



Kenya Electricity Transmission Co Limited (KETRACO) v Instalaciones Inabensa SA (Petition 17 (E024) of 2021) [2023] KESC 10 (KLR) (17 February 2023) (Ruling)

Neutral citation: [2023] KESC 10 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

PETITION 17 (E024) OF 2021

MK IBRAHIM, SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ

FEBRUARY 17, 2023

BETWEEN

**KENYA ELECTRICITY TRANSMISSION CO LIMITED
(KETRACO) APPELLANT**

AND

INSTALANCIAS INABENSA SA RESPONDENT

*(Being an Appeal from the Ruling of the Court of Appeal at Nairobi
(Makhandia, Mbogholi Msagha & Mumbi Ngugi, JJ.A.) delivered
on 19th November 2021 in Misc. Application No. E56 of 2021)*

Withdrawal of an appeal by consent of the parties does not absolve the appellant from costs.

The case was about withdrawal of an appeal by consent of the parties and the Supreme Court held that such a withdrawal did not absolve the appellant from costs. A delay in withdrawing a suit even after an appellate court had held that it did not have jurisdiction was an event in which costs could materialize.

Reported by John Wainaina

Civil Practice and Procedure – costs of the suit – principles guiding an award of costs - award of costs in an appeal - what principles guided courts in awarding costs - whether a court could award costs against an appellant where an appeal was withdrawn by consent of the parties - Supreme Court Act (Act No. 7 of 2011) section 21(2); Supreme Court Rules, 2020 rule 3(5)

Brief facts

In the instant appeal, the Supreme Court had already issued a ruling and declared itself of not having jurisdiction to deal with the instant matter. The only thing to be determined was matter of costs.

Following the ruling that the court lacked jurisdiction, and six days before the hearing to determine who was to bear the costs, the parties sought leave to enter a consent to withdraw the suit. Subsequently the appellant contended that since the respondent had already been awarded costs in the ruling absolving the court of jurisdiction, that they bore no further burden of costs. The respondent contended that the appellant’s claim that it should not be granted costs since it was awarded expenses in the ruling on jurisdiction was unfounded



because the two proceedings were separate and the respondent was entitled to costs for both. The respondent further contended that an application's expenses could not be the same as or equal to the costs of a challenge to an appeal.

Issues

- i. What principles guided courts in awarding costs?
- ii. Whether a court could award costs against an appellant where an appeal was withdrawn by consent of the parties.

Held

1. The Supreme Court had inherent jurisdiction to make orders on costs that it thought fit to award as it could deem it necessary for the ends of justice or prevent abuse of the process of the court pursuant to section 21(2) of the *Supreme Court Act* and rule 3(5) of the *Supreme Court Rules, 2020*.
2. Ordinarily costs followed the event and costs should not be used to punish the losing party, but to compensate the successful party for the trouble taken in prosecuting or defending a suit. There was no prescribed definition of any set of good reasons that would justify a court's departure, in awarding costs, from the general rule costs followed the event. Courts proceeded on a case by case basis, to identify good reasons for such a departure. Matters in the domain of public interest litigation tended to be exempted from award of costs.
3. The petition was withdrawn after the respondent, in response to the petition of appeal, had filed a replying affidavit. The appeal at the time of withdrawal was ripe for hearing and had indeed been scheduled for hearing. The appellant waited for a period of about three months before withdrawing the petition six days before the scheduled date for hearing. Costs normally followed the event, an event to which costs would follow had materialized. The appellant had failed to demonstrate why it was not to bear the costs of the appeal.

Application partly allowed.

