



**Gichengo v Ndiva (Environment and Land Appeal 66 of 2021)
[2025] KEELC 1483 (KLR) (21 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1483 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 66 OF 2021
LL NAIKUNI, J
MARCH 21, 2025
(FORMERLY CIVIL APPEAL 216 OF 2019)**

BETWEEN

JANE WANGECHI GICHENGO APPELLANT

AND

KENNEDY MUTHINI NDIVA RESPONDENT

RULING

I. Introduction

1. This ruling is in respect of the Notice of Motion application dated 28th November, 2024 filed by Kennedy Muthini, the Respondent/Applicant herein. The application was brought under the provision of Sections 1A, 1B, 3, 3A and 3B, 63 (e) of the *Civil Procedure Act*, Cap. 21 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 of the Laws of Kenya.

II. The Respondent/Applicant's case

2. The Respondent/Applicant sought for the following orders:-
 - a. That this Honourable Court be pleased to order that all the rent collected from the suit property be deposited in a joint interest earning account in the names of the Advocates representing the parties herein.
 - b. That the costs be provided for.
3. The application herein was premised on the grounds, testimonial facts and averments made out under the 14 Paragraphed Supporting Affidavit of Kennedy Muthini Ndiva sworn on the same day as the application together with two (2) annexures marked as "KMN - 1" to "KMN - 2" annexed hereto. The Respondent himself averred that: -



- a. The lower court Judgment was delivered on 11th October, 2019 in his favour. Annexed and marked “KMN - 1” was a copy of the said Judgment.
- b. The court granted an order for specific performance ordering the appellant to transfer the suit property to him.
- c. This was based on the fact that the Respondent had received the purchase price for the sale of the suit property but later refused to transfer the same to him.
- d. The deponent recalled that in order to purchase the suit land he had to sell his other land in order to finance the purchase price and he made the respondent aware of this fact but she assured him that she was committed to the sale.
- e. The lower court decree was issued by the Court on 26th February, 2020 and registered against the title deed. He annexed and marked was a copy of the said decree as Annexure “KMN – 2”.
- f. Instead of handing over the suit plot to him, the Respondent rented the same to another party namely Rosenelly Injeni and she admitted that she had been collecting rent from her ever since the delivery of the lower court judgment.
- g. This Court on 8th February, 2023 delivered a ruling in which it directed and ordered and Respondent to hand over the suit property to him pending hearing and determination of the appeal. The copy of the ruling was in the Court file.
- h. Again, blatantly the Respondent refused to obey the Court order and filed another application for review but which again this Court dismissed on 8th February, 2024. The Deponent to the Court file.
- i. The Respondent refused to obey the Court Order and kept pushing for a site visit.
- j. This Court’s Deputy Registrar visited the site on 14th June, 2024 he was also present and the visit confirmed that the Respondent had been receiving rent from the tenant. He referred to the Court file.
- k. It was completely unfair for the Respondent to have the land, had the purchase price money and now continue collecting rent from the suit premises to his detriment.
- l. The Respondent’s behavior was akin to her being a law unto herself and it’s also contemptuous to the Court orders and he prayed that this was put to an end by this Court.

III. Submissions

4. On 4th December, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 28th November, 2024 be disposed of by way of written submissions. Unfortunately, by the time the Court was penning down this Ruling it had not been able to access the written submission from neither the file nor the Judiciary CTS. Nonetheless, it still proceeded to prepare the Ruling on its own merit and reserved to deliver it on 28th January, 2025. However, due to unavoidable circumstances, it was eventually delivered on 21st March, 2025 accordingly.

IV. Analysis & Determination.

5. I have carefully read and considered the pleadings herein by the Respondent, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.



6. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-
 - a. Whether to deposit in court the gross or net rent or no rent at all?
 - b. Who will bear the Costs of Notice of Motion applications dated 28th November, 2024.

