



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 272 OF 2011

THOMAS GITAU NJOGU.....1ST PLAINTIFF

SAMUEL GATHECA MURIUKI.....2ND PLAINTIFF

JOHN TONY GICHAGA.....3RD PLAINTIFF

HUMPREY NJOROGE KIBE.....4TH PLAINTIFF

ZACCHAEUS KINYUA MURIITHI.....5TH PLAINTIFF

VERSUS

PATRICK WARUINGE MUHINDI..... 1ST DEFENDANT

CITY COUNCIL OF NAIROBI.....2ND DEFENDANT

NATIONAL ENVIRONMENTAL

MANAGEMENT AUTHORITY.....3RD DEFENDANT

RULING

The parties herein entered into consent on 8th November 2011 that was adopted as an order of the court, and that essentially settled the dispute in the suit herein save for the issue of costs. The parties agreed in the said consent to file submissions on the issue of costs that would form the basis of the court's decision on the award of costs. The Plaintiffs' counsel filed submissions dated 23rd March 2012 wherein she gave a background to the suit herein and explained that the Plaintiffs and the 1st Defendant are property owners at the area popularly called Mururui in Nairobi.

It was submitted that the leases in the area provide for controlled development by limiting the construction of a single dwelling house and that it is for this reason that the Plaintiffs purchased and developed their respective parcels of land. However, that in June 2011, the Plaintiffs noticed that the 1st Defendant was constructing a multi dwelling house on his parcel of land, namely Nairobi Block 139/171 that borders their respective properties. Further, that the Plaintiffs tried to prevail on the 1st Defendant to cease construction of the same and also notified the 2nd and 3rd Defendant of their concerns, and were compelled to file the action herein when the said concerns were not responded to.

The Plaintiffs' counsel submitted that costs shall follow the event and relied on the definition of event in

as provided in the text **Judicial Hints on Civil Procedure, 2nd Edition** by Justice Kuloba (as he then was), to mean the result of all the proceedings incidental to the litigation. Further, that the Plaintiffs herein succeeded in its claim against the Defendants as claimed in the Plaintiff in the said consent order. It is also urged that the Plaintiffs' rights had been infringed by the Defendants herein and they were entitled to enforce their rights as they did. The counsel also submitted that the Plaintiffs are not guilty of any misconduct, and hence are entitled to costs of the suit as a matter of course.

The 1st Defendant's counsel filed submissions dated 30th May 2012 and argued that the 1st Defendant should not be condemned to pay any costs in this matter for the reason that the Plaintiffs did not give notice of intention to sue. The counsel relied on Rule 53 of the Advocates Remuneration Order and the decision in the case of **Wambugu Vs. Public Service Commission (1972) EA 296** in this respect. It was further submitted that when the 1st Defendant was served with the suit papers, he immediately stopped construction, and subsequently agreed to record a consent that he was to adhere with the building requirements in the area as demanded by the Plaintiffs. Further that the 1st Defendant did not file any papers to contest the Plaintiffs suit either by Grounds of Objection or Replying Affidavit.

The 1st Defendant also submits that if there are any costs to be paid to the 2nd and 3rd Defendants the same should be paid by the Plaintiff, as the two defendants were not necessary parties to this suit. It was submitted in this respect that the Plaintiffs could have got the injunctive orders sought against the 1st Defendant, and should have joined the 2nd and 3rd Defendants only if the 1st Defendant disclosed in his defence that he had obtained the consents from the 2nd and 3rd Defendants.

The 2nd Defendant's counsel's submissions were dated 23rd March 2012 wherein he argued that no fault can be found on the part of the City Council of Nairobi. Further, that there is no dispute that it has passed Building Regulations which the 1st Defendant has herein admitted to have breached. The counsel argued that the 2nd Defendant cannot be blamed for the unlawful acts of the 1st Defendant of which it had no notice, and that it would only be blamed if even after notice it took no action. However, that in this case after being notified of the breach, the 2nd Defendant promptly moved to investigate and issue an Enforcement Notice as it is mandated to do under Section 38 of the Physical Planning Act.

The counsel relied on section 27 of the Civil Procedure Act to submit that the generally accepted principle is that costs follow the event, and that this principle still applies even though the determination of a case was consensual. He relied on the decisions in **Armadillo Equity Limited vs. Institute of Correspondence Studies (K) Limited (2006) eKLR** and **Col. Josiah Landy Mrashui vs. Clement Mulemwa Rugendo & others (2009) eKLR** for this position.

The counsel further urged the court to examine the consent order to determine the party who is at fault, and submitted in this respect that the 1st Defendant has unequivocally admitted wrongdoing in the said consent order. He also submitted that the events of the suit herein lead to the conclusion that the 1st Defendant is the party at fault, and should therefore bear the costs of the proceedings with interests until payment in full to the other parties.

Lastly, the 3rd Defendant's counsel in submissions dated 18th June 2012 supported the 2nd Defendant's written submissions and argued that costs follows the event. He argued that the 1st Defendant proceeded to start a project illegally without an Environmental Impact Assessment (EIA) License as required by the Environmental Management and Coordination Act as read together with the 2nd schedule thereof.

Further, that it was not in doubt that the 1st Defendant is the party at fault and that he has occasioned the other parties to incur costs in the suit. It was urged that the 1st Defendant should therefore meet the costs of the suit as costs follow the event. The counsel urged the court to find that the 3rd Defendant is entitled to costs, throw away or otherwise, and be allowed to assess the same for taxation before the taxing master of this court.