Orders

- i. *The notice of motion that sought to withdraw the petition of was allowed in the following terms:*
 1. *The consent dated January 27, 2023 and filed in court on January 30, 2023 granting the appellant leave to withdraw the petition of appeal dated November 26, 2021 was adopted as an order of the court.*
 2. *The appellant was to bear the costs of the appeal.*

Citations

Cases

1. Morgan Air Cargo Limited v Evrest Enterprises Limited (Civil Case 179 of 2013; [2014] eKLR) — Mentioned
2. Rai, Jasbir Singh & 3 others v Tarlochan Singh Rai & 4 others (Petition 4 of 2012; [2014] eKLR) — Applied
3. Republic v Kenya National Highway Authority Ex parte Mary Muthoni & 25 others (Judicial Review 14 of 2013; [2015] KEHC 2389 (KLR)) — Mentioned
4. Waiguru, Anne & another v Martha Karua & 2 others (Petition 5 of 2018; [2021] KESC 38 (KLR)) — Explained

Statutes

1. Supreme Court Act, 2011 (Act No 7 of 2011) — Section 21 (2), 24 — Interpreted
2. Supreme Court Rules, 2020 (Act No 7 of 2011 Sub Leg) — Rule 3 (5), 47 — Interpreted

Advocates

Mr. Paul Nyamodi for Appellant

Mr. James Muthui for Respondent



RULING

1. Upon perusing the notice of motion by the appellant dated January 24, 2023 and filed on January 25, 2023, anchored on section 24 of the [Supreme Court Act, 2012](#) as read together with rules 27 and 31 of the [Supreme Court Rules, 2020](#) and rule 47 of the Supreme Court (General) Practice Directions, 2020 seeking the following orders:
 - a. That this honourable court be pleased to grant the appellant/applicant leave to withdraw the petition of appeal dated November 26, 2021 with no order as to costs.
 - b. That each party to bear their own costs of this application.
2. Upon considering the grounds on the face of the application and the supporting affidavit by Lydia Wanja, the appellant's Manager, Legal Services sworn on January 24, 2023 contending that the court having substantially pronounced itself in its ruling delivered on October 7, 2022 that it lacks jurisdiction to hear and determine the appeal, there is nothing left to be determined. It is also contended that it would be a waste of precious judicial time and resources to pursue the appeal, hence the present application; and
3. Upon perusing the consent entered into by counsel for both the appellant and respondent dated January 27, 2023 and filed in court on January 30, 2023 granting leave to the appellant to withdraw the petition of appeal. Upon further perusing the consent and noting that the only dispute for the court's determination is that of costs upon withdrawal of the petition of appeal. Upon noting the directions by the Hon Deputy Registrar on January 27, 2023 directing the parties to file submissions limited to the issue of costs; and
4. Upon perusing the appellant's written submissions dated January 26, 2023 and filed on January 27, 2023 wherein the appellant contends that the appeal was withdrawn subsequent to this court's decision rendered on October 7, 2022 in respect of its application dated May 6, 2022 where the court found that the appeal was not arguable for reasons that the court lacked jurisdiction to hear and determine the same. The respondent was awarded costs of the said application. It is the appellant's submission that the court's jurisdiction having already been substantially addressed in the ruling of October 7, 2022, there was nothing left to be determined. Consequently, that on those grounds, it is not only just but also fair for each party to bear their costs of the appeal. The appellant cited the authority of [Anne Waiguru & another vs Martha Karua & 2 others](#), SC Petition 5 of 2018; (2021) KESC 38 where this court noted that the issues in the appeal sought to be withdrawn had already been substantially addressed in another appeal involving the same parties and, ordered each party to bear their costs. The appellant submits that it would be unfair and tantamount to unjust enrichment in the present circumstances for the respondent to be awarded costs of the appeal; and
5. Upon perusing the respondent's written submissions dated January 26, 2023 and filed on January 27, 2023 wherein the respondent submits that the appellant elected to withdraw the petition of appeal due to the ruling delivered on October 7, 2022; that by doing so, the appellant acknowledges that the final event or outcome of the appeal would be a dismissal, if not for any other reason, for want of jurisdiction. Relying on the decision in [Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & 4 others](#), SC Petition 4 of 2012 ("[Jasbir Singh Rai](#)"), it is contended that this court defined the general rule to be that costs follow the event. Further, the respondent argues that the appellant was aware that the court did not have jurisdiction as it was cognizant there were no constitutional questions for determination before the superior courts and neither did it seek for certification from the Court of Appeal or this



court, before filing the petition of appeal. The respondent submits that the appellant's claim that it should not have been granted costs since it was awarded expenses in the ruling from October 7, 2022, is unfounded because the two proceedings are separate and the respondent is entitled to costs for both. Furthermore, an application's expenses cannot be the same as or equal to the costs of a challenge to an appeal. The court is asked to use the general rule in *Jasbir Singh Rai* and grant the respondent costs of the appeal due.

