



Abdirahman v Mandera County Government & 5 others (Petition 14 (E016) of 2022) [2022] KESC 71 (KLR) (4 November 2022) (Ruling)

Neutral citation: [2022] KESC 71 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION 14 (E016) OF 2022
PM MWILU, DCJ & VP, SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ
NOVEMBER 4, 2022**

BETWEEN

ISMAIL ABDULLAHI ABDIRAHMAN PETITIONER

AND

MANDERA COUNTY GOVERNMENT 1ST RESPONDENT

COUNTY GOVERNOR OF MANDERA 2ND RESPONDENT

COUNTY ASSEMBLY OF MANDERA 3RD RESPONDENT

**COUNTY EXECUTIVE COMMITTEE MEMBER FOR FINANCE, MANDERA
COUNTY 4TH RESPONDENT**

CONTROLLER OF BUDGET 5TH RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION 6TH RESPONDENT

(Being an application for withdrawal of the Petition of Appeal and Costs)

Supreme Court allows an application seeking the withdrawal of an appeal and orders each party to bear its costs

The applicant filed the instant application for orders that; the court grants leave for the applicant to withdraw the appeal before the instant court and for costs to be in the cause. The court held that the matter was not ripe for hearing. The court further held that while applying the principle that costs followed the event, the event to which costs would follow had not materialized and that the respondents did not stand to suffer prejudice if the appeal was withdrawn without costs. The court therefore held that there was no reason to award costs.

Reported by Kakai Toili

Civil Practice and Procedure - costs - award of costs where a party sought to withdraw an appeal - whether costs could be awarded where a matter was not ripe for hearing and the respondents did not stand to suffer prejudice in the withdrawal of the appeal.



Brief facts

The applicant filed the instant notice of motion application for orders that; the court grants leave for the applicant to withdraw the petition of appeal dated June 27, 2022 before the instant court and for costs to be in the cause. It was the applicant's contention that having been aggrieved by the Court of Appeal's ruling, he lodged both a petition of appeal and an application seeking stay of the impugned ruling to effectively conserve the substratum of the appeal which related to funds under the supplementary budget of Mandera County. The applicant averred that before the court could hear and issue orders, the funds had since been released and utilized by the respondents. Resultantly, proceeding to hear the application and petition of appeal would be a waste of precious and scarce judicial resources.

The applicant further claimed that since pleadings were never served upon any of the respondents, the latter stood to suffer no prejudice if it was withdrawn with no orders as to costs and that it was in the interest of justice to do so. No party had filed a response to the petition of appeal and the application dated June 27, 2022 seeking conservatory relief save for the 2nd respondent who filed a notice of preliminary objection.

Issues

Whether costs could be awarded where a matter was not ripe for hearing and the respondents did not stand to suffer prejudice in the withdrawal of an appeal.

Held

1. None of the parties were opposed to the withdrawal of the petition, save for the prayer for costs by the 1st to 4th respondents. In the premises, the prayer to have the petition of appeal withdrawn was allowed. The substratum of the appeal, being of the nature of public interest, was overtaken by events necessitating the withdrawal of the appeal.
2. The matter was not ripe for hearing despite the 2nd respondent having filed a notice of preliminary objection which had not been heard or directions given. While applying the principle that costs followed the event, the event to which costs would follow had not materialized and the respondents did not stand to suffer prejudice if the petition of appeal was withdrawn without costs. There was no reason to award costs, the limited court attendances by the respondents, which were in any event of the nature of mentions notwithstanding.

Application allowed.

Orders

Each party to bear its costs.

Citations

Cases

1. Rai & 3 others v Rai & 4 Others (Petition 4 of 2012; [2014] 2 KLR 253) — Explained
2. Sonko v Clerk, County Assembly of Nairobi City & 12 others (Petition 14 (E021) of 2021; [2022] KESC 17 (KLR)) — Followed

Statutes

1. Constitution of Kenya, 2010 — Article 164(3) — Interpreted
2. Supreme Court Act, 2011 (Act No 7 of 2011) — Section 15; Section 19; Section 21(2) — Interpreted
3. Supreme Court Rules, 2010 (Act No. 7 of 2011 Sub Leg) — Rule 3(5); Rule 27 — Cited

