

THE REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PETITION (APPLICATION) NO. 10 OF 2021

-BETWEEN-

ROBERT MUTISO LELLI.....PETITIONER

-AND-

KENYA MEDICAL TRAINING COLLEGE.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

THE COMMISSIONER OF LANDS.....3RD RESPONDENT

*(Being an application to strike out the Petition and Notice of Appeal filed against the decision of the Court of Appeal (**Karanja, Murgor, Sichale, JJ.A**) in Civil Appeal No. 555 of 2019 delivered at Nairobi on 9th July, 2021)*

RULING OF THE COURT

[1] UPON perusing the Notice of Motion Application by the 1st Respondent dated 9th September, 2021 and filed on 22nd September, 2021 seeking orders to strike out the Petition of Appeal by the Petitioner, for being in violation of the provisions of Article 163(4) of the Constitution and Rule 33 of the Supreme Court Rules 2020 and/or in the alternative, the Court to order the Petitioner to provide costs of Kshs. 50 Million in priority and as a precondition to the prosecution of the instant petition; the application being predicated under the provisions of Article 163(4)(8) and (9) of the Constitution and Sections 3, 12, 15(1) and (2),

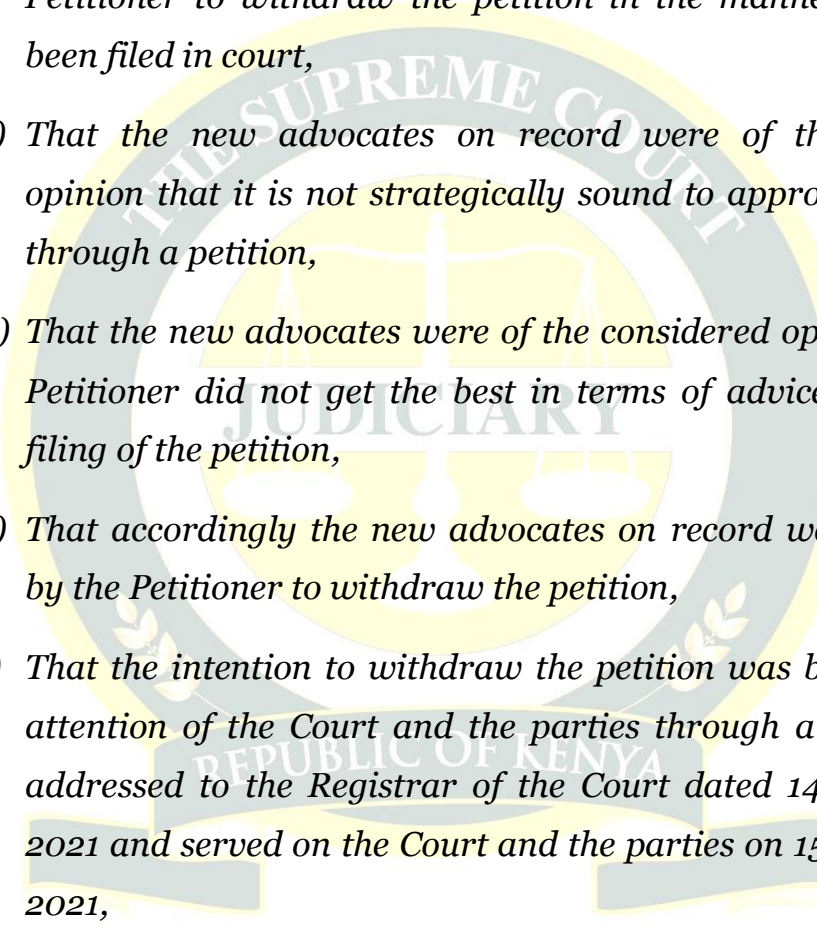
21(1) and (2), 24, 30(2), 31, 32 and 36(1) of the Supreme Court of Kenya Act, 2011 and Rules 2, 3(1), (5), 6(1) and (b), 31(1), (3), (6) and (7), 33(1) and (2), 36(1), 37(1) and (2), 38(1)(a), (2)(a) and 46(1) of the Supreme Court Rules 2020 and;

[2] UPON reading the 1st Respondent's grounds in support of the application, the supporting affidavit sworn by Prof. Michael Kiptoo on behalf of the 1st Respondent, where the 1st Respondent avers that the petition fails to meet the jurisdictional threshold under Article 163(4) of the Constitution and Section 30(2) of the Supreme Court Act and;

[3] UPON considering the 1st Respondent's written submissions filed on 22nd September, 2021 wherein it is contended that the Petitioner did not raise any questions of constitutional interpretation and application in his defence filed in response to the counter claim by the 1st Respondent before the trial Court and neither were any such issues addressed by the Court of Appeal in its judgement nor was any certification sought from the Court of Appeal that the intended appeal involves matters of general public importance as provided for under Section 30(2) of the Supreme Court Act 2011 as read with Rule 33 Supreme Court Rules 2020 and;

[4] NOTING the 1st Respondent's further submission that they were never served with the Notice of Appeal as mandated under Sections 31 and 36(1) of the Supreme Court Act as read with Rule 37 (1) of the Supreme Court Rules and their further contention that the Record of Appeal was lodged out of time after 30 days in contravention of Section 32 of the Supreme Court Act and Rule 38(1) (a) of the Supreme Court Rules and;

