



REPUBLIC OF KENYA



**KENYA LAW**  
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**Getare & 2 others (Suing on their own behalf and on behalf of their neighbours) v Nyakiba & 3 others (Land Case 270 of 2018) [2022] KEELC 3582 (KLR) (19 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3582 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**  
**LAND CASE 270 OF 2018**  
**FM NJOROGE, J**  
**MAY 19, 2022**

**BETWEEN**

**JEFFERSON AUNGA GETARE ..... 1<sup>ST</sup> PLAINTIFF**  
**SIMON MURUNGA GACHENGO ..... 2<sup>ND</sup> PLAINTIFF**  
**JESSICAH A. MUNG'AU ..... 3<sup>RD</sup> PLAINTIFF**  
**SUING ON THEIR OWN BEHALF AND ON BEHALF OF THEIR**  
**NEIGHBOURS**

**AND**

**PHILLIS NYABOKE NYAKIBA ..... 1<sup>ST</sup> DEFENDANT**  
**COUNTY GOVERNMENT OF NAKURU ..... 2<sup>ND</sup> DEFENDANT**  
**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY**  
**(NEMA) ..... 3<sup>RD</sup> DEFENDANT**  
**NATIONAL CONSTRUCTION AUTHORITY (NCA) ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The plaintiffs filed a notice of withdrawal of suit dated October 8, 2021 and in that notice filed under order 25 rule 1 of the [Civil Procedure Rules](#) they stated as follows:

“Take notice that the plaintiffs herein... have wholly withdrawn the case herein against the defendants in its entirety.

Unfortunately, the substratum of the case has been overtaken by events given that the construction sought to be halted through an order of this honourable court pending full hearing of the case has since been completed and allegedly occupied upon the court’s refusal to grant the temporary injunctive orders sought.



It is thus proposed that each party to bear its costs in a bit to balance the scales of justice.

Ochang Ajigo Advocates for the plaintiffs.

2. The last time this matter came up in court for hearing was October 12, 2021. Mr Ochang for the Plaintiff, Ms Wangari for the 1<sup>st</sup> Defendant and Mr Kinuthia for the 2<sup>nd</sup> Defendant appeared before me in the absence of the 3<sup>rd</sup> and 4<sup>th</sup> defendants. Mr Ochang informed the court that whatever was intended to be halted had already occurred and that the defendants do not deserve costs. The matter was adjourned to February 22, 2022 on which date Mr Ochang and Ms Wangari appeared in the absence of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. Mr Ochang applied to withdraw the suit entirely by virtue of the above cited notice which had been served on all the parties. He stated that the application for injunctive orders had failed and that the 1<sup>st</sup> defendant benefited from this. To balance the scales of justice each party ought to bear its own costs. He submitted that it would be unfair to charge costs on his clients while the 1<sup>st</sup> defendant is enjoying income from the developments on the suit land. Ms Wangari on the other side submitted that the plaintiffs should pay costs. She admitted that the application for injunction was abandoned so that the hearing of the main suit may be fast tracked in that it matters not that construction had been completed; she stated that the 1<sup>st</sup> defendant had always been ready to proceed while the plaintiffs' general conduct showed that they were not ready to proceed. She stated that her clients had suffered greatly and that she and the plaintiffs are neighbours. She averred that the area is not zoned as was pleaded by the County Government (2<sup>nd</sup> defendant in its defence). She stated that the area was a residential single dwelling unit area but her clients had been granted licence to develop multi-dwelling units and that other high-rise apartments exist in the same area. She stated further that the Environmental Impact Assessment had been conducted and submitted that the decision to licence her client's development was made after that EIA had been considered.
3. Mr Ochang further submitted the building was wall to wall with his clients' houses and his clients had settled there with knowledge that the area was a single unit dwelling area and that the 1<sup>st</sup> defendant's developments have adversely affected the flow of natural air sunlight and the plaintiffs' privacy. He expressed the view that the 1<sup>st</sup> defendant would not be prejudiced. He submitted that the tenements are ¼ acre in size.
4. After these submissions the court ordered the suit marked as withdrawn against all the defendants and reserved a date for the ruling on the issue of costs.
5. The provisions of the order 25 of the Civil Procedure Rules, 2010 provide for withdrawal, discontinuance and adjustment of suits. That order read as follows: -
  1. At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.
  - (1) Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn, upon the filing of a written consent signed by all the parties.
  - (2) 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."



