



RUFUS NJUGUNA MIRINGU.....1ST
PLAINTIFF

JOAB NJOROGE.....2ND
PLAINTIFF

VERSUS

MARTHA MURIITHI.....1ST
DEFENDANT

WAMUNYAWA INVESTMENT LIMITED.....2ND
DEFENDANT

CITY COUNCIL OF NAIROBI.....3RD
DEFENDANT

RULING

The 1st Plaintiff filed a suit by a plaint filed on 16th September 2009, which plaint was later amended on 2nd June 2010 after joinder of the 2nd Plaintiff. The Plaintiffs were in the said Amended Plaint seeking the following orders against the Defendants: damages for trespass on the Plaintiffs' properties known as L.R NO. 12350/16 and L.R. NO. 12350/11; a permanent injunction restricting the Defendants from effecting a new subdivision of the land originally known as L.R 12350 in a manner that would interfere with the Plaintiffs' said properties; and a mandatory injunction directing the Defendants to remove the beacons they had pitched on the said Plaintiffs' properties, and to restore the original access road thereto. The said Plaintiffs' properties were purchased from and hived off the 2nd Defendant's land which was originally registered as LR No. 12350.

Counsel for the Plaintiffs and for the 1st and 2nd Defendants, while in the course of the hearing of an application dated 14th September 2009 filed by the 1st Plaintiff, entered into a written consent dated 13th May 2011 that stated as follows:

1. All that parcel of land known as L.R. 12350 be re-subdivided in the terms of a Proposed Amendment to the Approved Subdivision Scheme on L.R. NO. 12350, which was annexed to the consent
2. The costs attendant to the actual sub-division be shouldered by the 1st and 2nd Defendants
3. The advocates on record do file written submissions on the issue of apportionment of costs of the suit only, and leave the same to the decision of the court
4. Upon the court's decision on apportionment of costs of the suit, this matter be marked as fully and finally settled on the terms above.

The said consent was adopted by this Court on 12th July 2011, and Honourable Justice Mboghli Msagha

directed Counsel for the parties to file and serve their respective submissions on the issue of apportionment of costs. Counsel for the Plaintiffs accordingly filed written submissions dated 25th August 2011 and further written submissions dated 14th October 2011. Counsel for the 1st and 2nd Defendants also filed written submission dated 14th November 2011. No written submissions were filed by the 3rd Defendant.

I have read and carefully considered the written submissions by the Plaintiffs and the 1st and 2nd Defendants. In summary, the Plaintiffs submit that that the Court must consider the conduct of the respective parties in awarding costs, and relied on the authority of **Hans Raj Aggarwal v Munshi & RAM Co. Ltd** (unreported) Civil Appeal No. 157 of 1991. The Plaintiffs did not provide a copy of the said decision. The Plaintiffs submission is that they are entitled to an award of costs since the suit was precipitated by the illegal and unlawful acts of the 1st and 2nd Defendants, and the Plaintiffs acted to protect their proprietary interests. The Plaintiff also referred this Court to the decision in the Chief Magistrates Court Case No 8544 of 2008 in which the 1st and 2nd Defendant's case against them was dismissed, as evidence of such conduct. In their further written submissions the Plaintiffs have given an explanation and computation of the damages he has incurred as a result of the 1st and 2nd Defendants' actions.

Counsel for the 1st and 2nd Defendants submitted that under section 27 (1) of the Civil Procedure Act (Cap 21) costs follow the event and it is the successful party who is awarded the costs of the suit. The Counsel relied on the Court of Appeal authority of **Supermarine Handling Services Ltd vs Kenya Revenue Authority, Civil Appeal (Mombasa) No. 85 of 2006** in this respect. The 1st and 2nd Defendants Counsel further submitted that in the event a suit is settled by consent, there is *per se* no successful party and each party bears their own costs. Counsel relied on the High Court decision of **Jesse Mburu Gitau and 3 others v The Attorney General , HC Misc Civil Application (Nairobi) No 1517 of 2003** with regard to this particular submission.

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 will pay the costs of this suit. Costs are in the discretion of the court, save that they will normally follow the event, unless the court or judge shall for good reason otherwise order. The applicable law 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.”

I agree with the Counsel for the 1st and 2nd Defendants that the interpretation of the proviso to the cited section is that the material event referred to is the result of the proceedings, and it is the successful party in this result who is normally awarded costs. The result in this suit is the settlement of the dispute between the parties following the written consent by the parties dated 13th May 2011 and adopted by this Court, save for the issue of costs. I also agree with the 1st and 2nd Defendants' Counsel that consent cannot be interpreted to mean that one or the other party has succeeded in a suit. Even if in the present case such settlement has worked out in the Defendants' favour, the successful determination of the dispute is still attributable to both the Plaintiffs and the 1st and 2nd Defendants.

The issue of a party's conduct affecting the award of costs as submitted by the Plaintiffs' Counsel in my opinion does not arise when parties have entered consent, as they are deemed to have accepted their

respective conduct prior to the consent. In addition the Defendants' conduct would in the circumstances only be material if the Plaintiffs are seeking to set aside the consent order.

In the circumstances, it would be just for the parties to bear their own costs of the proceedings. I therefore order that this suit be and is hereby marked as settled according to the terms of the written consent entered into by the Plaintiffs and 1st and 2nd Defendants dated 13th May 2011, and that the parties to the suit herein shall bear their own costs.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 19th day of January, 2012.

P. NYAMWEYA

JUDGE