



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

**PETITION (APPLICATION) NO. E010 OF 2024
(CONSOLIDATED WITH PETITION NO. E011 OF
2024)**

—BETWEEN—

**DOCK WORKERS UNION.....1ST APPELLANT/APPLICANT
OKIYA OMTATAH OKOITI.....2ND APPELLANT**

-AND-

**PORTSIDE FREIGHT TERMINALS LIMITED.....1ST RESPONDENT
PORTSIDE CFS LIMITED.....2ND RESPONDENT
HEARTLAND TERMINALS LIMITED.....3RD RESPONDENT
KENYA PORTS AUTHORITY.....4TH RESPONDENT
CABINET SECRETARY FOR NATIONAL
TREASURY & ECONOMIC PLANNING.....5TH
RESPONDENT
KILINDINI TERMINALS LIMITED.....6TH RESPONDENT
MOMBASA GRAIN TERMINAL LIMITED.....7TH
RESPONDENT
KAPA OIL REFINERY.....8TH
RESPONDENT
AFRICA PORTS & TERMINALS.....9TH
RESPONDENT
MULTISHIP INTERNATIONAL.....10TH
RESPONDENT**

**KATIBA INSTITUTE.....11TH
RESPONDENT**

*(Being an application for the withdrawal of SC Petition No. E010 of
2024)*

Representation:

Mr. Simon Sang on behalf of the 1st
appellant/applicant (*In Person*)

Mr. Okiya Omtatah Okoiti the 2nd
appellant (*In Person*)

Non-appearance by the respondents

RULING OF THE COURT

[1] UPON READING the applicant's (Union) Notice of Motion dated 14th August 2024, expressed to be brought under Rule 27 of the Supreme Court Rules, 2020 and Practice Direction No. 48 of the Supreme Court (General) Practice Directions, 2020 for orders, that:

- (a) *The Petition No. E010 of 2024 filed by the Dock Workers Union against Portside Freight Terminal Limited & 10 others as respondents, be withdrawn;*
- (b) *In the alternative, leave be granted to the Dock Workers Union, the 1st appellant, to cease participating as a petitioner and its further participation in the matter be dispensed with; and*
- (c) *The costs of this application and Petition No. E010 of 2024 sought to be in the discretion of the Court (sic);*
and

[2] UPON CONSIDERING the supporting affidavit sworn by the Union's Secretary General, Simon Sang, on 14th August, 2024 together with its written submissions of even date to the effect that: in addition to the construction and development of a grain handling facility and island berth at G- Section Area Kenya Port Authority, Portside Companies (1st, 2nd and 3rd respondents) had agreed to develop an offshore berth, which will be a common user berth, at the port of Mombasa which will result in additional cargo traffic; it has now

become apparent to the Union that more job opportunities will be created at the Port of Mombasa for its members and the wider public, besides generating additional revenue for Kenya Ports Authority (KPA) and the likely decrease in grain and food prices by

reason of competition that will result from the introduction of a second player in the sector; and

[3] CONSIDERING FURTHER, that before the High Court, the Union was an interested party whereas the dispute essentially involved private interests, which do not concern the Union in any real sense; that neither the Executive Committee nor the membership of the Union were aware that the applicant had been joined in the High Court or Court of Appeal and such joinder had not been authorized; equally, neither the Executive Committee nor the membership of the Union has permitted the filing of the instant petition before this Court. In any event, KPA which is a material stakeholder, seems to support the development of a second bulk grain handling facility as it has not participated in these proceedings. Consequently, the Executive Committee of the Union has therefore resolved to withdraw this petition as there is no plausible reason for the Union to proceed with this matter in view of the aforementioned benefits to both its members and the wider public; and

[4] NOTING THAT the 2nd appellant in a replying affidavit sworn by Okiya Omtatah Okoiti on 5th September 2024 has opposed this Motion on the grounds that: the Union has not demonstrated that it would be detrimental to the interests of the dock workers and the public interest if the project in issue was to be established either at Lamu or Dongo Kundu in compliance with KPA's masterplan; that the Union's Secretary General who is the deponent of the affidavits by the Union, was aware of the proceedings and actively participated in them; that although the 2nd appellant has no objection to the petition being withdrawn as prayed, he reasonably suspects that the same is being

withdrawn for improper motives and to advance corrupt practices. What is more, he alleges perjury on the part of, Mr. Simon Sang, the Union's Secretary General by his affidavits before this Court; and

[5] COGNIZANT THAT none of the respondents have filed any pleadings in response to or in opposition to this Motion; and

[6] HAVING CONSIDERED the application, affidavits and rival arguments,

WE NOW OPINE as follows:

- i. By the provisions of Rule 27 (1) of the Supreme Court Rules, 2020, **“A party may with leave of the Court, withdraw the proceedings at any time before the delivery of judgment.”**
- ii. We are alive to the fact that a party’s right to withdraw its case from court cannot be denied, and the Court cannot prohibit a party from doing so. This Court observed as much in ***Salat vs. Independent Electoral and Boundaries Commission & 7 others*** [2014] KESC 12 (KLR), where it held:

“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.”
- iii. Bearing this in mind, since the Union has expressed its desire to withdraw its petition, and despite the 2nd appellant’s arguments and concerns, we hereby allow the Union’s Motion for leave to withdraw **SC Petition No. E010 of 2024**. This withdrawal effectively now leaves **SC Petition No. E011 of 2024 [Okiya Omtatah Okoiti vs. Portside Freight Terminals Limited & 10 Others]** as the only petition of appeal in the matter.
- iv. On costs, we underscore the fact that an award of costs is an exercise of discretion and follows the principle set out by this Court in ***Rai & 3 others vs. Rai, Estate of & 4 others***, [2014]

KEESC 31 (KLR) that costs follow the event. In applying this principle, we note that the 2nd appellant, in his

replying affidavit, has not sought for costs of this application. Moreover, we note from the record, that the appeal is being withdrawn before the respondents had filed any responses or substantive submissions to the consolidated appeal. There will be no prejudice to any of the parties. In view of the foregoing and in the exercise of our discretion, we make no orders as to costs.

[7] CONSEQUENTLY, and for the reasons aforesated, we make the following Orders:

- i. The applicant's Notice of Motion dated 14th August, 2024 be and is hereby allowed;***
- ii. SC Petition No. E010 of 2024 dated 21st March 2024 and filed on 4th April 2024, be and is hereby marked as withdrawn, leaving SC Petition No. E011 of 2024 [Okiya Omtatah Okoiti v. Portside Freight Terminals Limited & 10 Others] as the only petition of appeal; and***
- iii. There shall be no orders as to costs.***

It is so ordered

DATED and DELIVERED at NAIROBI this 8th day of November, 2024.

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P. M. MWILU
DEPUTY CHIEF JUSTICE & VICE
PRESIDENT OF THE SUPREME COURT
OF KENYA

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

.....
S.C. WANJALA
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

