



**Mwazonga & another v Chief Registrar, Mombasa; Vipingo Development & 5 others (Interested Parties) (Environment and Land Judicial Review Case 4 of 2021) [2023] KEELC 19326 (KLR) (28 August 2023) (Ruling)**

Neutral citation: [2023] KEELC 19326 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 4 OF 2021  
MAO ODENY, J  
AUGUST 28, 2023**

**BETWEEN**

**CHRISTOPHER MWANDEJE MWAZONGA ..... 1<sup>ST</sup> APPLICANT**

**BIASHA HAMISA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**THE CHIEF REGISTRAR, MOMBASA ..... RESPONDENT**

**AND**

**VIPINGO DEVELOPMENT ..... INTERESTED PARTY**

**VIPINGO ESTATE LIMITED ..... INTERESTED PARTY**

**VIPINGO ENERGY LIMITED ..... INTERESTED PARTY**

**REA VIPINGO PLANTATIONS ..... INTERESTED PARTY**

**VIPINGO DEVELOPMENT PLC ..... INTERESTED PARTY**

**MOMBASA CEMENT LIMITED ..... INTERESTED PARTY**

**RULING**

1. This ruling is in respect of this Honourable court's direction on October 6, 2022 that parties file written submissions on the issue of costs payable to the Applicants. This arises from the judgment in Malindi ELC No. 71 of 2011 (OS) which suit was between the Applicants and the 4<sup>th</sup> Interested party herein where judgment was entered in favour of the applicants in the following terms;
  - a. A declaration be and is hereby issued that the applicants are entitled to land measuring 20 acres of land described as L.R No. 291/111/MN/CR NO. 7314 by virtue of adverse possession.



- b. An order be and is hereby issued made that the Director of Surveys cause the Sub division of L.R No. 291/III/MN and curve out 20 acres and the Chief Land Registrar to issue a Certificate of Title in the name of the Applicants and tenants in common within 45 days upon being served this order.
- c. Each party to bear his/its own costs.

### **Applicant's Submissions**

2. Counsel for the Applicant gave a factual background of what transpired in the proceedings in Malindi ELC NO 71 of 2011 (OS) Christopher Mwanje Mwanzonga & Biasha Baya Hamisi V Rea Vipingo Plantations Limited where Judgment was entered in favour of the Applicants.
3. Mr Kinisu submitted that subdivisions and transfers were subsequently done but the same took a period of four years to be finalized due to complexities.
4. It was counsel's further submissions that the various changes of ownership of the suit property which passed through the 1<sup>st</sup> Interested party all through to the 6<sup>th</sup> Interested party caused delay in issuance of Certificate of Title pursuant to court's judgment and decree of June 24, 2016. That that is why the applicants brought the instant judicial review proceedings due to the illegalities of the respondent and the interested parties.
5. On the issue of costs, counsel relied on section 27 of the Civil Procedure Act and submitted that cost of any action, cause or other matter or issue shall follow the event unless the court or judge shall have a good reason otherwise order.
6. Counsel cited the cases of Biashara Sacco Society Ltd & 2 others v Dickson Miricho Kibagi [2016] eKLR and Patrick Kimathi Muchena Arimi Kimathi & Company Advocate v Baseline Architects Limited [2013]eKLR to explain the nature and importance of the case, conduct of the parties and complexity of the matter and urged the court to allow the application as prayed

### **1<sup>st</sup> 2<sup>nd</sup> And 5<sup>th</sup> Interested Parties'submissions**

7. the 1<sup>st</sup> 2<sup>nd</sup> and 5<sup>th</sup> interested parties objected to the application for costs by the applicants. Counsel also gave a brief background to the case and opposed the application.
8. Counsel submitted that the only parties in Malindi ELC No 71 of 2011(OS) were the Applicants and the 4<sup>th</sup> interested party, that the 1<sup>st</sup> 2<sup>nd</sup> and 5<sup>th</sup> Interested Parties were not parties to the suit either at the filing of the suit or at the conclusion in 2016.
9. Mr Musangi further submitted that in any even no costs were awarded to the Applicants as the court expressly directed that each party to bear their own costs. It was counsel's submission that neither the 4<sup>th</sup> Interested party nor the 1<sup>st</sup> 2<sup>nd</sup> and 5<sup>th</sup> Interested Parties were ordered by the Court to bear the cost of subdivision.
10. Counsel also clarified that the 1<sup>st</sup> and 5<sup>th</sup> Interested Parties are the same entity as the 1<sup>st</sup> Interested Party was incorporated on 20<sup>th</sup> February 2015 and subsequently the 1<sup>st</sup> Interested Party underwent a conversion from private company to a public company and therefore changed from Vipingo Development Limited to Vipingo Development PLC.
11. On the issue of costs, counsel submitted that the 1<sup>st</sup> 2<sup>nd</sup> and 5<sup>th</sup> Interested parties are not liable to pay the Applicants cost as the discretion to grant or withhold costs is provided for under section 27 of the Civil Procedure Act



12. Counsel further cited the cases of *Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others* [2013] eKLR, *Salmon vs Salmon* [1897]AC 78, *Victor Mabachi & another v Nurtun Bates Limited* [2013] eKLR to explain the issue of the courts discretion of costs and a company being a legal person with separate independent identity in law distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil. the interested parties are companies that are distinct.
13. Counsel therefore urged the court to dismiss the application.

