



Kandie & 7 others v Bundotich & 5 others (Environment & Land Case 532 of 2013) [2023] KEELC 21871 (KLR) (23 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21871 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 532 OF 2013
LA OMOLLO, J
NOVEMBER 23, 2023**

BETWEEN

SIMION KANDIE & 7 OTHERS PLAINTIFF

AND

RICHARDSON KIPKOECH BUNDOTICH & 5 OTHERS DEFENDANT

RULING

1. This ruling is in respect of the Defendants/Applicants' Notice of Motion application dated 4th November, 2022. The application is expressed to be brought under the provisions of Section 3A of the *Civil Procedure Act* and Order 25 of the Civil Procedure Rules.
2. The application seeks the following orders;
 - a. That this Honourable court be pleased to order that the Plaintiff's having withdrawn this suit against the Defendants; they be and are HEREBY ordered to pay the Defendants costs of this suit.
 - b. That costs of this application be provided for.

Factual Background.

3. This suit was commenced vide a Plaint dated 10th September, 2013.
4. Before the matter was set down for hearing, several interlocutory applications were filed, heard and determined. On 22nd December, 2017 the Plaintiffs/Respondents filed a notice of withdrawal of the suit.
5. On 22nd January, 2018 this court marked the suit as withdrawn and directed that any party may apply for costs.



6. Before the filing of the notice of withdrawal of this suit, there was an application dated 26th July, 2017 that was pending determination. This was an application filed by the Defendants herein. In the said application, they sought orders for dismissal of the suit for want of prosecution and also sought orders for the return of the company instruments. The court observed, vide a ruling dated 1st February, 2018, that the order seeking dismissal of the suit for want of prosecution had been overtaken by events due to the filing of the notice of withdrawal. This court then proceeded to determine the question of return of the company instruments.
7. Subsequently, the Defendants/Applicants then filed their party to party Bill of Costs. The Plaintiff/Respondent filed a Preliminary Objection dated 24th February, 2020. The objection is as follows
 1. That 1st and 2nd Defendant's Bill of cost dated 12th February, 2020- is an abuse of the court process as there was no order for costs made in favour of the 1st and 2nd Defendant Plaintiff/Respondent or against the Plaintiffs and therefore there can be no Bill of cost in respect of the suit herein against the Plaintiff.
8. The Taxing Master then referred the matter back to this court for hearing and determination.
9. The Defendants/Applicants did not respond to the Preliminary Objection but instead filed the instant application.
10. The same now forms the basis of the instant ruling.

Response.

11. The Plaintiffs/Respondents filed a Replying Affidavit sworn on 16th November, 2022. It is sworn by their Advocate Mr. Steve Odhiambo Opar.
12. He deposes that he was aware of the ruling which endorsed the notice of withdrawal of the suit by the Plaintiffs.
13. He further deposes that the 1st, 2nd and 3rd Defendants/Applicants through the firm of Hassan N. Lakicha & Company Advocates sought review of the orders issued by the court on 1st February, 2018 and that the application was heard and dismissed with costs in favour of the Plaintiffs/Respondents.
14. It is his deposition that the 1st, 2nd and 3rd Defendants being aggrieved by the said ruling of 1st February, 2018 on costs should have sought review or appeal.
15. He further deposed that the application herein is defective and should be struck out with costs for the reason that the firm of Maragia Ogaro & o. Advocates has no instructions on behalf of the 1st to 3rd Defendants/Applicants.
16. The Plaintiffs/Respondents deposes that the party and party Bill of Costs drawn by the firm of Olonyi and Company is defective for want of instructions.
17. He also deposes that they filed a Preliminary Objection dated 24th February, 2020 to wit that the said Bill of Costs was an abuse of the court process as there were no orders for costs that were made and adds that the 1st to 3rd Defendants/Applicants shifted goal posts on the direction by the taxing master and instead filed the present application.



