



REPUBLIC OF KENYA



Paragon Electronics Limited v Gachoka; Ngum & another (Interested Parties) (Environment and Land Miscellaneous Application 17 of 2022) [2023] KEELC 15777 (KLR) (24 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15777 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 17 OF 2022
MD MWANGI, J
FEBRUARY 24, 2023**

BETWEEN

PARAGON ELECTRONICS LIMITED APPLICANT

AND

MWANIKI GACHOKA RESPONDENT

AND

OUSAINOU NGUM INTERESTED PARTY

KHADIJATOU NGUM INTERESTED PARTY

(In respect of the Interested Parties' prayer for costs after the applicant's withdrawal of the application)

RULING

Background

1. By a Notice of Withdrawal dated January 26, 2023, the Applicant's Counsel, Mr Ataka, gave notice in this matter as follows:

“Take notice that the Applicant herein withdraws this Application in its entirety, with no orders as to costs, following the Respondent informing the parties that he is no longer in a position to proceed as an Arbitrator in the underlying Arbitration following his appointment as Judge of the Court of Appeal.”

2. When this matter came up before the court, the Applicant's Advocate sought to have the matter marked as withdrawn with no orders as to costs. The 1st and 2nd Interested Parties through their Advocate, Mr Obok, though not opposed to the withdrawal of the matter, sought costs insisting that



they had incurred expenses in the matter and that the matter was unnecessarily filed in court. That prayer by the Interested Parties is the subject of this ruling.

Chronology of Events

3. A brief history of the proceedings in this case is necessary so as to put the Interested Parties' Objection into a proper perspective. The record shows that the Applicant approached the High Court, Civil Division, vide a Notice of Motion dated November 19, 2021 under a Certificate of Urgency. The application was expressed to be brought pursuant to the provisions of article 50 (1) of the Constitution, Section 17(6) & (7) of the Arbitration Act, 1995 and order 51 rule 1 of the Civil Procedure Rules, 2010. The Applicant challenged the jurisdiction of the Arbitrator, the Respondent herein, to determine a dispute between the Applicant and the 1st and 2nd Interested Parties, arising from a Lease dated April 4, 2016.
4. On November 22, 2021, the Court certified the application as urgent and fixed it for inter parties hearing on the December 20, 2021. The applicant was directed to serve the Respondent and the Interested Parties.
5. Upon service, the 1st and 2nd Interested Parties appointed the firm of Prof Albert Mumma & Company Advocates through the Notice of Appointment of Advocates dated January 17, 2022. They opposed the application vide a Notice of Preliminary Objection and a Replying Affidavit both dated the January 17, 2022. The Interested Parties objected to the Jurisdiction of the High Court in determining the application. The Respondent did not file or participate in the proceedings therein.
6. On the May 25, 2022, the court directed that the Preliminary Objection be determined first and to be canvassed by way of written submissions. Both parties complied by filing their respective submissions as well as highlighting the same on the June 23, 2022. Subsequently a Ruling was delivered on the October 6, 2022 in which the Court determined that it lacked the jurisdiction to determine the application and exercised its discretion not to dismiss the matter but instead transferred it to this Court.
7. On the February 21, 2023 when the matter came up for directions, Counsel for both parties appeared. Mr Ataka for the Applicant, informed court that the Respondent has since been appointed as a Judge of the Court of Appeal and consequently had resigned as an Arbitrator. They had therefore filed the Notice of withdrawal dated January 26, 2023.
8. Mr Obok for the Interested Parties prayed for costs on the basis that the matter was unnecessarily filed in court and his clients had therefore incurred expenses.
9. In rebuttal, Mr Ataka averred that a withdrawal under order 25 rule 1, before a matter is fixed for hearing is unconditional and does not attract an award of costs. That in any event, Mr Obok's clients were just Interested Parties. No prayer was sought against them in the application filed in this matter. That the matter was between the Applicant and the Respondent. Further that the reason for withdrawal was because of the resignation of the Arbitrator. The Applicant therefore argued that it cannot and should not be blamed for the turn of events leading to the withdrawal.
10. In response thereof, Mr Obok stated that the Interested Parties were necessary parties in the matter and that Order 25 of the Civil Procedure Rules does not specify on costs after a withdrawal of suit.



Determination

11. It is important from the onset for this court to ascertain if the instant application should be considered to be a suit. As a general rule, suits are instituted by way of a Plaint unless the rules or statute prescribe any other manner. Order 3 Rule 1 of the [Civil Procedure Rules](#) stipulates that: -

“Every suit shall be instituted by presenting a plaint to the court or in such other manner as may be prescribed.”