6. 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:

“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.”

7. In the case of [Samson K A Tim v D M Machage](#) [2019] eKLR, Muriithi J opined as follows:

“In considering this exercise of the discretion, the court may properly take into account 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.”

8. In the case of *Samson (supra)* the court observed that on September 11, 2018, a week before the date fixed for the highlighting of submissions on the Preliminary Objection on September 18, 2018, the plaintiff filed the Notice of Withdrawal of the Suit.

9. The court while awarding costs for the withdrawn suit in that case observed as follows:

“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 withdraw the suit wholly, the suitor must as a general rule pay to the defendant the costs of the suit. I do not see a good reason in this suit to depart from this general rule.”

10. It is clear that the issue of whether the plaintiff should pay any of the defendants costs prompts necessity to refer to the court record to establish what nature of claim had been filed by the plaintiff, the progress of the suit and any other relevant matter that may assist the court decide whether costs may be awarded or not.

11. The plaintiffs filed suit on July 27, 2018 seeking a declaration that the subject area is designated as a private residential single dwelling unit area and that the purported change of user of the suit property to a high-rise commercial multi-dwelling development is illegal null and void, a permanent injunction to restrain the 1st defendant from further construction, and a permanent injunction to restrain the 2nd, 3rd or 4th defendants from granting any approval for change of user to the 1st defendant’s project.

12. In its defence filed on December 13, 2018 the 2<sup>nd</sup> defendant denied the claim and averred that the notice of change of user was advertised in the Daily Nation on June 1, 2018 and that the public was



notified about the 1<sup>st</sup> defendant's proposed development through an onsite board notice placed on site on May 18, 2018. It further stated that the whole of Kiamunyi region is not served by conventional sewer system and that all the properties there are serviced by individual septic tanks designed on specific development. The 2<sup>nd</sup> defendant did not see any risk environmental or otherwise in the 1<sup>st</sup> defendant's developments and its view was that the change of user in respect of the suit property was carried out in accordance with the laid down procedures. The 1<sup>st</sup> respondent filed her defence denying the claim and reiterated the matters pleaded by the 2<sup>nd</sup> respondent as stated herein before.

13. The suit filed by the plaintiffs was essentially an attempt to preserve the environment they believed befitted the area they were living in. They have ordinary single dwelling units which they desired to protect from the effects of the 1<sup>st</sup> defendant's highrise development. There is clear evidence arising from the pleadings of the parties that a change of user of the 1<sup>st</sup> defendant's plot was necessary before development of the highrise structure she put up. That can only imply that before the change of user, the 1<sup>st</sup> defendant's property was just like the plaintiffs' in terms of the developments it could host. The suit never went to the full hearing. The withdrawal of the suit is based on the plaintiff's perception of futility of pursuit of the court process, a dangerous precedent in itself since it means that no final determination has been made regarding their rights vis a vis the 1<sup>st</sup> defendants, and also that all the parties and particularly the regulatory entities joined to the suit will not stand properly advised by a final judgment of this court on the issue, whatever that judgment could have been. From the submission made by Mr Ochang in respect of the issue of costs, the plaintiffs apparently circumscribed the powers of the court to an injunction and envisaged no mandatory orders and so withdrew the suit.
14. The very fact that piecemeal change of user was necessary for the 1<sup>st</sup> defendant's property before development of highrise multi-dwelling structures implies a fluidity that can not allow precise prognostication of the final decision of the court on the issue of the propriety of the approval of change of user itself and the development of the 1<sup>st</sup> defendant's development. It implies a lacuna occasioned by lack of comprehensive and planning and strategic environmental; assessments which are endemic phenomena in the nation. Perchance there is primary school adjacent to a project proponent's land, would it be automatic that an application for change of user from residential into a bar or wines and spirits business can be allowed by the regulatory authorities? I do not think so, and that is what I mean when I state that there is "fluidity." On the other hand, if there was a much more specific and provable regulation of the typology of structures that can be erected within the vicinity of the plaintiff's neighbourhood as well as their use, there would have been no need for change of user, and the court's response to the injunction application filed herein may have been different. Consequently, the plaintiffs need for an interpretation of the situation by this court was amplified by the defendant's attempts to develop her land in a manner the plaintiffs never envisaged while acquiring their plots and there were indeed triable issues.
15. Also, in these matters even the claim such as that raised by a section of defendants that "...other developers have done the same thing nearby..." is not sufficient to demonstrate to court that the plaintiff's claim was utterly hopeless for a wrong can not be made right by another wrong.
16. The upshot of the foregoing is that the matter was purely environmental and the *Constitution* of Kenya 2010 espouses environmental protection. At article 70 of the *Constitution*, the following provisions can be found:

“Enforcement of environmental rights

- (1) If a person alleges that a right to a clean and healthy environment recognised and protected under article 42 has been, is being or is likely to be, denied,



violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.

- (2) On application under clause (1), the court may make any order, or give any directions, it considers appropriate—
  - (a) to prevent, stop or discontinue any act or omission that is harmful to the environment;
  - (b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or
  - (c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.
- (3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.”

17. Section 3 of the *Environmental Management and Co-Ordination Act* 1999 provides as follows:

“Entitlement to a clean and healthy environment

- (1) Every person in Kenya is entitled to a clean and healthy environment in accordance with the *Constitution* and relevant laws and has the duty to safeguard and enhance the environment.
- (2) The entitlement to a clean and healthy environment under subsection (1) includes the access by any person in Kenya to the various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes.

(2A) Every person shall cooperate with state organs to protect and conserve the environment and to ensure the ecological sustainable development and use of natural resources.
- (3) If a person alleges that the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may on his behalf or on behalf of a group or class of persons, members of an association or in the public interest may apply to the Environment and Land Court for redress and the Environment and Land Court may make such orders, issue such writs or give such directions as it may deem appropriate to—
  - (a) prevent, stop or discontinue any act or omission deleterious to the environment;
  - (b) compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment;
  - (c) require that any on-going activity be subjected to an environment audit in accordance with the provisions of this Act;



- (d) compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and
- (e) provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing.
- (4) A person proceeding under subsection (3) of this section shall have the capacity to bring an action notwithstanding that such a person cannot show that the defendant's act or omission has caused or is likely to cause him any personal loss or injury provided that such action—
  - (a) is not frivolous or vexatious; or
  - (b) is not an abuse of the court process.
- (5) In exercising the jurisdiction conferred upon it under subsection (3), the Environment and Land Court shall be guided by the following principles of sustainable development—
  - (a) the principle of public participation in the development of policies, plans and processes for the management of the environment;
  - (b) the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law;
  - (c) the principle of international co-operation in the management of environmental resources shared by two or more states;
  - (d) the principles of intergenerational and intragenerational equity;
  - (e) the polluter-pays principle; and
  - (f) the pre-cautionary principle.”

18. I think it is evident from the above cited constitutional and statutory provisions that there is an imperative on every person to protect the environment in whatever manner they can and the plaintiff's action of instituting the instant suit was no less such kind of action. In so far as the present litigation is concerned, the plaintiffs stated in their plaint that they have “brought this suit on their own behalf and on behalf of their neighbours residing” within the locality. They presented a letter of authority to act and to represent other persons who were not named as plaintiffs. In my view, the plaintiff's claim is public interest litigation which transcends their own personal interest and this affects the issue of costs in their favour.

19. The upshot of the foregoing is that I find that each party in this suit ought to bear their own costs and I so order.

**DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 19TH DAY OF MAY, 2022.**

**MWANGI NJOROGE**

**JUDGE, ELC, NAKURU**