Advocates

None mentioned



RULING

- [1] Upon perusing the notice of motion application dated July 22, 2022 and filed on July 26, 2022 by the applicant (petitioner), pursuant to rule 27 of the Supreme Court Rules, 2020 and all other enabling provisions of the law for orders that:
- i) The learned court be pleased to grant leave for the petitioner/applicant to withdraw the petition of appeal dated June 27, 2022 and filed on June 28, 2022 before this court; and
 - ii) Costs be in the cause; and
- [2] Upon perusing the grounds on the face of the application, the affidavit sworn on July 22, 2022 by the applicant, Ismail Abdullahi Abdirahman, in support of the application and his submissions dated July 22, 2022 and filed on July 26, 2022, it is the applicant's contention that having been aggrieved by the Court of Appeal's ruling delivered on June 24, 2022, he lodged both a petition of appeal and an application dated June 27, 2022 seeking stay of the impugned ruling to effectively conserve the substratum of the appeal which relates to funds under the supplementary budget of Mandera County. The applicant avers that before this court could hear and issue orders, the said funds have since been released and utilized by the respondents. Resultantly, proceeding to hear the application and petition of appeal will be a waste of precious and scarce judicial resources. Furthermore, since pleadings were never served upon any of the respondents, the latter stands to suffer no prejudice if it is withdrawn with no orders as to costs and it is in the interest of justice to do so. The applicant relies on this court's decisions in Sonko v Clerk, County Assembly of Nairobi City & 12 others (Petition 14(E021) of 2021) [2022] eKLR where the court did not award costs as the petition was withdrawn before substantive responses or submissions were filed, and Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & 4 others Sup Ct Petition No 4 of 2012 [2014] eKLR it was held that where a matter relates to public interests they do not ordinarily attract the award of costs to support his averments; and
- [3] Upon considering that no party had filed a response to the petition of appeal and the application dated June 27, 2022 seeking conservatory relief save for the 2nd respondent who filed a notice of preliminary objection dated July 14, 2022 and filed on even date, on the ground that "this court does not have jurisdiction to entertain the application dated June 27, 2022, by virtue of article 164(3) of the Constitution and section 15 and 19 of the Supreme Court Act No 7 of 2011; and on such other or further grounds as may be adduced at the hearing thereof"; and
- [4] Noting from the court record, that the applicant, on July 15, 2022 indicated to the Hon Deputy Registrar of the court his intention to withdraw the petition of appeal and the application for conservatory relief. In spite of the 1st to 4th respondents not being in opposition to the withdrawal of the petition of appeal and the application, but prayed for costs, only the 1st, 3rd and 4th respondents filed submissions on 10th August 2022 on the issue of costs. They submit that they are entitled to costs for the court attendances for 15th, July 25, 2022 and August 5, 2022 which attendances were occasioned by the filing of the petition with the accompanying application for conservatory orders on June 27, 2022 that prompted the issuance of directions on June 28, 2022 by Hon Lenaola, SCJ in which the petitioner was directed to serve the application upon the respondents and as a result of which the respondents became aware of the proceedings. They rely on Jasbir Singh Rai (supra) for the submission that courts follow the event;
- [5] Further Noting that the 5th and 6th respondents have not participated in these proceedings, it is evident that none of the parties are opposed to the withdrawal of the petition, save for the prayer for costs by



the 1st to 4th respondents. In the premises, we allow the prayer to have the petition of appeal withdrawn and turn to the question of costs;

- [6] Considering section 21(2) of the *Supreme Court Act* and rule 3(5) of the *Supreme Court Rules*, and this court's principles on grant of costs as set out in *Jasbir Singh Rai* (*supra*); bearing in mind the nature of the dispute and the circumstances leading to the filing of the petition of appeal; and considering this court's finding in *Sonko v Clerk, County Assembly of Nairobi City & 12 others* (Petition 14 (E021) of 2021) [2022] KESC 17 (KLR) (19 May 2022) (Ruling) where we held as follows:

“Having so stated, we note from the record that the petition was withdrawn before the respondents had filed any responses or substantive submissions to the appeal save for the 7th respondent who filed a notice of preliminary objection. The appeal, at the time of withdrawal was not ripe 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 negative. Such an event has not happened. We note that the applicant's appeal did not proceed as the occurrence of the event that would have led to the applicant being successful crystallized as the 11th respondent was sworn in as Governor of Nairobi County. We therefore come to the conclusion that each party shall bear its costs before this court.”

- [7] Mindful of the fact that the substratum of the appeal, being of the nature of public interest, was overtaken by events necessitating the withdrawal of the appeal; that the matter was not ripe for hearing despite the 2nd respondent having filed a notice of preliminary objection which has not been heard or directions given; and as we stated in the *Sonko v Clerk* (*supra*) while applying the principle that costs follow the event, the event to which costs would follow had not materialized and that we are not persuaded that the respondents stand to suffer prejudice if the petition of appeal is withdrawn without costs, we see no reason to award costs, the limited court attendances by the respondents, which were in any event of the nature of mentions notwithstanding.

- [8] In the circumstances, we make the following orders:

- (a) The notice of motion dated July 22, 2022 and filed on July 26, 2022 seeking to withdraw the petition of appeal dated June 27, 2022 and filed on June 28, 2022 be and is hereby allowed.
- (b) Each party shall bear its costs thereof.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF NOVEMBER 2022.

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT 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



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I. LENAOLA

JUSTICE OF THE SUPREME COURT

W. OUKO

JUSTICE OF THE SUPREME COURT

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I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

