



REPUBLIC OF KENYA



**Galot v Adera & another (Civil Appeal E1126 of 2023)
[2025] KEHC 11344 (KLR) (Civ) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11344 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1126 OF 2023

JN MULWA, J

JULY 31, 2025

BETWEEN

MOHAN GALOT APPELLANT

AND

JOHNSON OTIENO ADERA 1ST RESPONDENT

TIEGO MAKOGONYA TITUS TIDAL T/A TIEGO & COMPANY

ADVOCATES 2ND RESPONDENT

RULING

1. Before the Court for determination is the motion filed by Johnson Otieno Adera, Advocate (hereafter the Applicant Advocate) dated 15/07/2024 seeking inter alia -:
 - a. Spent.
 - b. That the time for lodging and serving an appeal to a single judge against the decision of the Registrar herein declining to enter judgment on costs upon withdrawal of the appeal herein be extended by a period of seven (7) days.
 - c. That the cost of the application be provided for.
2. The motion is saliently brought pursuant to Order 25 Rule 3, Order 49 Rule 2, Order 50 Rule 6 of Civil Procedure Rules (CPR) and on grounds on the face of the motion, which are amplified in the supporting affidavit dated 15/07/2024 sworn by Johnson Otieno Adera, the Advocate. The gist of his deposition is that Mahon Galot (hereinafter the Appellant) filed an appeal which was served upon his counsel who perused it and called him to attend to his chambers over the same. That he thereafter instructed his advocate to represent him in the matter who undertook the said work by rendering an opinion in the matter and incurring instruction fees. He goes on to depose that the Appellant



amended his memorandum of appeal, which was equally perused by his counsel on record however on 05/04/2024 the Appellant filed a notice of withdrawal and consequently withdrew the appeal.

3. That on 26/04/2024, the Appellant's counsel wrote to the Deputy Registrar (DR) with a request to enter judgment on costs pursuant to Order 25 Rule 3 as read with Order 49 Rule 1 of the CPR however the same was not done and was later declined with no date, and no indication on the latter. He states that despite requests to the DR to advise on the date of her decision declining costs, no response has since been received therefore the duration within which to lodge an appeal with respect to the said decision has lapsed thus necessitating the instant motion.
4. That the Advocate being aggrieved by the DR's decision on costs an appeal preferred an appeal as he was never heard on the issue whereas the instant motion has been lodged within reasonable time considering the totality of the circumstances leading hereto. He further states that costs follow the event and the DR's failure to award him costs is unreasonable. He concludes by stating that his intended appeal is arguable therefore it is in the interest of justice that motion is allowed.
5. Mohan Galot the Appellant opposes the motion by way of a replying affidavit dated 26/09/2024. He confirms having lodged an appeal which was amended which he later advised his counsel on record to abandon and withdraw vide a notice of withdrawal dated 05/04/2024 so as to pursue other redress avenues. That at no given time did the 1st Respondent file any documents after they were served with the Memorandum of Appeal or take any steps with respect to the instant appeal. He asserts that even on withdrawal of the appeal on 08/05/2024, the 1st Respondent and or counsel failed to attend to the matter, to wit, the order on costs was discretionary. He goes on to state that the only available avenue to challenge the DR decision is by way of Order 12 Rule 7 of the CPR and not Order 49 as sought herein.
6. It is his further deposition that the 1st Respondent's affidavit in support of the motion is intended to mislead the Court particularly concerning the letter to the DR requesting for costs. He states that the order declining costs was duly posted on the Case Tracking System (CTS) on 08/05/2024 and the 1st Respondent has offered no explanation for the delay in presenting the instant motion.
7. In rejoinder by way of a supplementary affidavit dated 17/12/2024, the 1st Respondent states that neither him nor his counsel was served with a notice for 08/05/2024. He concludes by stating that given the lack of notice when the matter came up on 08/05/2024 he was condemned unheard therefore his motion ought to be allowed as prayed.
8. Tiego Makonga Titus Tidal t/a Tiego & Co. Advocates, (hereafter the 2nd Respondent) did not participate in the instant proceedings.
9. Directions were taken on disposal of the motion by way of written submissions, to wit, only the 1st Respondent complied. That said, the Court has duly considered the respective parties' affidavit material alongside the 1st Respondent's submissions and postulates that the issues for determination concern:
 - a. Whether the Court ought to extend time within which the 1st Respondent can lodge an appeal?
 - b. Who ought to bear the costs of the motion?

Whether the Court ought to extend time within which the 1st Respondent can lodge an appeal?

10. The 1st Respondent's motion inter alia invokes the provisions of Order 25 Rule 3, Order 49 Rule 2, Order 50 Rule 6 of Civil Procedure Rules (CPR). Order 25 Rule 3, concerns an order for costs in respect of a suit that has been discontinued or any part of the claim in respect of the said suit having been withdrawn. Order 49 Rule 2 on its part concerns procedure in respect of appeals from orders



rendered by DR, specifically herein Order 25 of the CPR. Whereas, Rule 6 of Order 50 provides for the enlargement of time. It specifically states that-;

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

If the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

11. Conspicuously, the CPR does not specifically provide for withdrawal of appeals or the manner in which the same may be done. However, it has since been settled within our jurisdiction that the right of a party to discontinue or withdraw his claim cannot be questioned, taken away and is a kind of absolute and untrammelled right. See *Canyon Properties Limited, Abdulhakim Abdalla Zubedi, Twaha Zubedi & Mohammed Abdalla Zubedi v Eliud Kipchirchir Bett, Mwenda Thurairira & China Africa Total Logistics Ltd* [2017] KECA 115 (KLR) and *Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] KESC 12 (KLR).
12. That said, the Court is however empowered under Rule 6 of Order 50 to grant enlargement of time even when time granted for performing an act has lapsed. The Supreme Court in the case of *Salat* [2014] KESC 12 (KLR) (*supra*) distilled the principles governing that discretion as follows:

“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;

A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court

Whether the court should exercise the discretion to extend time is a consideration to be made on a case to case basis;

Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;

Whether there will be any prejudice suffered by the respondents if the extension is granted;

Whether the application has been brought without undue delay; and

Whether in certain cases, like election petitions, public interest should be a consideration for extending time”.
13. Additionally, the case of *John Tomno Cheserem vs Sammy Kipketer Cheruiyot* [2018] eKLR in which a motion was brought under Rule 4 of the Court of Appeal Rules appears to have some relevance to the matter at hand as Rule 4 of the Court of Appeal Rules is in *pari materia* with the provisions of



Order 50 Rule 6 of the CPR. The application in that case was for enlargement of time or leave to file a record of appeal out of time. The Court (Mohammed JA) observed that; -

“7. The principles guiding the court on an application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is therefore upon an applicant under this rule to, explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour. In exercising my discretion, I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and any interested parties if the application is granted, and whether the matter raises issues of public importance.

14. In the instant matter, the circumstances that led to delay in filing of the intended appeal as against the DR’s decision on costs have been duly explained in the 1st Respondent’s affidavit material to pertain the fact that despite requests to the DR to advice on the date of her decision declining costs, no response has since been received meanwhile no notice was ever issued when the matter came up on 08/05/2024 therefore they were condemned unheard on the issue. The Appellant has assailed the said explanation by arguing that no reason has been offered towards the 1st Respondent’s failure to attend Court on the date in question.
15. A perfunctory review of the record reveals that 1st Respondent lodged a Notice of Withdrawal of its appeal on 11/04/2024 whereafter on 29/04/2024 (Annexure A5) the 1st Respondent lodged a request for judgment on costs to be entered in his favour on the backdrop of the Appellant’s notice of withdrawal. The matter thereafter came up before the DR for mention on 08/05/2024 in the presence of the counsel for the Appellant and in the absence of the Respondents and or their counsel. There is no indication from the record how the latter date was fixed and neither does the record reveal if the 1st Respondent requested a mention date for the purpose of the Notice of Withdrawal or whether mention notice was issued to either party towards the said date.
16. That said, I find it useful to capture the proceedings of 08/05/2024, verbatim for the benefit of the parties and this Court. The honorable Deputy Registrar upon considering the Appellant’s counsel submission on the Notice of Withdrawal proceeded to order as follows;

“Due to the stage of the matter, the same is found not suitable for RRI. The date earlier given of 09/07/2024 for mention before the DR is dispensed with. Notice of withdrawal dated 05/04/2024 is considered at the request of counsel for the Appellant. The appeal is marked as withdrawn. The Respondent’s letter dated 26/04/2024 on request for costs is noted. There has been no action in this file or documents filed by the Respondent. The request for costs is declined. File is closed” (sic)
17. It further can be discerned from the record that it is only on 19/06/2024 (Annexure A7) that 1st Respondent became aware of the proceedings of 08/05/2024 and the resultant order of the DR. A subsequent follow up letter was done on 15/07/2024 (Annexure A8) appertaining the 1st Respondent request for costs and proceedings of 08/05/2024. It would seem as rightly posited by the 1st Respondent that they received no response from the DR thus prompting him to move this Court vide the instant motion.



18. Perceptibly, from the above, the delay between the proceedings of 08/05/2024 and filing of the instant motion seems to have relatively been explained by the 1st Respondent with delay therein being shy of three (3) months. As is, an explanation has been offered, in compliance with the exhortation of Makhandia JA in *Patrick Wanyonyi Khaemba v Teachers Service Commission, Board of Management, Kapletingi Mixed Day Secondary School & Francis Tanui* [2019] KECA 112 (KLR), wherein it was observed that; -

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained, hence a plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour.

19. Here, the Court is convinced by the explanation advanced by the 1st Respondent. The delay in itself does not appear to be so inordinate. Indubitably, it would be a travesty of justice for the Court to drive the 1st Respondent from the seat of justice for what appears to be an inadvertent omission by the Court condemning him unheard on the quest for costs. Notwithstanding, the DR capturing in her brief ruling that the 1st Respondent’s letter was considered, as at when parties appeared before her, it cannot be discerned whether the said date was duly communicated to the 1st Respondent.

20. Besides, it does not seem that the Appellant will suffer any prejudice that cannot be compensated through costs if the 1st Respondent’s motion is allowed.

21. Concerning the arguability of the intended appeal to this Court, it is well trodden that the requirement touching on the viability of the intended appeal, is neither mandatory nor sternly applied in an application of this nature. The Court of Appeal in *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* [2020] eKLR stated that “an arguable appeal need not (be one that will) succeed so long as it raises a bona fide issue for determination by the Court.”

22. In the circumstances of this case, the Court is persuaded to facilitate the 1st Respondent’s undisputed right of appeal as equally advanced in *Vishva* (supra). The upshot, is the 1st Respondent’s motion is allowed as prayed with attendant costs in favour of the Appellant.

23. This matter shall be listed before the DR Civil Appellate Division on 26/8/2025 for further directions.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 31ST JULY, 2025

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JANET MULWA.

JUDGE