18. In conclusion, the Plaintiffs/Respondent urge the court to dismiss the present application with costs. They also urged the court to expunge from record the party and party bill of costs dated 12th February, 2020 for having been filed by a law firm not properly on record.
19. The 1st Defendant/Applicant in response filed a Supplementary Affidavit dated 27th January, 2023. He deposes that the firm of Hassan Lakicha Advocates came on record after the court endorsed the withdrawal of the suit.
20. He added that the court record bears a notice of change of avocates from the said firm. He stated that the firm of Maragia Ogaro & Co. Advocates was and remains validly on record for the Defendants/Applicants.
21. He deposes that as advised by his advocates, the application dated 30th January, 2019 was irregularly filed by the firm of Hassan Lakicha Advocates and adds that the said application has no impact on the instant application.
22. It is his deposition that the Bill of Costs having been drafted by the firm of Olonyi advocates was a typographical error curable by an amendment. He adds that Mr. Olonyi was always holding brief for Mr. Maragia hence the drawing of the Bill of Costs accidentally being typed as having been drawn and filed by Olonyi.
23. In conclusion, he states that the trial court was silent on the issue of costs and urged the court to review the ruling dated 1st February, 2018 and provide for costs.

Issues For Determination.

24. The Defendants/Applicants filed their submissions on 28th February, 2023. They give a background of this suit and identified the following issues for determination:
 - a. Whether the firm of Hassan N. Lakicha & Co. is validly on record and if it legally replaced the firm of Maragia Ogaro & Co. Advocates.
 - b. Whether in endorsing the Notice of Withdrawal of the suit the court endorsed the same “WITH NO ORDERS AS TO COSTS” or it escaped its attention to award “Costs” in terms of Section 27 of the *Civil Procedure Act* or was silent given the implied disposition of the same section.
 - c. What will be the proper recourse in the event the court was silent in respect to costs?
 - d. Whether the Application dated 30/1/2018 by the firm of Hassan N. Lakicha & Co. Advocates has an impact on the current application.
 - e. The issue with regard to the party and party bill of costs being drawn by the firm of Olonyi & Co. Advocates and the Preliminary issues that were raised against it.
25. On the first issue, they rely on the judicial decision in Bahati Shee Mwafundi V Elijah Wambua (2015) eKLR and Order 25 of the Civil Procedure Rules. They submit that the Plaintiff has the absolute right to withdraw a suit and what ought to remain for determination is the issue of costs. The Defendants/Applicants also relied on Order 9 Rule (6) (9) and (10) of the Civil Procedure Rules and submit that an application by the firm of Hassan N. Lakicha & Co. Advocates to be granted leave to come on record ought to have been filed. They added that the purported Notice of Change of Advocates dated 30th January, 2019 is in violation of the said Order 9 rules (6), (9) and (10). They concluded that both the firms of Hassan N. Lakicha & Co. Advocates and the firm of Odhiambo Opar are invalidly on record.



26. On the second issue for determination, the Defendants/Applicants relied on Section 27 of the [Civil Procedure Act](#) and submit that a determination on costs were to be made. They submit that the application dated 30th January, 2019 dealt with a different aspect and the suit could not be reviewed even if the application was to be allowed. The Defendants/Applicants submit that costs follow the event and that from the ruling dated 1st February, 2018, nowhere did the court refuse to give costs and this the instant application seeking for costs.
27. The Defendants/Applicants on the third issue submit that the application dated 30th January, 2019 sought different orders from the instant application as the former dealt with matters that remained unresolved. On the final issue, they submit that the error in filing the Bill of Costs is curable by amendment since the Plaintiff would remain the party bearing the costs of the suit. They added that the tabulation in arithmetic terms would not change and that the bill of costs is limited from the time of initiation of the suit to its withdrawal and the antecedents connected to the withdrawal.
28. The Plaintiffs/Applicants filed their written submissions on 4th May, 2023. They gave a background of the case and identified the following issues for determination:
 - a. Whether the Preliminary Objection is merited or not
 - b. Whether the Notice of Motion dated 4th November, 2022 is merited.
 - c. Which orders to grant.
29. On the first and second issue, the Plaintiffs/Applicants submit that the Preliminary Objection is merited and urged the court to strike out the bill of costs dated 12th February, 2020 with costs.
30. They argue that in the event this court finds that the same is merited, they submit that the instant application is an afterthought and should be dismissed with costs on account that the same is not a review. They relied on Section 27 of the [Civil Procedure Act](#) and the judicial decision in Republic V Rosemary Wairimu Munene Ex-Parte Applicant V Ihururu Dairy Farmers Co-operative Society Ltd SR. APP No. 6 of 2014. They submit that an award of costs by the court is discretionary and the court exercised its discretion by not awarding costs to the Defendants/Applicants.
31. They further submit that in instances where the court did not award costs and the Defendants/Applicants being aggrieved by the said decision, they ought to have filed a review or an appeal against the decision.
32. The Plaintiffs/Respondents submit that a review application is initiated under Section 80 of the [Civil Procedure Act](#) as read with Order 45 Rule 1 of the Civil Procedure Rules. They argue that the present application was brought under Section 3A of the [Civil Procedure Act](#) and Order 25 of the Civil Procedure Rules and as such the same is not a review proceeding.
33. On the issue of representation, they submit that the firm of Maragia Ogaro & Co. Advocates did not file any Notice of Change and therefore the said law firm is a stranger to the proceedings with no capacity to represent the 1st and 2nd Defendants/Applicants.
34. In conclusion, the Plaintiffs/Respondents urge this court to strike out the instant application together with the Party and Party Bill of Costs dated 12th February, 2020 with costs. They urge the court to allow their Preliminary Objection dated 24th February, 2020.