Issue No a). Whether to deposit in court the gross or net rent or no rent at all

7. The facts of this matter are straight forward. The substratum before this Court is an appeal from the decision of the lower court. It is not in dispute that the lower court judgment was delivered on 11th October, 2019 in his favour. Annexed and marked “KMN - 1” is a copy of the said Judgment. Being aggrieved by the said decision she preferred an appeal.
8. The lower court in its decision granted an order for specific performance ordering the appellant to transfer the suit property to him. This was based on the fact that the Respondent had received the purchase price for the sale of the suit property but later refused to transfer the same to him. The deponent recalled that in order to purchase the suit land he had to sell his other land in order to finance the purchase price and he made the Respondent aware of this fact but she assured him that she was committed to the sale. The lower court decree was issued by the Court on 26th February, 2020 and registered against the title deed. He annexed and marked a copy of the said decree as Annexure “KMN – 2”. Instead of handing over the suit plot to him, the Respondent rented the same to another party namely Rosenelly Injeni and she admitted that she had been collecting rent from her ever since the delivery of the lower court judgment.
9. This Court on 8th February, 2023 delivered a ruling in which it directed and ordered and Respondent/ Appellant to hand over the suit property to him pending hearing and determination of the appeal. The copy of the ruling was in the Court file. Again, blatantly the Respondent refused to obey the Court order and filed another application for review. Once more, on 8th February, 2024 this Court dismissed it.
10. In the ruling delivered on 8th February, 2023 I disposed as follows:-
 - a. “That the Notice of Motion application dated 19th August, 2021 by the Appellant/Applicant herein be and is hereby allowed for being meritorious.
 - b. That an order be made that the Respondent shall take possession of the suit properties but based on “the Doctrine of Lis Pendens” under the provisions of Section 52 of the Transfer of Property Act the Respondent shall not sell, charge, or in any other way dispose Plot No. Kilifi/Mtwapa/1765 pending the hearing and determination of the Appeal.
 - c. That an order be and is hereby made that the Appellant/Appellant directed to deposit the original Certificate of the title deed document and a current Certificate of Official Search for all that parcel of land known as Land Reference No. Kilifi/Mtwapa/1765 with Court within the next thirty (30) days from the date of the delivery of this Ruling and shall remain in the custody of the Court until the hearing and determination of the appeal or until such other orders are made in respect of the same.
 - d. That for expediency sake, this Appeal should be set down for hearing and disposal within the next ninety (90) days from the date of the delivery of this Ruling. There should a mention date on 8th May, 2023 for purposes of taking direction of the Appeal under the provisions of



Section 79B and G of the Civil Procedure Act, Cap. 21 and Order 42 Rules 13 (1), (2),(3) & (4), 16 and 18 of the Civil Procedure Rules, 2010.

- e. That the Appellant/Applicant shall bear costs of the Application”
11. The Court is cognizant that the suit property being a physical building would remain intact and even appreciate in value by the time the Appeal is determined so that if the Respondent succeeds in the Appeal, they will merely take the building together with its appreciated value. However, the rental income had to be secured so that if the Appeal fails, then the Respondent would not lose out on the rental income.
 12. By and large, and all facts remaining constant, I strongly find the Application meritorious and hereby allow it as pleaded.

Issue No. b). Who will bear the Costs of Notice of Motion application dated 28th November, 2024.

13. It is now well established that the issue of costs is at the discretion of the Honourable Court. The Black Law Dictionary defines cost to means:-

“ the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”
14. The proviso of Section 27 of the Civil Procedure Act, Cap. 21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) of the Civil Procedure Act provides as follows:-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order.”
15. A careful reading of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18th Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise.
16. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book *Judicial Hints on Civil Procedure*, 2nd Edition, 2005 at 95 notes that the words ‘the event’ means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under section 27 remains at the discretion of the court.
17. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each



case. In “Morgan Air Cargo Limited – Versus - Everest Enterprises Limited [2014] eKLR” the court noted that;

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why Section 27(1) of the Civil Procedure Act is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

18. In this case, this Honourable holds the right not to award any costs.

V. Conclusion & Disposition

19. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience.

20. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, this court arrives at the following decision and makes below order:-

- a. That the Notice of Motion application dated 28th November, 2024 be and is hereby allowed as pleaded.
- b. That an order be and is hereby made that all the rent collected from the suit property be deposited in a joint interest earning Escrow bank account in the names of the advocates representing the parties herein - Messers. Munyithya, Mutugi, Umara & Muzna Company Advocates and Messrs. Gikandi Gibuini & Company Advocates.
- c. That for expediency sake this matter to be mentioned on 29th April, 2025 before Hon. Justice Olola for direction on how to dispose off the impugned Appeal.
- d. That there shall be no orders as to costs.

It Is So Ordered Accordingly.

RULING DELIVERED THROUGH THE MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 21ST DAY OF MARCH 2025.

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**HON. JUSTICE MR. L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT
MOMBASA**

Ruling delivered in the presence of:

- a. Ms. Firdaus Mbula, the Court Assistant.
- b. M/s. Gwahanah Advocate & Mr. Gikandi Gibuini Advocate for the Appellant/Respondent.
- c. Mr. Mutugi Advocate for the for the Respondent.

