribed by rule

27; that rule 27 like all the other rules enshrined in the 2013 rules, is constitutionally underpinned and is not a mere technicality; and that the rule is justified granted the public significance of an application alleging violation of the Bill of Rights, literally the heart of the Constitution. To the extent that the withdrawal of constitutional petitions is regulated by a specific regime that is traceable directly to the provisions of the Constitution, the appellants were obliged to comply with rule 27 before they could competently withdraw the petition. The duty of a party to follow a specifically prescribed procedure has been emphasized by this Court time an again, for example in ***SPEAKER OF THE NATIONAL ASSEMBLY V. KARUME*** *(2008) KLR (EP) 425,* ***KONES V. REPUBLIC & ANOTHER EX PARTE WANYOIKE & 4 OTHERS*** *(2008) 3 KLR (EP) 291* and ***MUTANGA TEA & COFFEE COMPANY LTD V. SHIKARA LTD & ANOTHER, CA NO 54 OF 2014.***

We have no hesitation in holding that, in so far as this appeal involves withdrawal of a constitutional petition, decisions on withdrawal of ordinary suits are not helpful. We accordingly do not think there is any basis for the claim that the learned judge in the High Court ignored biding decisions of the Supreme Court contrary to Article 163(7) of the Constitution.

In ***BEIJING INDUSTRIAL DESIGNING RESEARCH INSTITUTE V LAGOON DEVELOPMENT LTD (supra),*** we held, citing ***CASTANHO V. BROWN & ROOT (UK) LTD & ANOTHER (1981) 1 ALL ER 143*** that even where a party has a right to withdraw his suit, the court has inherent jurisdiction to stop such withdrawal if it constitutes abuse of the process of court. In the circumstances of this appeal, we are satisfied that the learned judge did not err by setting aside the appellant's purported notice of withdrawal of the petition. To start with, the appellant's reason for the purported withdrawal of the petition was that the learned judge was biased and had violated several of their constitutional rights.

If indeed the appellants truly believed that the earned judge was biased against them, they were obliged to apply to the judge to recuse himself from the proceedings. They were obliged further to place before the judge such material as would lead a fair minded person, having considered the facts, to conclude that there was a real possibility that the judge would not be fair. ***(See MAGILL V. PORTER [2002] 2 AC 357)***. If the learned judge made a decision which did not satisfy them, they had a right of access to this Court by way of appeal.

But what did the appellants do? They constituted themselves into the complainant, the witness and the judge. They charged the learned judge with bias and violation of their constitutional rights and convicted him, as it were. By way of remedy, they awarded themselves the right to withdraw the petition without recourse to the prescribed procedure and proceeded to file a suit that was a mirror image of the petition that they had purported to withdraw. They then immediately obtained in the new suit interlocutory orders similar to those they had obtained in the petition without full disclosure of the history of the proceedings.

On the facts of this appeal, we are satisfied that the learned judge was entitled to find that the purported withdrawal of the petition on the basis of the reasons advanced by the appellants, when they had not bothered to even apply for his recusal, was an abuse of the process of the court. Once they had purportedly withdrawn the petition, the appellant filed the very next day a suit seeking the very same remedies that they had sought in the petition and obtained *ex parte* orders that would have enabled them, before the hearing and determination of the dispute, to conclude the transaction. In those circumstances, it is understandable when the respondents submit that the appellants were merely forum shopping.

We have said enough to show that we do not find any merit in this appeal and do not need to address the issue whether public interest was involved in the appellant's petition. It is enough that the purported withdrawal was in abuse of court. Accordingly, we dismiss this appeal in its entirety with costs to the respondents. It is so ordered.

Dated and delivered at Mombasa this 26th day of February, 2016

ASIKE-MAKHANDIA

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR