



**Owino & 2 others v Shining Hope for Communities (SHOFCO) & another (Environment & Land Petition E011 of 2023) [2023] KEELC 19107 (KLR) (18 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19107 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION E011 OF 2023**

**MD MWANGI, J  
JULY 18, 2023**

**BETWEEN**

**RAPHAEL OWINO ..... 1<sup>ST</sup> PETITIONER  
ONGARO JACOB ..... 2<sup>ND</sup> PETITIONER  
SAMWEL OYUGI ..... 3<sup>RD</sup> PETITIONER**

**AND**

**SHINING HOPE FOR COMMUNITIES (SHOFCO) ..... 1<sup>ST</sup> RESPONDENT  
BOARD OF DIRECTORS (SHOFCO) ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Background**

1. The Petitioners moved this Court vide the Petition dated March 6, 2023 seeking redress for alleged violation of their Constitutional rights by the Respondents. The Petition was accompanied by an application seeking interim orders pending the hearing and determination of the matter. Upon being served with the Petition and the application, the Respondents entered appearance and filed their responses which included a preliminary objection.
2. When the parties appeared before the court through their Advocates, they informed the court that they were willing to attempt a possible out of court settlement. Subsequently, and by agreement of both parties, the matter was marked as settled save for the costs payable. They left it to the court to determine the issue of costs. The court directed parties to file submissions on that issue of costs only with leave to the Petitioners to file a Further Affidavit attaching the pictures and correspondences in regard to the Petition to assist the court in making a determination which they did.



### **Petitioner's submissions**

3. In their Submissions dated May 31, 2023, the Petitioners restated the averments contained in the Further Affidavit sworn by Raphael Owino and submitted that the Petitioners as the successful party out of the negotiated settlement should not be deprived costs. They submitted that the Respondents had met 4 out of their 5 demands evidenced by the annexed pictures. They submitted that it was confirmation that they had succeeded in their case. It was their further submission that costs ordinarily follow the event. They cited Justice Kuloba (as he then was) on the word "event" in his book *Judicial Hints on Civil Procedure*, 2nd edition at page 99. The event refers to the result of the entire litigation. The expression that, 'the costs shall follow the event' means that the party who on the whole succeeds in the action gets the general costs of the action.
4. The Petitioners further referred to Rule 26 of the '*Mutunga Rules*' which provides that the award of costs is at the discretion of the court. The Court is however enjoined to take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms. They too referred to Section 27 of the *Civil Procedure Act*, Cap. 21 which reiterates the position that the award of costs shall be at the discretion of the court and that the costs unless the court or Judge for good reason otherwise orders.
5. The Petitioners relied on the Supreme Court's holding in *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* (2014)eKLR, Petition No. 4 of 2012.
6. It was their submission that the Court should exercise its discretion in their favour and find that the Petitioners are entitled to costs. They prayed for an award of costs of Kshs. 900,000/- together with interests at courts rates until payment in full.

### **Respondent's Submissions**

7. The Respondents Submissions are dated the June 9, 2023. They identify 3 issues for determination as follows:
  - a. whether damages are payable to the Petitioners;
  - b. whether costs of the suit are payable to the Petitioners; and
  - c. if costs are indeed payable to the Petitioners, the quantum of such costs.
8. On the first issue, the Respondents submitted that damages are awarded for the purpose of replacing the monetary value of property or rights which have been lost or damaged, or to cover expenses, loss, pain and suffering relating to a victim's injury or death. They submitted that they had not at any given time accepted liability for any legal or constitutional infringements of the Petitioners' rights in any manner. The consent by the parties was entered into amicably and voluntarily. It was therefore not open to them to go back to their initial claim in the Petition and claim damages which have not been proved in any case. The Respondents submitted that they had indeed taken care of the Petitioners' key issues at their own costs which the Petitioners had not only confirmed to the court verbally but also in their further affidavit sworn on May 31, 2023.
9. The Respondents therefore urge this court to disregard the Petitioners' claim for damages.
10. As to whether costs of the suit are payable to the Petitioners, the Respondents submit that each party should bear its own costs as the matter was resolved amicably. That the Respondent organization is a non -profit organization fully reliant on donor funding aimed at impacting the lives of the communities it serves. The organization therefore operates on restricted donor budgets



and unbudgeted amounts such as legal fees as in this case are detrimental to their objectives. The Respondents urged the court to adopt the position which the parties themselves had agreed upon; that reasonable costs would be paid to the petitioners by the Respondents and that the computation of the reasonable would be mutually agreed on by the parties.

