



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Mwilu, DCJ & VP, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

APPLICATION NO. 4 (E006) OF 2021

— BETWEEN —

BOOKPOINT LIMITED.....APPLICANT

-AND-

GUARDIAN BANK LIMITED.....1ST RESPONDENT

GUILDERS INTERNATIONAL BANK LIMITED..... 2ND RESPONDENT

(Being an appeal from the Judgment and Order of the Court of Appeal (Asike - Makhandia, Kiage & Sichale, JJ.A.) delivered at Nairobi on 18th December, 2020 in Civil Appeal No.90 of 2017)

Representation:

Mr. Kamau for the Applicant
(Sobhag H. Shah & V. Goswami Advocates)

Mr. Onyango for the 1st Respondent
(LJA Associates Advocates LLP)

Mr. Mutua for the 2nd Respondent
(Mutua Waweru & Company Advocates)

RULING OF THE COURT

[1] UPON considering the Notice of Motion by the Applicant dated 19th July, 2022 to withdraw its application dated 8th April, 2021, in which it had sought that time to lodge a Notice of Appeal be enlarged and;

[2] UPON noting that the respondents consented to the withdrawal of that application; but however, the 1st and 2nd respondents have filed submissions on the issue of costs only which falls for our determination and;

[3] UPON further considering the 1st respondent's submissions to the effect that the applicant has conceded that the application was dead on arrival but nonetheless, at the time of filing, the applicant considered it merited; that in response to the application, the 1st respondent filed a replying affidavit, submissions and a list and digest of authorities dated 16th April, 2021; and that the withdrawal is sought so that the applicant can pursue related proceedings in the High Court against the respondents which proceedings are bound to expose the 1st respondent to further costs; and

[4] UPON considering the 2nd respondent's arguments to the effect that, by Section 21(2) of the Supreme Court Act and Rule 3(5) of the Supreme Court Rules, 2020 this Court has inherent power to award costs; that in view of the Court's ruling dated 16th July, 2021 dismissing the applicant's application for extension of time, which had no prospects of succeeding and was bound to be dismissed; that, exercising diligence, the applicant ought to have waited for the determination of its first application before saddling the respondents with the second application whose outcome was dependent on the first; and

[5] UPON EXAMINING these arguments, especially that the 1st and 2nd respondents had opposed the application and the fact that the applicant is pursuing related proceedings against the respondents in the High Court, it is only just, fair and mete that both respondents be awarded costs of the application.

[6] WE NOW THEREFORE OPINE as follows:

- i. This Court by the provisions of Section 21(2) of the Supreme Court Act and Rule 3(5) of the Supreme Court Rules, 2020, has inherent jurisdiction to make orders on costs.

- ii. The guiding principles for award of costs are enunciated in ***Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others***, SC Petition No. 4 of 2012; [2014] eKLR, where we stated that costs follow the event with the discretion of the Court being exercised judiciously.
- iii. Applying these principles, we note from the record that the application was withdrawn after the 1st respondent, in opposition to the application, had filed a replying affidavit, submissions and a list and digest of authorities. Likewise, the 2nd respondent had filed grounds of objection, submissions and a list and digest of authorities.
- iv. Further, we acknowledge that the applicant's appeal could not proceed as the Court lacked jurisdiction to determine it for the reason that there was no valid Notice of Appeal on record.
- v. Consequently, this application was bound to face an insuperable end.
- vi. In these circumstances, we are inclined to award costs as against the applicant.

[7] In the event, we allow the motion dated 19th July, 2022 seeking to withdraw the applicant's application dated 8th April, 2021 and award costs to 1st and 2nd respondents.

It is so ordered.

DATED and DELIVERED at NAIROBI this 17th Day of February, 2023.

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P.M. MWILU
DEPUTY CHIEF JUSTICE & VICE PRESIDENT
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

