



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Kenya Commercial Bank & another (Suing as the Executor of the Estate of Simon Hongo Ominde (Deceased) v Muiruri t/a Leakeys Auctioneers & 6 others (Environment & Land Case 248 of 2019) [2023] KEELC 21873 (KLR) (21 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21873 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 248 OF 2019
LN MBUGUA, J
NOVEMBER 21, 2023**

BETWEEN

**KENYA COMMERCIAL BANK AND ELIZABETH OGAJA (SUING AS
THE EXECUTOR OF THE ESTATE OF SIMON HONGO OMINDE
(DECEASED) PLAINTIFF**

AND

**GEORGE MUIRURI T/A LEAKEYS AUCTIONEERS 1ST DEFENDANT
EQUITY BANK KENYA LIMITED 2ND DEFENDANT
GOLDEN SEQUINS LIMITED 3RD DEFENDANT
CHARU LIMITED 4TH DEFENDANT
CHIEF LAND REGISTRAR 5TH DEFENDANT
DIRECTOR OF SURVEY 6TH DEFENDANT
THE HON ATTORNEY GENERAL 7TH DEFENDANT**

RULING

1. The Plaintiffs commenced this suit by a plaint dated 23.7.2019 and amended on 18.12.2020. On 19.10.2023, the plaintiffs made an application to withdraw this suit with no orders as to costs. The 2nd Defendant did no object to the withdrawal of the suit but prayed for costs. The 1st, 5th -7th Defendants did not raise any objections, though I note that the case against 3rd and 4th defendants had earlier on been dismissed.
2. The Plaintiffs' submissions are dated 27.10.2023, where they urge the Court to consider that the Plaintiffs being executors filed this suit in an effort to safeguard the interests of the estate of the deceased



from any illegal dealings. That they had sought to restrain the Defendants from selling the land known as Land Reference No. 13400 (I.R No. 39372) registered in the names of Simeon Hongo Ominde (Deceased) which was the subject matter of litigation.

3. It is further submitted that on 20.9.2021, the suit property was sold to 3rd parties which led to the suit being nugatory. They argue that each party should bear their own costs as there is no successful party. They rely on the case of *Jasbir Singh Rai & others v Tarlochan Rai & Others* [2014] eKLR as well as the case of *Republic v Rosemary Wairimu Munene, Ex-Parte Applicant v Ihururu Dairy Farmers Co-operative Society Ltd* Judicial Review Application No. 6 of 2014.
4. The submissions of the 2nd defendant are dated 2.11.2023 where they aver that they have filed various documents including the statement of defence in a quest to defend the suit. That they even defended the plaintiff's application dated 23.7.2019 where an order of maintenance of status quo was allowed.
5. They further contend that the suit has been in court for a period of 4 years where the plaintiff was not complying with courts directions geared towards the finalization of the suit. For instance, plaintiff failed to comply with directions given on 12.10.2021 relating to service upon the 3rd and 4th defendants which led to the dismissal of the case against the aforementioned defendants on 9.12.2021. The plaintiff was also never ready to proceed with the case on the dates the matter was listed for hearing.
6. The 2nd defendant avers that costs follow events even though the court has discretion to award the same. That in the case at hand, the 2nd defendant was caused to participate in these proceedings hence they should get costs.
7. In support of their case, the 2nd defendant relies on the cases of Kabarnet HCCC No. 2 of 2017; *Samson K.A. Tim vs. Machange, Robert Shaw & 2 others vs. Director General NEMA & 2 others* (2022) eKLR and *Pacis Insurance Company Limited vs. Francis Njeru Njoka* [2018] eKLR.
8. It is trite law that Costs is a discretionary award given to a successful party in tandem with the provisions of section 27 of the *Civil Procedure Act*. See *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR.
9. The record indicates that indeed the 2nd defendant has dutifully been trying to defend the suit for a period of 4 years, including filing a statement of defence and a trial bundle. It is also noted that after the plaintiff's successful prosecution of their application for injunction dated 23.7.2019, the plaintiffs became indolent, sometimes even failing to give instructions to their advocates, and they were also not ready to proceed whenever the matter was set down for hearing.
10. Further, it is noted that the reason advanced by the Plaintiffs for withdrawing the suit is that the subject matter was sold on 20.9.2021 yet the application for withdrawal was brought forth 2 years later.
11. In light of the foregoing analysis, I hereby award costs of the suit to the 2nd defendant as against the plaintiffs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Muvidye for Plaintiff

Kibara for 2nd Defendant



Kabuthu for 1st Defendant

JUNE

COURT ASSISTANT

