



**Real Capital Limited v Githina (Environment & Land Case
730 of 2017) [2022] KEELC 3198 (KLR) (9 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3198 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 730 OF 2017**

JG KEMEI, J

JUNE 9, 2022

BETWEEN

REAL CAPITAL LIMITED PLAINTIFF

AND

EVALYN WANJIRU GITHINA DEFENDANT

JUDGMENT

1. The Plaintiff filed suit on the 1/9/2017 against the Defendant seeking inter alia a perpetual injunction restraining the Defendant from entering into encroaching and howsoever dealing with all that parcel of land known as Ruiru/ruiru East Block 7/84 as well as an eviction order. The Plaintiff claims to be the registered owner of the suit land.
2. Opposing the suit, the Defendant filed her statement of defence dated 15/1/2018 through the firm of Muriu, Mungai & Co. Advocates and raised a Preliminary Objection dated 23/3/2018 and pleaded subjudice on account of Thika ELC Petition No. 8 of 2017 Sabina Nyambura Githina & Anor. vs The Land Registrar Thika & 4 others touching on the same subject matter. The Defendant prayed for striking out of this suit with costs pending the determination of Thika ELC Petition No. 8 of 2017. The Defendant also filed an application dated 28/6/2019 seeking stay of proceedings herein pending the outcome of the said Petition 8 of 2017. It appears that this application was not heard on account of the Defendant's absence e.g. on 5/11/2018, 26/3/2019, 26/11/2019, Court not sitting e.g. on 4/11/2019 absence of the parties at the height of Covid- 19 Pandemic e.g. on 1/7/2020.
3. Undeterred the Defendant filed another application seeking stay of proceedings herein dated 7/4/2021. Notably there is no evidence of the Plaintiff's objections/responses on to the aforesaid applications.
4. On 3rd September 2021, the Plaintiff filed a notice of withdrawal of suit against the Defendant. The Defendant did not oppose the withdrawal but prayed for an award of costs which the Plaintiff opposes.



Parties could not agree on the issue of costs and the Court directed that they file their respective Affidavits and submissions for the Court to pronounce itself on it hence the instant Ruling.

5. The Plaintiff's director Stephen Kiarie swore his Affidavit dated 9/3/2022. He averred at the time of filing the instant suit, the Plaintiff held the sole legally recognized title over the suit hence the prayer for the Defendant's eviction from the suit land. That the Defendant had on the other hand filed ELC Petition No. 8 of 2017 challenging the procedure through which the Land Registrar had cancelled entries in the land registrar that had been deemed fraudulent by Director of Criminal Investigations (DCI). That in a judgment delivered in ELC Petition No. 8 of 2017, annexed as SK-1, the Court found that the process through which the Land Registrar cancelled entries on the title was unprocedural and contrary to the Defendant's right to fair administrative action and reinstated the previous entries in the register. Accordingly, that there are now two competing titles over the suit land and there is a suit between the parties herein ELC case No. E095 of 2021 that will determine who the legitimate owner of the suit land is. He beseeched the Court to order each party to bear their costs.
6. In its written submissions dated 9/3/2022 through the firm of Mwaniki Gachoka & Co. Advocates, the Plaintiff submitted that the Judgement in Petition 8 of 2017 delivered on 17/6/2021 defeated the substratum of the instant suit necessitating the withdrawal of their suit. That since there are now two competing titles over the suit land, it is only fair that the Court balances the parties' interests and order that each party bears their own costs. The Plaintiff relied on Section 27(1) of the [Civil Procedure Act](#) and the case of [Anthony Kago v Peter Gitau Kariuki & 3 Others](#) [2021] eKLR on the factors the Court should take into account before making an order for costs.
7. The Defendant Evalyn Wanjiru Githina swore her Affidavit on 31/3/2022. She deponed that the Plaintiff filed this suit yet it was well aware of Thika ELC Petition No. 8 of 2017 between the parties. That she objected to the instant suit vide her statement of defence and Preliminary Objection dated 23/3/2018 respectively but the Plaintiff nevertheless proceeded with his suit. That it is unfair for her to incur costs arising from a case that could have been avoided by awaiting the determination of her Petition first and she still has to incur costs of defending ELC 95 of 2021 by the Plaintiff against her and others. That it is only fair and just that the Court awards her costs to cushion her from the overzealous Plaintiff's litigation.
8. The Defendant through the firm of Muriu Mungai & Co. Advocates filed her submissions dated 4/4/2022 and a List and Bundle of Authorities of even date. She submitted that the Plaintiff insisted on filing the instant suit despite knowing the existence of ELC Petition No. 8 of 2017. That it was common knowledge that she instructed her Advocates to act for her herein and the matter was set down for hearing and it is only fair and just that she be awarded costs. That alternatively, the Plaintiff ought to have amended its pleadings herein in light of the outcome of ELC Petition No. 8 of 2017 but instead withdrew this suit and filed another, ELC 095 OF 2021 Real Capital Limited vs Evalyn Githina & Others in total disregard of the costs incurred in defending these suits. In beseeching the Court to grant her prayer, the Defendant relied on the Judgment in ELC Petition No. 8 of 2017, [Pacis Insurance O. Ltd v Francis Njeru Njoka](#) [2018] eKLR, [Samson K.A v D.M Machage](#) [2019] eKLR and [PIL Kenya Ltd v Joseph Oppong](#) [2009] eKLR in support of her case.
9. The main issue for determination is whether the Defendant's prayer for an award of costs is merited.
10. The legal underpinning for an award of costs is contained in Section 27(1) of the [Civil Procedure Act](#) that;