Analysis And Determination.

35. It is this court's view that the main issue for determination is:



- a. Whether the instant application is rightfully before this court.
- b. Whether this court should order that the Plaintiff do pay costs to the Defendants having withdrawn this suit against them.

A. Whether the instant application is rightfully before this court.

36. It is not in dispute that the Plaintiffs/Respondents withdrew this suit vide a Notice of withdrawal dated 22nd December, 2017. It also not in dispute that the suit was marked as withdrawn on 22nd January, 2018.
37. It is also not in dispute that at the time of marking the suit as withdrawn, this court directed that any party may apply for costs.
38. The Respondent submits that the Applicant should not have filed the present application but should have instead responded to its notice of preliminary objection. I do not agree with this especially in light of the directions issued on the 22nd January, 2018.
39. While it is true that the Defendants/Applicants jumped the gun by filing the said bill of costs yet the court had not made any determination on who was to be awarded costs, the present application remedies the said error. Consequently, the preliminary objection has been overtaken by events.
40. It is the mandate of this court to administer justice without undue regard to procedural technicalities. This is set out in Article 159 (2) (d) of *the Constitution* of Kenya, 2010.
41. The Court of Appeal in the judicial decision of Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR held thus;

“It is globally established that where procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness...

In modern times, the courts do not apply or enforce the words of statute or rules, but their objects, purposes and spirit or core values...reiterate what the court said in Githere V. Kimungu [1976 - 1985] E.A. 101, that:

“...the relation of rules of practice to the administration of justice is intended to be that of a handmaiden rather than a mistress and that the court should not be too far bound and tied by the rules, which are intended as general rules of practice, as to be compelled to do that which will cause injustice in a particular case.

...A look at recent judicial pronouncements from all the three levels of court structure leaves no doubt that the courts today abhor technicalities in the dispensation of justice.”
42. This court in its ruling delivered on 6th December, 2021 declined to make orders on cost and stated that it was an issue for an application under Order 25. The present application is the one envisioned in the said ruling and the question of entitlement to costs is now ripe for determination.
43. I find that this application is properly before this court and complies with the directions issued on 22nd January, 2018.



B. Whether this court should order that the Plaintiff do pay costs to the Defendants having withdrawn this suit against them.

44. Section 27 (1) of the [Civil Procedure Act](#) provides as follows: -

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.

45. Halsbury's Laws of England 11th Edition at page xx states that

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice” (Emphasis added).

46. Judicial Hints on Civil Procedure, 2nd Edition, (Nairobi) Law Africa) 2011, page 94 discusses the subject of costs. It is stated thus;

“ Costs are {awarded at} the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise...”

47. The Supreme court in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, SC Petition No 4 of 2012; [2014] eKLR held as follows;

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.”(Emphasis mine).

48. In *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another* [2016] eKLR the Learned Judge held thus;

“To my mind, in determining the issue of costs, the court is entitled to look at inter alia

i. the conduct of the parties,



- ii. the subject of litigation,
- iii. the circumstances which led to the institution of the proceedings,
- iv. the events which eventually led to their termination,
- v. the stage at which the proceedings were terminated,
- vi. the manner in which they were terminated,
- vii. the relationship between the parties and
- viii. the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of *the Constitution*.

In other wards the court may not only consider the conduct of the party 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.”