### **Analysis and Determination**

14. The issue for determination is whether the Applicants are entitled to costs.
15. This application arises from Malindi ELC NO 71 of 2011 (OS) between Christopher Mwanjenje Mwanzonga & Biasha Hamisi Vs Rea Vipingo Plantations Limited. The case was heard and determined in 2016 and judgment was entered in favour of the applicants in the following terms;
  - a. A declaration be and is hereby issued that the applicants are entitled to land measuring 20 acres of land described as L.R No. 291/111/MN/CR NO. 7314 by virtue of adverse possession.
  - b. An order be and is hereby issued made that the Director of Surveys cause the Sub division of L.R No. 291/III/MN and curve out 20 acres and the Chief Land Registrar to issue a Certificate of Title in the name of the Applicants and tenants in common within 45 days upon being served this order.
  - c. Each party to bear his/its own costs.
16. The Judgment clearly stated that each party to bear their own costs. Later it is not disputed that survey was done and subdivisions carried out and the 20 acres awarded to the Applicants were excised from the suit land.
17. It is further not in dispute that the parties entered into a consent on 4<sup>th</sup> July 2022 in the following terms:

It is hereby ordered by consent:

1. That the 6<sup>th</sup> Interested party herein will purchase the suit property measuring 20 acres being part of the land comprised in parcel describes as L.R No.11843/III/MN Original No. 291/1 (comprised in the title CR No. 75503) as contained in deed Plan No. 444028 from the 1<sup>st</sup> and 2<sup>nd</sup> Applicants at Kenya Shillings 1,500,000 per acre and the total acreage being 20 acres translating to Kenya shillings 30,000,000 (Total Purchase price)
2. That the 6<sup>th</sup> Interested Party will compensate the 1<sup>st</sup> and 2<sup>nd</sup> Applicants a total sum of Kshs. 10, 750,000/=for and on account of any improvements or trees or any sort of developments on the suit property.
3. That the 6<sup>th</sup> Interested party does pay the costs of the 1<sup>st</sup> and 2<sup>nd</sup> Applicants as agreed at Kshs. 1,000,000/= all inclusive.
4. The total sum payable to the 1<sup>st</sup> and 2<sup>nd</sup> Applicants in full settlement of this suit is Kshs. 41, 750,000/= (total Settlement amount).



5. That the total settlement amount of kshs. 41,750,000/= be paid by the 6<sup>th</sup> Interested party to the Advocates of the 1<sup>st</sup> and 2<sup>nd</sup> Applicants on the following terms:
    - a. Kshs.10,437,500/= being the 1<sup>st</sup> instalment of 25% of the total settlement amount shall be on the filing of this consent in court.
    - b. Kshs.10,437,500/= being the next instalment of 25% of the total settlement amount on the 30<sup>th</sup> day from the date of filing this consent
    - c. The balance of Kshs. 20, 875,000/=being the final installment of 50% of the total settlement amount to be paid on the day when the 1<sup>st</sup> and 2<sup>nd</sup> applicants do handover vacant possession of the suit property to the 6<sup>th</sup> interested party , such vacant possession to be absolutely free of all structures and persons on the suit property
  6. That the 1<sup>st</sup> and 2<sup>nd</sup> Applicants do undertake to vacate the suit property and to clear all forms of developments/improvements on the suit property as per the terms of the consent.
  7. That the 1<sup>st</sup> and 2<sup>nd</sup> Applicants' Advocates on record do handover the original Deed Plans for both parcels of land(the said 20 acres and the remainder area) and all applications made and decree submitted to the Director of Surveys to be handed over to the 6<sup>th</sup> Interested party for cancellation by the Director of Surveys.
18. The above consent was adopted as an order of the court on July 4, 2022 in the presence of all the advocates on record in court. Counsel for the Applicants stated that the matter was settled but the only outstanding issue was whether costs were payable to the Applicants.
19. From the history of this case, which has well been enumerated by counsel for the parties, it is not in dispute that this matter was settled. It is also not is dispute that judgment was entered in favour of the Applicants in Malindi ELC No 71 of 2011(OS) where the court ordered that each party to bear their own costs.
20. Section 27 of the *Civil Procedure Act* provides as follows :

27

- (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 give all the necessary directions for the purposes aforesaid; and the fact that the court 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 direct.



21. This section gives the judge discretion to either award or withhold costs depending on the circumstances of the case. The discretion must be exercised judiciously so as not to cause injustice.
22. In the case of *Reid, Hewitt & Co v Joseph*, AIR 1918 Cal 717 and *Myres v Defries* (1880) 5 Ex D 180, the House of Lords noted that: -

“The expression ‘costs shall follow the event’ means that the party, who, on the whole, succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.”
23. I note that the judge indicated in the judgment that the applicants had claimed for 54 acres but were only able to prove a claim for 20 acres that they had admitted that Ms Salita had allowed them to occupy and no more.
24. In the case of *Joseph Oduor Anode v. Kenya Red Cross Society*, [2012] eKLR Odunga, J. observed that:

“...whereas this court has the discretion when awarding costs, that discretion must, as usual, be exercised judicially. The first point of reference, with respect to the exercise of discretion is the guiding principles provided under the law. In matters of costs, the general rule as adumbrated in the aforesaid statute [the *Civil Procedure Act*] is that costs follow the event unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words, where the Court decides not to follow the general principle, the Court is enjoined to give reasons for not doing so.”
25. As mentioned above, the judge gave a reason that the applicants had partially succeeded in the claim for 20 acres instead of the 54 acres. Subsequently Parties herein agreed to an out of court settlement, which resulted to the consent adopted by the court on July 4, 2022. The said consent also covered the issue of costs to the Applicants
26. I find that the application lacks merit and therefore cannot interfere with the discretion of the judge in directing that each party to bear their owns costs. The application is therefore dismissed.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 28<sup>TH</sup> DAY OF AUGUST, 2023.**

**M.A. ODENY**

**JUDGE**