11. Finally, on quantum, the Respondents submitted that the alleged Project Value contained in Annexure RO1 of the Further Affidavit of the Petitioners refers to the entire Project. Majority of the funds donated for the Project have already been expended. That the Petitioners claim is based on a short stretch that does not exceed Kshs.150,000/=. Therefore, if the Project Value is to be used as a basis for calculating costs, then the value of Kshs.150,000/- should be the value taken into account as the Petitioners do not have an interest or claim whatsoever in the rest of the project.
12. As for liability and costs following the event, the Respondents reiterated that they did not at any time accept liability for any infringements of any of the Petitioner's rights. That they were ready to defend the Petition as the record reflects through their responses filed in court. The suit having been compromised by consent, the principle of costs following the event does not apply since the Petitioners did not 'win' rather the matter was amicably settled.
13. Finally, that the Project being one that benefits hundreds of the residents of Kibera and the Respondents being a nonprofit organization, it is a public interest affair as against the displeasure of the 3 Petitioners herein. The Respondent submitted that a sum of Kshs. 30,000/= was therefore reasonable in the unique circumstances of this case.

#### **Issues for determination**

14. I have considered the application; the submissions made by the parties and perused the record. The issues that arise for determination are;
  - a. Whether the Petitioner is entitled to costs of this suit?
  - b. If the answer to (a) is in the affirmative, how much is payable to Petitioner?

A. Whether the Petitioner is entitled to costs of this suit?

15. This being a Constitutional Petition, in which the Petitioners claim violation of their constitutional rights, the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 commonly referred to as the '*Mutunga Rules*' are applicable. Rule 26 on costs provides that;

26.

- (1) The award of costs is at the discretion of the Court.
- (2) In exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms.

16. In *Republic v. Rosemary Wairimu Munene (Ex parte Applicant) v. Ibururu Dairy Farmers Co-operative Society Ltd* Judicial Review Application No. 6 of 2004, Mativo J (as he then was) held that the issue of costs is the discretion of the Court and is used to compensate the successful party for the trouble taken in prosecuting or defending the case and not to penalize the losing party.



17. In *Devram Dattan v Dawda* [1949] EACA 35 it was held:

“It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so, its exercise must be based on facts ... if, however, there be, in fact some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of the sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance”.

18. In the case of *Jasbir Singh Rai & Others v Tarlochan Rai & Others* {2014} eKLR it was observed that:

“In the classic common law style, the courts have to proceed 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.....”

19. The question of how costs are to be dealt with when parties have settled a matter by consent without resolving the costs, was dealt with by Nyamweya J in *Rufus Njuguna Muringu & Another v Martha Muriithi & 2 Others* [2012] eKLR. There the court stated:

“...consent cannot be interpreted to mean that one or the other party has succeeded in a suit. Even if in the present case such settlement has worked out in the Defendants’ favour, the successful determination of the dispute is still attributable to both the Plaintiffs and the 1st and 2nd Defendants... The issue of a party’s conduct affecting the award of costs as submitted by the plaintiff’s counsel in my opinion does not arise when parties have entered consent as they are deemed to have accepted their respective conduct prior to the consent. In addition, the Defendants’ conduct would in the circumstances only be material if the plaintiff is seeking to set aside the consent order.”

The court finally determined that each party should bear their own costs.

20. In *Morgan Air Cargo Ltd v Everest Enterprises Ltd* (2014) eKLR, Gikonyo J took further the issue of award or costs in the face of a consent settlement. The Judge said:

“It does not necessarily mean that, where parties have entered into a consent to settle a proceeding no costs should be awarded, or there is no successful party in the matter. The incidence of settlement by consent of the parties, to my mind, is just but a vital factor the court should consider within the circumstances of each case in deciding whether costs are payable or not. A consent recorded in settlement of a proceeding is not an automatic dis-entitlement of costs.....The court should, therefore, look at the event within the circumstances of the case. And that exercise will inform the exercise of discretion by the court. It should also be understood well; that a successful party does not refer to a person who has been through the rigorous and convoluted motions of litigation by the other party. Similarly, a party does not cease to be a successful party merely because he met no contest in his claim against the Defendant. He is a successful party because he is declared to be so by the Court after looking at the entire litigation which includes: negotiations or steps which culminates to, and the recording of a consent thereto, conduct of the Plaintiff etc.”