49. The decision of Cecilia Karuru Ngayu (Supra) offers useful guidance in deciding whether the 1st and 2nd Defendants/ Applicants are entitled to costs. The conduct of the parties prior and after filing this suit is relevant for purposes of this determination. I must also take into consideration the level of involvement by the parties after filing of this suit so as to appreciate the efforts and/or trouble they have undergone.
50. The record shows that this suit was instituted in the year 2013 by 6 Plaintiffs in their capacity as members of Solai Ruyobei Farm Ltd. The first time the matter came up in court was on 15th August, 2017 for the hearing of an application dated 26th July, 2017 which application was not certified as urgent. The said application was filed by the 1st and 2nd Defendants.
51. On the 13th October, 2017, the 1st and 2nd Defendants set down the application dated 26th July, 2017 for hearing. It was scheduled for hearing on 16th January, 2018. On the said date, the 1st and 2nd Defendants did not attend court and the matter was adjourned.
52. The record shows that the application dated 26th July, 2017 came up for hearing on 22nd January, 2018. On the said date, the Defendants explained that they needed to file a supplementary affidavit. The Court noted that the application sought orders of dismissal of the suit for want of prosecution and brought it to the attention of the Defendants that the Plaintiffs had on 22nd December, 2017 filed a notice of withdrawal of the suit. On this same date, the suit was marked as withdrawn.
53. What was left after this withdrawal was an order for return of the Title deed and certain company documents belonging to the Solai Ruyobei Farm Ltd that had been deposited in court. On 1st February, 2018, the court made a ruling in which it ordered that the documents and title deed be released to the 1st, 3rd and 6th Plaintiffs.
54. Subsequent to these orders, the court records show that the proceeding that were undertaken were in respect of release of the said securities and title deeds including. Particularly, the title deed deposited in court was misplaced and it was necessary for the court to aid in the replacement of it as this process was ongoing it was alleged that the Defendants were in contempt of the order directing the release of the title deed to the 1st, 3rd and 6th Plaintiffs. The allegation was that they had obtained the provisional title deed in disobedience of the court order.
55. There was another application filed by the 1st and 2nd Defendant seeking review of the order releasing the title deed and company documents to the 1st, 3rd and 6th Plaintiffs. This application was dismissed



56. In summary this suit is what a conflict between warring factions of a company looks like. This is properly captured in the letter dated 2nd August, 2018 written by the Chief Land Registrar to this court. It says in part

“... The office therefore summoned the representatives of the different factions of the company and made a hearing on 27th July 2018. The representative could not agree on bonafide directorship of the company. Therefore, the participants agreed unanimously at the hearing that the provisional certificate of title may be applied by the court in whose custody it was lost and issued to the court by the registrar. In the alternative, the court should issue an order determining the bonafide directors who can make the application for title...”

57. The relationship between the Plaintiffs and 1st- 3rd Defendant can be seen from the plaint and written Statement of Defence. The Plaintiffs are members of a company i.e. Solai Ruyobei Farm Limited while the 1st-3rd Defendants are/were officials of the Solai Ruyobei Farm Limited.

58. The bulk of the proceedings after withdrawal of these suit, in my view, are representative of management squabbles within Solai Ruyobei Farm Limited.

Disposition.

59. Considering the entire chain of events from filing this suit up to its withdrawal, also considering the relationship that exists/existed as between the Plaintiffs and the 1st and 2nd Defendant; which has its roots in the Solai Ruyobei Farm Limited, considering that Plaintiffs and 1st and 2nd Defendant believed to be protecting the interests of the said company (as can be deduced from the Plaint and Written Statement of Defence) and further considering that the trouble that has been occasioned to them or the effort expended by parties in instituting or defending these proceeding is minimal, in exercise of my discretion and in order to meet the ends of justice for all parties I hereby make the following orders:-

- a. The application dated 4th November, 2022 is hereby dismissed
- b. with no order as to costs.
- c. The Bill of Cost filed by the 2nd and 3rd Defendant in this matter is hereby struck out.
- d. This suit stands withdrawn and each party shall bear own costs.

60. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 23RD DAY OF NOVEMBER, 2023

L. A. OMOLLO

JUDGE

In the presence of:

Mr. Maragia for the Defendant/Applicant.

Mr. Opar for the Plaintiff

Court Assistant: Ms. Monica Wanjohi.

