



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO. 234 OF 2011

SALIM A. MUHSIN & 3 OTHERSPLAINTIFFS

-versus-

NEW MAMBA APARTMENTS LIMITED.....1ST DEFENDANT

THE MUNICIPAL COUNCIL OF MOMBASA..... 2ND DEFENDANT

RULING

1. By a Complaint dated and filed on 15th August 2011, the Plaintiffs claimed that the 2nd Defendant had approved the change of user of the 1st Defendant's Plot No. MN/1/6614 ("the subject plot") from OPHD to multiple dwelling blocks of apartments and penthouse without addressing the Plaintiffs' objections. The Plaintiffs also alleged that the said approval did not consider whether the proposed change of user was in tandem with the Local Physical Development Plan for the area; whether the approval conformed to any alterations to the Local Physical Development Plan approved by the Director of Physical Planning; and whether the approval will have injurious impact on the environment.
2. The Plaintiffs further alleged that it was wrong for the 2nd Defendant to commence construction on the subject plot without first fulfilling the conditions given by the 2nd Defendant, namely: endorsement of the new user on the title by the Commissioner of Lands; determination of new rates by the Chief Valuer of Municipal Council of Mombasa; the Director of Survey and Planning making comments on the change of user; the 1st Defendant complying with sections 36, 41 and 52 of the Physical Planning Act and any approved zoning policy; submission by the 1st Defendant of amended building plans that conform to conditions given by the 2nd Defendant; and compliance with all legal requirements in respect of the change of user.
3. Further, the Plaintiffs claimed that the 1st Defendant failed to undertake an environmental impact assessment study of the intended development and change of user and did not obtain an Environmental Impact Assessment License from the National Environment Management Authority (NEMA). The Plaintiffs, therefore, contended that the 2nd Defendant's approval of the 1st Defendant's application for change of user of the subject plot was wrong and or illegal as it did not address the concerns of the Plaintiffs and did not comply with the requirements of the law.
4. Alongside the filing of the Complaint, the Plaintiffs filed an application for interlocutory injunction seeking to bar the continuation of the 1st Defendant's development on the subject plot. Tuiyott, J. in his ruling delivered on 6th March 2012 restrained the 1st Defendant, its employee, agents, servants, assignees, devisees and/or successors in title from commencing and/or proceeding with the project and/or construction on the subject plot before obtaining Environment Environmental Impact Assessment License.
5. When the matter came up for hearing before this court on 4th November 2015, Mr. Odera, learned counsel for the Plaintiffs applied to withdraw the case on the basis that the construction which the Plaintiffs sought to bar has since been undertaken to completion and therefore the case was

- overtaken by events. The court endorsed the prayer to withdraw the suit and accordingly the suit was marked as withdrawn. The parties' respective advocates then addressed the court, through oral submissions, on who should bear the costs of the withdrawn case.
6. Mr. Odera for the Plaintiffs submitted that his clients should not be ordered to pay costs of the suit because when the Plaintiffs came to court, they sought to restrain the development on the subject plot on the basis that the 1st Defendant had not obtained a license. That at the time of filing the case, the Plaintiffs had a good cause of action as against the Defendants. That the suit has been withdrawn to save on judicial time because proceeding with it will be an academic exercise since the development it sought to restrain has since been completed.
 7. Mr. Odera further submitted that since the ruling on the interlocutory application had found the 1st Defendant on the wrong, the 1st Defendant should pay the costs of the suit. However, he conceded that in the circumstances of this case, the Plaintiffs are amenable to an order that each party should bear own costs.
 8. Mr. Taib, learned counsel for the 1st Defendant, submitted that the Plaintiffs should be ordered to pay costs of the suit because they withdrew the case on realization that they have no case against the Defendants. Counsel argued that there was no injunction to bar the 1st Defendant from constructing since the injunction had either been discharged or it lapsed. The record shows that the injunction died a natural death because it was conditional to the 1st Defendant obtaining an Environmental Impact Assessment license, which it did.
 9. Mr. Taib continued that if the 1st Defendant proceeded with construction against an existing injunction, the Plaintiffs would have instituted contempt of court proceedings against it but they did not. Counsel further submitted that the nature of the prayers in the Plaint were such that the same could not be overtaken by events. Mr. Taib submitted that it is the 1st Defendant's side that has always fixed the case for hearing and not the Plaintiffs who had brought it to court. Counsel informed court that the Environment Impact Assessment License was obtained by the 1st Defendant and filed in court, albeit after the case had been filed.
 10. The 1st Defendant's learned counsel lamented that the Plaintiffs did not even bother to inform him of their intention to withdraw the suit. While submitting that costs follow the event, counsel stated that he had traveled from Nairobi together with the 1st Defendant's witnesses and had taken two days to prepare for the hearing. That he was therefore entitled to costs.
 11. Mr. Mutiso appearing for the 2nd Defendant submitted that since the 2nd Defendant filed its Defence and complied with all pre-trial procedures, it was entitled to costs irrespective of the reason for the withdrawal of the case.
 12. The one and only issue for the court's determination is, who should bear the costs of the withdrawn suit? The provision that deals with withdrawal and discontinuance of suits after the same has been set down for hearing, like in this case, is **Order 25 Rule 2** of the Civil Procedure Rules, 2010 which provides that:

“Where a suit has been set down for hearing the court may grant the plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just.” (Underlining mine)

13. Under this Rule, the court is given unfettered discretion to allow the discontinuance or withdrawal of a suit on terms as to costs. That an order awarding costs is the court's discretion has been stated in many cases inter alia; **KAY CONSTRUCTION COMPANY LIMITED V ECO BANK KENYA LTD & 6 OTHERS [2015] eKLR** Gikonyo, J. stated as follows:

“Costs follow the event. They are, therefore, discretionary and not awarded as a matter of course. The discretion must, however, be exercised judicially and judicious[ly]; not capriciously; not whimsically but upon define[d] legal principles. Also, it should be noted that the purpose of costs is not to punish the losing party, rather to compensate the successful party for the trouble taken in the proceeding or defending the suit.

