



## REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Ibrahim, Wanjala, Njoki, Lenaola & Ouko SCJJ)

PETITION NO. 17 (E024) OF 2021

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

**-VERSUS-**

**INSTALANCIAS INABENSA S.A ..... RESPONDENT**

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

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Representation

Mr. Paul Nyamodi for the Appellant/Applicant  
(V. A. Nyamodi & Co. Advocates)

Mr. James Muthui for the Respondent  
(Kaplan & Stratton Advocates)

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### RULING OF THE COURT

[1] UPON perusing the Notice of Motion by the Appellant dated 24<sup>th</sup> January, 2023 and filed on 25<sup>th</sup> January, 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 26<sup>th</sup> November, 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 24<sup>th</sup> January, 2023 contending that the Court having substantially pronounced itself in its Ruling delivered on 7<sup>th</sup> October, 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 27<sup>th</sup> January, 2023 and filed in Court on 30<sup>th</sup> January, 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 27<sup>th</sup> January, 2023 directing the parties to file submissions limited to the issue of costs; and

[4] **UPON** perusing the Appellant's written submissions dated 26<sup>th</sup> January, 2023 and filed on 27<sup>th</sup> January, 2023 wherein the Appellant contends that the Appeal was withdrawn subsequent to this Court's decision rendered on 7<sup>th</sup> October 2022 in respect of its Application dated 6<sup>th</sup> May, 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 7<sup>th</sup>

October 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 26<sup>th</sup> January, 2023 and filed on 27<sup>th</sup> January 2023 wherein the Respondent submits that the Appellant elected to withdraw the Petition of Appeal due to the Ruling delivered on 7<sup>th</sup> October 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 7<sup>th</sup> October, 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 30<sup>th</sup> July, 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 Exparte 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 23<sup>rd</sup> May 2022. The Appeal at the time of withdrawal was ripe for hearing and had indeed been scheduled for hearing on 1<sup>st</sup> February, 2023 through a Cause List issued on 22<sup>nd</sup> December 2022.

**[10] BEARING** in mind that the Ruling that substantively determined the Court’s jurisdiction was delivered on 7<sup>th</sup> October 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 AFORESTATED 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 24<sup>th</sup> January, 2022 and filed on 25<sup>th</sup> January, 2023 seeking to withdraw the Petition of Appeal dated 26<sup>th</sup> November, 2021 be and is hereby allowed in the following terms:*

i. *The Consent dated 27th January, 2023 and filed in Court on 30th January, 2023 granting the Appellant leave to withdraw the Petition of Appeal dated 26th November, 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 17<sup>TH</sup> day of FEBRUARY 2023.**

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**M.K. IBRAHIM**  
**JUSTICE OF THE SUPREME COURT**

.....  
**S.C. WANJALA**  
**JUSTICE OF THE SUPREME COURT**

.....  
**NJOKI NDUNGU**  
**JUSTICE OF THE SUPREME COURT**

.....  
**I.LENAOLA**  
**JUSTICE OF THE SUPREME COURT**

.....  
**W. OUKO**  
**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

**REGISTRAR**

**SUPREME COURT OF KENYA**