I have carefully considered the written submissions and authorities filed by the Plaintiffs and the 1st and 2nd Defendants. The issue before this court is which party or parties should pay the costs of this suit in the circumstances of this suit where the dispute has been settled by consent of the parties. Costs are in the discretion of the court, save that they will normally follow the event, unless the court shall for good reason otherwise order. I need in this respect to clarify that the applicable law with respect to payment of costs of a suit is section 27 (1) of the Civil Procedure Act (Cap. 21) which states 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 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.”

The 1st Defendant argued that section 53 of the Advocates Remuneration Order also applies in determining who should pay the costs of the suit, and that as he was not served with notice he should not pay the Plaintiff’s costs. Section 53 of the Advocates Remuneration Order provides as follows:

“If the plaintiff in any action has not given the defendant notice of his intention to sue, and the defendant pays the amount claimed or found due at or before the first hearing, no advocate’s costs shall be allowed except on a special order of the judge or magistrate.”

This section is specific that it only applies to an advocate’s costs, and section 2 of the Advocates Remuneration Order is specific on its application in this regard as follows:

“This Order shall apply to the remuneration of an advocate of the High Court by his client in contentious and non-contentious matters, the taxation thereof and the taxation of costs as between party and party in contentious matters in the High Court, in subordinate courts (other than Muslim courts), in a Tribunal appointed under [the Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#) and in a Tribunal established under [the Rent Restriction Act](#).”

The Order is therefore not applicable at this stage of the proceedings when the court is awarding costs of a suit, and only becomes relevant thereafter in the taxation of the said costs. In any event the court is also given discretion under section 53 to order payment of an advocate’s costs in the event that notice of intention to sue was not given.

I also need to clarify in this respect that it was stated in the decision of **Wambugu Vs. Public Service Commission (1972) EA 296** that the failure to serve notice of intention to sue is but one of the considerations that the court takes into account in the exercise of its discretion under section 27 of the Civil Procedure Act. In this particular suit however the Plaintiff argued that he did give notice to the 1st Defendant and the said notice dated 2nd June 2011 addressed to all the Defendants was produced as part of the Plaintiffs documents and has acknowledgment of receipt by the 2nd and 3rd Defendants.

The question that remains to be answered by the court is that of who the successful party is when parties settle a dispute by consent. I agree in this regard with the Counsel for the Plaintiffs, 2nd and 3rd Defendants that the interpretation of the proviso in section 27 (1) of the Civil Procedure Act is that the event referred to is the result of the proceedings, and it is the successful party in this result who is normally awarded costs of the suit. The result in this suit is that there has been a settlement of the dispute between the parties following the consent entered into by the parties on 8th November 2011, save for the issue of costs.

It has been argued by the Plaintiffs, 2nd and 3rd Defendants in this respect that even in such a consensual settlement, the party whose wrongful acts led to the dispute and eventually to the suit herein should be made to bear the costs of the other innocent parties. It is however my opinion the only material event under section 27 of the Civil Procedure Act is the success or otherwise of a suit. Fault is only material when it comes to exercise of the courts discretion whether or not to award costs due to a successful party on account of their conduct.

It is also my view that it is not always given that in a consent there will be a successful and unsuccessful party. To determine the successful party in a consent order the court will need to examine the content and nature of the said consent in relation to the pleadings by the parties. The consent order recorded and adopted herein on 8th December 2012 in this regard stated as follows:

1. **By consent the 1st Defendant will stop any further constructions and will bring down the already constructed structures on the suit property known as LR. NAIROBI BLOCK 139/171.**
2. **The 1st Defendant will abide with the City Council of Nairobi and NEMA building regulations of the area in which the said property is located as stipulated in the lease.**
3. **The parties to take a date for the court to hear submissions on costs and determine the award of the costs.**

The Plaintiffs in their Plaint date 9th June 2011 had sought a permanent injunction restraining the 1st Defendant from continuing with construction on the said property, and a mandatory injunction compelling him to demolish the structures already constructed. In addition they also sought an order that any approvals and/or consents given by the 2nd and 3rd Defendants to undertake the said construction be declared illegal and a nullity.

The 3rd Defendant filed an undated Defence on 25th July 2011 in which it stated that they had not issued any approvals to the 1st Defendant and but asked that the prayers in the Plaint be dismissed against it, except the prayer for a permanent injunction against the 1st Defendant. The 2nd Defendants had not filed a Defence by the time the consent was entered into, and did not attach any evidence of the enforcement notice it was claimed it issued against the 1st Defendant.

In the circumstances, it would appear that the Plaintiffs largely succeeded in securing the orders sought in their Plaint in the consent orders that were adopted on 8th December 2012. The 3rd Defendant also partially succeeded in light of the pleadings and prayers in its Defence. The 2nd Defendant cannot however be regarded as a successful party as they had made no claim against the 1st Defendant. The fault or otherwise of the 1st Defendant cannot on its own therefore entitle the 2nd Defendant to any costs.

I therefore accordingly order that the 1st Defendant shall meet the Plaintiffs' and 3rd Defendant's costs of this suit, and that the 2nd Defendant shall bear their own costs of the suit.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 17th day of October, 2013.

P. NYAMWEYA

JUDGE