6. The respondent further contends that the appellant has put it through a painstaking process of litigation before the High Court and Court of Appeal with intent to unsuccessfully set aside the arbitral award dated July 30, 2019. Further that the numerous applications and appeals including the appeal before this court were unnecessary, an abuse of court process and solely aimed at denying the respondent access to the fruits of the award. The respondent argues that having been taken through rigorous and convoluted motions of litigation by the appellant culminating in the filing of the petition of appeal, without any legal justification whatsoever, which the respondent opposed and filed submissions in respect of, the respondent is entitled to costs of the appeal. The respondent relies on the High Court cases of *Morgan Air Cargo Limited vs Everest Enterprises Limited* (2014) eKLR and *Republic vs Kenya National Highway Authority & 2 others Ex parte Kanyingi Wahome* (2015) eKLR to argue that even where an appeal is withdrawn by consent of the parties, an award of costs can be made. The respondent argues that it has suffered prejudice occasioned by the respondent's delays since 2019 when the award was published. Finally, the respondent contends that the present case is not similar to that of *Anne Waiguru & another vs Martha Karua & 2 others (supra)* in that in the *Waiguru* case, there was no question or findings that the proceedings were a nullity. Therefore, the appellant having filed an incompetent appeal, should bear the costs of the appeal.

We Now Pronounce as Follows, Bearing in Mind All these Submissions:

7. Appreciating this court has inherent jurisdiction to make orders on costs that it thinks fit to award as it may deem it necessary for the ends of justice or prevent abuse of the process of the court pursuant to section 21(2) of the *Supreme Court Act* and rule 3(5) of the *Supreme Court Rules, 2020* being instructive on this.
8. Restating the guiding principles in *Jasbir Singh Rai* where we stated that ordinarily, costs follow the event and costs should not be used to punish the losing party, but to compensate the successful party for the trouble taken in prosecuting or defending a suit. It was our finding that:

"(15) It is clear that there is no prescribed definition of any set of "good reasons" that will justify a court's departure, in awarding costs, from the general rule, costs-follow-the-event. In the classic common law style, the courts have proceeded on a case-by-case basis, to identify "good reasons" for such a departure. An examination of evolving practices on this question, shows that, as an example, matters in the domain of public-interest litigation tend to be exempted from award of costs. (Emphasis ours)."

9. Further noting from the record that the petition was withdrawn after the respondent, in response to the petition of appeal, had filed a replying affidavit sworn by Miguel Angel Maeras Gutierrez, the respondent's Director and substantive submissions dated May 23, 2022. The appeal at the time of withdrawal was ripe for hearing and had indeed been scheduled for hearing on February 1, 2023 through a cause list issued on December 22, 2022.
10. Bearing in mind that the ruling that substantively determined the court's jurisdiction was delivered on October 7, 2022, we take note that the appellant waited for a period of about three (3) months before



withdrawing the petition a mere six (6) days before the scheduled date for hearing. While applying the principle in *Jasbir Singh Rai* that costs normally follow the event, has an event to which costs would follow materialized? The answer is in the affirmative.

11. For the aforesaid reasons we come to the conclusion that the appellant has failed to demonstrate why it should not bear the costs of the appeal.
12. Consequently, we make the following orders:
 - a. The notice of motion dated January 24, 2022 and filed on January 25, 2023 seeking to withdraw the petition of appeal dated November 26, 2021 be and is hereby allowed in the following terms:
 - i. The consent dated January 27, 2023 and filed in court on January 30, 2023 granting the appellant leave to withdraw the petition of appeal dated November 26, 2021, be and is hereby adopted as an order of the court.
 - ii. The appellant shall bear the costs of the appeal.

Orders accordingly.

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

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M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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S.C. WANJALA

JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I.LENAOLA

JUSTICE OF THE SUPREME COURT

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W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