[5] FURTHER noting from the record that the Application is not directly responded to but instead, the Petitioner, by way of a Notice of Motion Application dated 7th October 2021 and filed on 14th October, 2021 seeks an order that the Petition dated 21st August, 2021 and filed on 23rd August, 2021 be marked as withdrawn on the grounds that: -

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- The watermark of the Supreme Court of Kenya is visible in the background. It features a central emblem with a scale of justice, a book, and a sun, surrounded by the text 'THE SUPREME COURT OF KENYA' and 'REPUBLIC OF KENYA'.
- a) *That the firm of Prof. Migai Akech and Associates was instructed on 13th September, 2021 by the Petitioner in place of the firm of Nzamba Kitonga LLP Advocates,*
 - b) *That upon examining the petition, the new advocates on record Messrs. Prof. Migai Akech and Associates Advocates (hereinafter, the new advocates on record) advised the Petitioner to withdraw the petition in the manner that it had been filed in court,*
 - c) *That the new advocates on record were of the considered opinion that it is not strategically sound to approach the court through a petition,*
 - d) *That the new advocates were of the considered opinion that the Petitioner did not get the best in terms of advice prior to the filing of the petition,*
 - e) *That accordingly the new advocates on record were instructed by the Petitioner to withdraw the petition,*
 - f) *That the intention to withdraw the petition was brought to the attention of the Court and the parties through a formal letter addressed to the Registrar of the Court dated 14th September, 2021 and served on the Court and the parties on 15th September, 2021,*
 - g) *That further the Petitioner filed a Notice to withdraw in Court on 28th September 2021 and served the parties on 29th September 2021,*
 - h) *That the new advocates on record acted expeditiously after being instructed by the Petitioner to withdraw the petition,*

i) *That no prejudice will be suffered by any party should the order for withdrawal be granted and;*

[6] **FURTHER** noting that the above grounds are repeated in the supporting affidavit sworn on 7th October, 2021 by Prof. Migai Akech, the Advocate on record for the Petitioner and;

[7] **UPON** reading the written submissions by the Petitioner in support of his application where he submits that this Court held in the case of ***Council of Governors v. Senate & another***; SC Reference No. 1 of 2014; [2014] eKLR that the choice by a party to withdraw a matter before court, as a general rule, cannot be taken away from that party and that with the Petitioner having given reasons seeking for withdrawal of the petition, then the withdrawal should be granted in accordance with **Rule 27(1)** of the **Supreme Court Rules 2020** and;

[8] **HAVING** considered the two related Applications before us, we now opine as follows:

- i. While we recognize that a party may move this Court to have an appeal struck out, we nevertheless note that as provided under **Rule 27 (1)** of the **Supreme Court Rules, 2020**, a party may, with the leave of the Court, withdraw the proceedings at any time before the delivery of the judgment. This position was settled in ***John O. Ochanda v Telkom Kenya Limited (Ochanda Case)***; SC Motion Application No. 25 of 2014 where Ibrahim, SCJ held:

“I do hold the view that a prospective appellant is at liberty to withdrawal (sic) a Notice of appeal at any time before the Appeal has been lodged and any further steps taken. No proceedings have

commenced strictly. I am also of the view that just like under the Civil Procedure Rules or Court of Appeal Rules, the right to withdrawal (sic) or discontinue proceedings or withdraw a notice of Appeal respectively ought to be allowed as a matter of right subject to any issue of costs which can be claimed by the respondents if any.”(Emphasis provided)

We further held in ***Hamdia Yaroi Nuri v Faith Tumaini Kombe & 2 Others***; SC Petition (Application) No. 38 of 2018; [2019] eKLR that a party who seeks to withdraw from proceedings is required to file a substantive application seeking to withdraw from the proceedings.

- ii. It therefore suffices to say that indeed a party's liberty to withdraw a matter cannot be taken away and this Court has to allow a party who has approached the Court to withdraw such a matter, if he deems so fit to do. In effect, the application to withdraw the appeal stands allowed.
- iii. Since the application dated 7th October, 2021 has been granted, we see no need to delve into the Application dated 9th September, 2021 because the Petitioner on his own motion, has moved to withdraw the petition in the appeal. This does not of itself connote bad faith as the appeal shall now stand as withdrawn, which is essentially what the 1st Respondent sought to have this Court do by seeking orders to have the appeal struck out. Furthermore, no prejudice will be caused to the 1st Respondent by the Petitioner moving the Court to have the proceedings withdrawn.
- iv. On costs, as per our holding in ***Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai Estate of & 4 Others***; SC Petition No.

4 of 2021; [2014] eKLR we found that costs follow the event and also in the **Ochanda** case cited above, the Court observed that indeed an order for withdrawal could be made, subject to an order for costs. The 1st Respondent shall therefore have costs.

[9] In the event and for reasons above:

- a) The Notice of Motion dated 7th October, 2021 and filed on 14th October, 2021 is hereby allowed.**
- b) The Petition dated 21st August, 2021 and filed on 23rd August, 2021 is marked as withdrawn.**
- c) The Petitioner shall bear the costs of the 1st Respondent, the only party that responded to the Appeal.**

[10] It is so ordered.

DATED and DELIVERED AT NAIROBI this 3rd day of December **2021**

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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

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

**I certify that this is a true copy
of the original**

REGISTRAR,
SUPREME COURT OF KENYA

