



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CAUSE NO. 29 OF 2020

ROBERT SHAW.....1ST PLAINTIFF

DAVID MAMBO.....2ND PLAINTIFF

SIMON HERD.....3RD PLAINTIFF

-VERSUS-

DIRECTOR OF GENERAL NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....1ST DEFENDANT

CHINA QINGJIAN INTERNATIONAL GROUP(KENYA) LIMITED.....2ND DEFENDANT

KENNEDY SIMIYU.....3RD DEFENDANT

RULING

1. On 17th November 2021, when this matter came up for mention, **Mr. Mereka Learned Counsel** for the Plaintiffs' informed the Court that save for the 3rd Defendant, the other parties had agreed to have the suit withdrawn with no orders as to costs.
2. The plaintiffs' suit herein was initiated vide a plaint dated 17th February 2020 together with a Notice of Motion dated the same day. The plaint sought a number of declarations against the defendants.
3. The 2nd and 3rd defendants filed their responses to the plaintiffs' applications dated 17th February 2020 and 26th February 2020 on diverse dates. The 3rd Defendant also filed a preliminary objection dated 4th March 2020 through his **Counsel M/s Magare Musundi & Co. Advocates**. The 1st Defendant did not file any response.
4. On, 19th October 2021, when the matter came up for mention before the Deputy Registrar, the Plaintiffs' counsel informed the Court that that the site and plant was being decommissioned and that the Plaintiffs seeks to have the suit withdrawn with no orders as to costs. The Court was also informed that save for the 3rd Defendant, the 2nd Defendant had no objection to having the matter withdrawn with no orders as to costs. The Deputy Registrar of this Court subsequently directed the matter to be mentioned before the Judge on 17th November 2021 for further directions.
5. Pursuant to the directions issued by the Court on 17th November 2021, the Court directed that the issue of costs be canvassed through written submissions. The Plaintiffs' submissions were filed on 29th November 2021 while the 3rd Defendant's submissions were filed on 1st December 2021.
6. The gist of the Plaintiffs' submissions was that the suit filed herein was a public interest litigation which was filed by **Robert Shaw, David Mambo and Simon Herd** on behalf of Windy Ridge Residents Association and by extension Karen Langata District Association.
7. It was the Plaintiffs' contention that the residents of Windy Ridge and Karen Langata District Association are entitled to a clean and healthy environment and that the only order that was sought against the 3rd defendant was a declaration that the EIA report of 17th October 2017 was procedural and unlawfully prepared and therefore null and void.

8. The Plaintiffs referred to several international texts and publications on public interest litigation and further submitted that this being a public interest matter and particularly concerning the right to a clean and healthy environment, the court should not award any costs since doing so would have a negative effect to those who strive to ensure observance of the Constitution.

9. The Plaintiffs also referred to the following authorities in support of their case, **Republic v Independent Electoral and Boundaries Commission & 2 Others Exparte Alinoor Derow Abdullahi & Others [2017]**, **John Harun Mwau and 3 Others v Attorney General and 3 Others [2012] eKLR**, **Rufus Njuguna Miringu & Another v Martha Muriithi & 2 Others [2012] eKLR among others.**

10. On the other hand, the 3rd Defendant submitted that that he was entitled to costs and that ordinary costs follow the event. It was his submission that he was sued in his personal capacity and that he incurred costs in defending the suit. He also stated that he had filed voluminous documents in support of his defence.

11. In response to the Plaintiffs submissions on whether or not this matter was a public interest litigation, he submitted that the same was not the true position since the suit was instituted by the Plaintiffs in their own personal capacities with a view of stopping the construction of a major road serving millions of residents who use it to access Ngong and Kiserian area and as such it was also a waste of valuable judicial time.

12. It was further submitted that, prior to the request for withdrawal of the suit, the 3rd Defendant had successfully defended two applications seeking interim orders and had also complied with pre-trial directions and that the matter had been certified ready for hearing when the Plaintiffs decided to withdraw.

13. In support of his submissions, the 3rd Defendant relied on the cases of **Simon K.A Tim v D.M Machage (2019) eKLR**, **Truth Justice and Reconciliation Commission v Chief Justice of the Republic of Kenya [2012] eKLR**, **Okiya Omtatah v Communication Authority of Kenya & 14 Others [2015] eKLR**, **Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another [2016] eKLR** and **Nicholas Kiptoo Arap Korir Salat.**

14. I have considered the submissions and authorities relied on by parties. The single issue for determination is whether or not costs should be awarded to the 3rd Defendant upon the withdrawal of the suit herein.

15. Costs of a suit or other proceedings are always in the discretion of the Court in terms of **section 27 of the Civil Procedure Act**, which provides as follows:

“27. Costs

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.

(2) The Court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

16. It is a settled principle of costs that costs follow the event, meaning that the successful party takes the costs unless the Court for sufficient reason orders otherwise. In considering this exercise of the discretion, the Court may properly consider the length of time that the suit or proceedings has been going in Court before the withdrawal or other determination; the nature of the relief sought; the steps taken in the proceedings; the stage of hearing of the suit or proceedings; the need to promote access to justice by indigent suitors; and other sufficient reason in the interest of justice.

17. In other words, the court may not only consider the conduct of the party in the actual litigation, but the matters which led up to litigation, the eventual termination thereof and the likely consequences of the order for costs. See **Hussein Janmohamed & Sons Vs. Twentsche Overseas Trading Co. Ltd [1967] EA 287** and **Mulla (12thEdn) P. 150.**

18. 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 v Evrest 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.”

19. Furthermore, this discretion must be exercised judiciously and courts should not deprive a party of his or her costs unless it can be shown

that they acted unreasonably. The Halsbury's Laws of England, 4th Edition (Re-issue), {2010}, Vol.10. para 16, notes 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).

20. In the instant cases, the request to have the suit withdrawn with no orders as to costs was made on 28th October 2021. At that point in time, the 3rd Defendant who had been sued in his personal capacity had indeed made efforts and acted in defending the suit. The 3rd Defendant had already filed his response to the applications dated 17th February 2020 and 26th February 2020 as well as a Notice of Preliminary Objection dated 4th March 2020 and as such it is evident that the 3rd Defendant had already incurred costs in the matter.

21. I have also perused the pleadings filed by the Plaintiffs and noticed that there was no authority attached either as part of the Plaintiffs bundle of documents or separately confirming that the Plaintiffs' herein had initiated the suit on behalf of the residents of Windy Ridge and Karen Langata District Association. There was also no evidence annexed confirming whether the Plaintiffs were officials or members of Windy Ridge Association and or Karen Langata District Association. As such and in the absence of any evidence to the contrary, the contention by the Plaintiffs that this suit was a public interest litigation brought on behalf of those residents is misleading.

22. I do not see, in terms of the wording of section 27 of the Civil Procedure Act, a “good reason” to order against the general principle that “costs shall follow the event.” Once withdrawn the suit wholly, the suitor must as a general rule pay to the defendant.

23. Finally, in conclusion having considered the proceedings and the entire circumstances of the case, I am persuaded that the 3rd Defendant is entitled to costs herein. **Accordingly, I direct that costs shall be paid by the Plaintiffs to the 3rd Defendant, however the same shall only be limited to costs for defending the two applications that had been filed by the Plaintiffs.**

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17TH DAY OF JANUARY 2022

E. K. WABWOTO

JUDGE

In the presence of: -

Ms. Njoroge h/b for Mr. Mereka for the Plaintiff

Ms. Njomo h/b for Mr. Musundi for the 3rd Defendant.

Court Assistant; Caroline Nafuna.

E. K. WABWOTO

JUDGE