12. Similarly, Section 19 of the [Civil Procedure Act](#) provides that: -

“Every suit shall be instituted in such manner as may be prescribed by the rules.”

13. In the case of [Joseph Kibowen Chemior v William C Kisera](#) [2013] eKLR the court extensively discussed filing of suits in the following words:

“Under Section 19 of the [Civil Procedure Act](#), every suit shall be instituted in such manner as may be prescribed by rules. It will be observed that Section 19 does not pretend that the [Civil Procedure Rules](#) have a monopoly on how suits should be instituted. It provides that suits may be instituted in the manner prescribed by rules. There could be rules in other statutes on how Proceedings may be commenced. For example, the Probate & Administration Rules under the Succession Act, (14) prescribe how matters touching on succession of estates of deceased persons need to be instituted.

It means therefore that where a person is commencing a civil suit (in this instance to enforce a civil action), he needs to follow prescribed rules.”

14. The instant Application was brought under Section 17(6) & (7) of the [Arbitration Act, 1995](#). The said provision provides that;

(6) Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter.

(7) The decision of the High Court shall be final and shall not be subject to appeal.

(8) While an application under subsection (6) is pending before the High Court the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided and such award shall be void if the application is successful.

15. It is my finding that the application before this court qualifies as a suit by virtue of the provisions of the statute, Section 17(8) of the [Arbitration Act, 1995](#).

16. Going back to the objection herein, it is trite law that costs follow the event, meaning that the successful party takes the costs unless the Court for sufficient reason orders otherwise. Section 27 of the [Civil Procedure Act](#) provides: -

“(1)Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give



all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”(emphasis added)

17. In exercising its discretion, the Court should, as precedent dictates, take into account the length of time that the suit or proceedings has been going in Court before the withdrawal or other determination; the nature of the relief sought; the steps taken in the proceedings; the stage of hearing of the suit or proceedings; the need to promote access to justice by indigent suitors; and other sufficient considerations in the interest of justice.
18. It must be emphasized that it is within a party’s right to discontinue or withdrawal his suit at any stage of the proceedings prior to verdict or judgment. This right has been declared to be substantial. The said right has been recognized in Order 25 of the Civil Procedure Rules, 2010. It reads: -
 - “ 1. At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.
 2.
 - (1) Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn, upon the filing of a written consent signed by all the parties.
 - (2) Where a suit has been set down for hearing the court may grant the plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just.”
19. In the case of Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others, Supreme Court Application No 16 of 2014, the Supreme Court stated as follows;

“A party’s right to withdraw a matter before the court cannot be taken away. A court cannot bar a party from withdrawing his matter. All that the court can do is to make an order as to costs where it is deemed appropriate.”
20. In the case of Beijing Industrial Designing & Researching Institute v Lagoon Development Limited [2015] eKLR, the Court of Appeal stated as follows;

“As a general proposition, the right of party to discontinue a suit or withdraw his claim cannot be questioned. There are many circumstances when a Plaintiff may legitimately wish to discontinue his suit or withdraw his claim.”
21. The Supreme Court of Nigeria in Abayomi Babatunde v Pan Atlantic Shipping & Transport Agencies Ltd & others SC 154/2002 identified those circumstances to include, where;
 - (i) A Plaintiff realizes the weakness of his claim in the light of the defence put up by the Defendant.
 - (ii) A Plaintiff’s vital witnesses are not available at the material time and will not be so at any certain future date,