21. The court further addressed itself on the factors that should be taken into consideration when determining the costs of suit. The learned judge stated that the factors include:
  - a. the conduct of the parties
  - b. the subject of litigation
  - c. the circumstances which led to the institution of the proceedings
  - d. the events which eventually led to their termination
  - e. the stage at which the proceedings were terminated
  - f. the manner in which they were terminated
  - g. the relationship between the parties and
  - h. the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of the *Constitution*.
22. From the foregoing what comes out is that the court may not only consider the conduct of the parties in the actual litigation, but the matters which led to the litigation, the eventual termination thereof and the likely consequences of the order for costs.
23. As stated above in cases, whereby the parties enter into a consent, the court does not go further to inquire the reasons for the consent or dig into the reasons why the plaintiff sought to resolve the matter with the defendant; neither should an adverse inference be made against the plaintiff while determining costs. The only relevant issue is whether or not the plaintiff is entitled to costs given the event of the suit in light of lawful steps taken in pursuit of a remedy.
24. In the circumstances of this case, the Petitioners alleged violation of their rights as stated above. The Respondents on the other hand denied any liability or any violation as stated in their respective responses. However, looking at the consent recorded herein, the Respondent rectified or moved the faulty pillar which had left an open and untreated sewer environment thereby risking the Petitioners' health and environment. No doubt the project by the Respondents is beneficial to the Kibera community, and while the 2nd Respondent is a non-profit making organization, the Petitioners were justified to institute proceedings for the infringement of their rights.
25. Considering the entire chain of events from the filing this suit up to the time the parties left the issue of costs to the court to determine, including the court attendances by parties, I find no reason to deny the Petitioners costs. It is also clear from the submissions by the Respondents that the parties had agreed on payment of reasonable costs only that they failed to agree on the amount. In exercise of my discretion in order to meet the interests of justice for both parties, I award costs to the Petitioners.

B. How much is payable to Petitioners?
26. The Petitioners pray for an award of costs of Kshs. 900,000/- together with interests at courts rates until payment in full. The figure has been arrived at on the basis of the estimated cost of the entire project being Kshs. 100,000,000/=. They submit that Kshs. 500,000/- is however damages for the infringement of their rights and Kshs. 400,000/- is the legal fees.
27. The Respondents on the other hand are willing to pay a reasonable fees to the Petitioners. They submit that the amount claimed by the Petitioners is excessive considering that a consent was recorded. Further that the Petitioners cannot claim damages that were not proved through the rigors of a trial. The Respondents therefore urge this court to disregard the Petitioners' claim for damages.



28. This court agrees with the Respondents on the aspect of damages. First and foremost, the damages claimed have not been proved. In *David Bagine v Martin Bundi* [1997] eKLR, the Court of Appeal cited the judgment by Lord Goddard CJ. in *Bonham Carter v Hyde Park Hotel Limited* (1948) 64 TLR 177), where he stated that:

[The] Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying ‘this is what I have lost’, I ask you to give me these damages; they have to prove it.

29. Secondly, the terms of the consent by the parties are clear. The consent marked the matter as settled between them. The parties having agreed to have the matter closed, the Petitioners cannot go back to reopen the matter then and claim damages through the back door. The court too has no basis upon which to grant the damages. The parties’ agreement was that the court was to assess the costs only.

30. As for the claimed legal fees in sum of Kshs. 400,000/=, the Petitioners claim that that they raised a sum of Kshs. 200,000/= which was paid to their advocates, the balance was to be paid later. It is important to note that what is before me for determination is costs payable as party and party costs. I will limit to myself to that only.

31. The Petitioners have argued that the estimated value of the Project should be considered in determining the costs payable. The Respondents have contested the proposal on the basis that the figure of Kshs.100,000,000/- is for the whole project yet the Petitioners ‘complaint is limited to a small portion of the project’. Further that the 2nd Respondent is a non-profit organization dependent on donors and as such the costs should be reasonable. They propose a sum of Kshs. 30,000/=. They plead that the funds for the project are meant to the benefit the public.

32. I agree with the Respondents; the estimated value of the project cannot be used as the basis for calculating costs. It was just an estimate anyway. Further, this being a claim for violation of constitutional rights, the value of the subject matter was not in issue.

33. The Court of Appeal restated in *Joreth Limited v Kigano & Associates* [2002] eKLR, stated that:

“We would at this stage, point out that the value of the subject matter of a suit for the purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not ascertainable the taxing officer is entitled to use his discretion to assess Instruction fee as he considers just, taking into account, amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, and direction by the trial judge and all other relevant circumstances.”

34. Considering the nature of this matter and the importance of the project to the community, coupled with the fact that the matter did not proceed to full trial, I shall exercise my discretion as guided by Rule 26 of the *Mutunga Rules* and grant the Petitioners a sum of Kshs. 200,000/= as costs of this Petition.

It is so ordered.

**Dated, Signed and Delivered at Nairobi this 18<sup>th</sup> day of July 2023.**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:



Mr. Amisi holding brief for Kamenju for the 2<sup>nd</sup> Respondents.

Mr. Okoyo for the Petitioner's/Applicants.

Court Assistant – Yvette.

**M.D. MWANGI**

**JUDGE**

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