14. the case of **ROSALINE NJERI MACHARIA v. DAIMA BANK LIMITED [2012] eKLR**, Mabeya, J. stated the factors a court should consider in awarding costs when he held that:

“Accordingly, the issue of whether or not costs of the suit are to be awarded by the court is in the discretion of the court. Like in all other discretions, that discretion has to be exercised judiciously and not capriciously. It depends on the circumstances of each individual case...”

In my view, the factors which a court has to consider in deciding whether or not to order costs, is the nature of the allegations a Plaintiff has made against a Defendant, the nature of the claim, the likelihood and nature of liability that would attach against a Defendant if he does not defend the claim. Also the court should consider the nature of the defence, if any, filed by the Defendant and the stage at which the suit is being withdrawn or discontinued.”

15. In deciding how to exercise its discretion on costs, this court reverts to the Ruling delivered in this case by Tuiyott, J. on 6th March 2012. At page 12, the learned Judge stated as follows:

“I now turn my attention to the compliance of EMCA. This court has [been] shown, and accepts, that NEMA has approved the proposed project vide a letter of 12th August 2011 subject to some conditions. The letter required the 1st Defendant to confirm in writing that it would comply with the conditions to enable the authority issue a license. That confirmation was made by the 1st Defendant through its letter of 12th August 2011.

No license was shown to this court by the 1st Defendant. A license is issued upon approval (Regulation 24 of the Environmental (Impact Assessment and Audit) Regulations). A license is the formal expression of the approval. A developer must have the licence before commencing a project. Yet it is evident that the 1st Defendant commenced the construction even before it got approval. And there is no evidence that the licence has since been issued. On this the plaintiffs grievance is well founded.”

At page 13 the learned Judge stated that:

“...There is however non-compliance of the provisions of EMCA. This court will not countenance that breach, however minimal or small it may appear. The result is that the court will not allow the project to continue until it is granted an Environmental Impact Assessment License.”

16. The nature of the Plaintiffs' claim has been discussed above, it is manifestly clear that at the time the Plaintiffs filed this case, the 1st Defendant had not obtained Environmental Impact Assessment License. Whether the 1st Defendant was at fault or not is an issue that would have been determined had the case proceeded to full trial. What is clear, however, is that the Plaintiffs' decision to file this case was triggered by, *inter alia*, the absence of the Environmental Impact Assessment License. The Plaintiffs therefore did not just come to court but had a just cause for doing so.
17. The 1st Defendant, subsequent to the filing of the case, obtained Environment Impact Assessment License and therefore complied with the order of Tuiyott, J. of 6th March 2012 which had restrained it from proceeding with the project until it obtained an Environmental Impact Assessment License. Upon obtaining the license, the 1st Defendant proceeded with the construction thereby rendering the Plaintiffs' case untenable. In my view, the Plaintiffs cannot be faulted for filing the case and subsequently withdrawing it after the circumstances obtaining at the time of its filing changed. The decision of the Plaintiff to file the case was occasioned and informed by the 1st Defendant's failure to obtain the requisite license. The Plaintiff therefore cannot be condemned wholly to pay the costs of the suit. Instead, each party should bear own costs.
18. However, I take cognisance of the fact that on 4th November 2015 when this case was scheduled for full trial, the Plaintiffs did not bother to notify the Defendants of their intention to withdraw the suit. Counsel for the Defendants did not only attend court but the 1st Defendant's witnesses are said to have traveled from Nairobi for the hearing. It is only reasonable that the Defendant's

advocates be awarded costs of getting up fees, attendance for that day as well as the witnesses' travel and subsistence expenses for that day.

19. The record shows that the defendants had previously been awarded costs of attendance in these proceedings. Specifically, on 17th April 2013, Mukunya, J. ordered the Plaintiffs to pay the Defendants costs of that day. These, plus any other costs previously awarded expressly, are costs that the Defendants are entitled to recover despite my finding that each party should bear own costs of the suit.

20. In the end, the orders that commends themselves to me are:

- i. **Each party is ordered to bear their own costs of the suit.**
- ii. **Notwithstanding (i) above, the 1st Defendant are awarded costs of getting up for the preparation of hearing of 4th November 2015 and costs of advocates attendance and witnesses expenses for that day plus any other costs previously awarded to them in these proceedings.**
- iii. **Parties to agree on the costs in (ii) above in default of which the same be taxed by the Taxing Master.**
- iv. **The 2nd defendant did not establish any costs incurred for the day.**

RULING DATED & DELIVERED IN MOMBASA THIS 30TH DAY OF NOVEMBER 2015

A. OMOLLO

JUDGE