- (iii) Where by abandoning the prosecution of the case, the Plaintiff could substantially reduce the high costs that would have otherwise followed after a full-scale but unsuccessful litigation, or
 - (iv) A Plaintiff may possibly retain the right to re-litigate the claim at a more auspicious time if necessary.
22. In the case of *Priscilla Nyambura Njue v Geobhem Middle East Ltd; Kenya Bureau of Standards (Interested Party)* [2021] eKLR Mativo J, cited the case of *Beijing Industrial Designing & Researching Institute v Lagoon Development Limited* (*supra*) in which the three circumstances contemplated under Order 25 were elaborated. It stated: -
- “The above provision presents three clear scenarios regarding discontinuance of suits or withdrawal of claims.
- The first scenario arises where the suit has not been set down for hearing. In such an instance, the Plaintiff is at liberty, any time, to discontinue the suit or to withdraw the claim or any part thereof. All that is required of the Plaintiff is to give notice in writing to that effect and serve it upon all the parties. In that scenario, the Plaintiff has an absolute right to withdraw his suit, which we agree cannot be curtailed.
- The second scenario arises where the suit has been set down for hearing. In such a case the suit may be discontinued or the claim or any part thereof withdrawn by all the parties signing and filling a written consent of all the other parties.
- The last scenario arises where the suit has been set down for hearing but all the parties have not reached any consent on discontinuance of the suit or withdrawal of the claim or any part thereof. In such eventuality, the Plaintiff must obtain leave of Court to discontinue the suit or withdraw the claim or any part thereof, which is granted upon such terms as are just. In this scenario too, the Plaintiff’s right to discontinue his suit is circumscribed by the requirement that he must obtain the leave of the Court. That such leave is granted on terms suggests that it is not a mere formality.”
23. The right provided for under Order 25 Rules 1 & 2(1) is not fettered by any conditions; it is an absolute right which a plaintiff can exercise at his will at any time before the judgment is delivered.
24. In *Allah Baksh v Niamat Ali* 1892 All WN 53 (1) the court described the right as "absolute" and capable of being exercised "without any permission from the court'. However, under the third category, discontinuance or withdrawal of the suit or any part thereof requires permission of the court, which will be granted upon such terms as are just.
25. Having held in this ruling that the instant application amounts to a suit, once directions were issued on the hearing of the application and the Interested Parties filed their response, it amounted to setting down the suit for hearing. The third scenario as categorized in *Beijing Industrial Designing & Researching Institute v Lagoon Development Limited* (*supra*) is therefore applicable. The Applicant required approval from the court. It is then upon the court at that moment to set the terms of the withdrawal including the issue of costs.
26. The Applicant maintains that the reason for the withdrawal was the appointment of the then Arbitrator as a Judge of the Court of Appeal and his subsequent resignation as such. Proceeding with the matter farther would have been an exercise in futility.
27. In the case of *DGM v EWG* [2021] eKLR, Kariuki Charles J, addressed the issue of costs in detail making reference to a number of decided cases. He cited with approval the case of Republic v Rosemary



- Wairimu Munene (Ex parte Applicant) v Ihururu Dairy Farmers Co-operative Society Ltd, Judicial Review Application No 6 of 2004, where Mativo J (as he then was) held that the issue of costs is the discretion of the Court and is used to compensate the successful party for the trouble taken in prosecuting or defending the case and not to penalize the losing party. This position was adopted by the court in Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR.
28. The Judge observed that a successful party is entitled to costs unless he or she is guilty of any misconduct or there exists some other good reasons and or cause for not awarding costs to the successful party.
29. In the case of *Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others* [2013] eKLR which cited with approval the words of Murray C J in *Levben Products v Alexander Films (SA) (PTY) Ltd 1957 (4) SA 225 (SR)* at 227 where the court stated that:
- “It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion ...But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at.....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”
30. Courts have the ultimate discretion in the award of costs. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR the court noted that;
- “The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”
31. The *Halsbury’s Laws of England*, 4th Edition (Re-issue), [2010], Vol 10. para 16, notes that:
- “The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”.
32. Any departure from the general principle can only be for good reasons which the Supreme Court in *Jasbir Singh Rai & others v Tarlochan Rai & others* [2014] eKLR noted includes public interest litigation, since in such a case the litigant is pursuing public interest as opposed to personal gain.
33. A court must therefore put into considerations the circumstances of each case when determining the issue of costs. These circumstances were addressed by the learned judge in *Morgan Air Cargo Limited v Everest Enterprises Limited* (*supra*) to include:
- a. the conduct of the parties
 - b. the subject of litigation



- c. the circumstances which led to the institution of the proceedings
 - d. the events which eventually led to their termination
 - e. the stage at which the proceedings were terminated
 - f. the manner in which they were terminated
 - g. the relationship between the parties and
 - h. The need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of the Constitution.
34. The list is not exhaustive off course. In other words, the court must be guided not only by the issues listed above, but also by other relevant matters including the likely consequences of the order for costs.
35. In this case, the Applicant explained that the withdrawal was necessitated by change of the circumstances. The Respondent who was the arbitrator has since been appointed as a Judge of the Court of Appeal. The proceedings herein, so to state, have therefore been overtaken by events.
36. One of the considerations that the court is enjoined to consider in exercising its discretion in such a scenario, from the above cited authority, is

‘the events which eventually led to the termination of the proceedings.’

In this case, having considered the events that led to the withdrawal of the proceedings, I am of the view that the Applicant must not be condemned to pay costs to either of the parties in these proceedings. In the circumstances, the Interested Parties’ prayer for costs is disallowed. Each party will bear its own costs.

It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF FEBRUARY 2023

M.D MWANGI

JUDGE

In the virtual presence of:

Mr. Obok for the Interested parties.

Mr. Ataka for the Applicant.

Court Assistant – Yvette.

M.D. MWANGI

JUDGE