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“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.”

11. It is also trite that costs follow the event and such an award is discretionary. See the case of *Supermarine Handling Services Ltd vs. Kenya Revenue Authority* [2010] eKLR
12. In the case of *Republic v Commissioner for Co-operative Development & another Ex parte Water Resources Management Authority* [2018] eKLR, the Court stated that in determining an application for costs the Court should consider among other factors; the conduct of the parties, the subject of litigation, the circumstances which led to the institution of the legal proceedings, the events which eventually led to their termination, the stage at which the proceedings were terminated, the manner in which they were terminated, the relationship between the parties and the need to promote reconciliation amongst the disputing parties pursuant to Article 159(2)(c) of *the Constitution*.
13. Additionally, in the case of *Devram Manji Daltani vs. Danda* [1949] 16 EACA 35 it was held that a successful litigant can only be deprived of his costs where his conduct has led to litigation, which might have been averted.
14. Has the Defendant’s conduct led to a litigation that could have been avoided? The answer is found in the pleadings before Court. In her statement of defence, the Defendant urged the Court to dismiss this suit with costs just as she did in her Preliminary Objection dated 23/3/2018 when she pleaded sub judice. Further it is not denied that the Plaintiff was aware of ELC Petition No. 8 of 2017. I have perused the judgement in Thika ELC Petition No. 8 of 2017 and it is evident that the petition was initially filed in Nairobi Petition No. 153 of 2017 by the Defendant and others against the Plaintiff who was the Interested Party therein. The matter was later transferred to this Court on 31/7/2017 and renumbered Thika ELC Petition No. 8 of 2017. Two months on, the Plaintiff filed this suit on 4/9/2017 well aware of Petition No. 8 of 2017.
15. In the persuasive authority of *Joseph Oduor Anode vs. Kenya Red Cross Society* [2012] eKLR the Court held that a withdrawal of proceedings amounts to a determination thereof in favour of the Respondents thereto and pursuant to the provisions of section 27 aforesaid the Respondents would be entitled to costs.
16. The Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR affirmed that the principle that costs follow the event is not to be used to penalize the losing party; rather, it is for compensating the successful party for the trouble taken in prosecuting or defending the suit. In the instant suit the Defendant had expended money, time and effort to defend the case and had incurred expenses in the process.
17. I rely on the Court of Appeal judgment in *Canyon Properties Limited & 3 Others v Eliud Kipchirchir Bett & 2 Others* [2017] eKLR whereby the Learned Judges set aside the trial Court decision that declined to award costs to the appellants after the Respondents withdrew their suit. The Court of Appeal appreciated that even though the matter had not been listed for hearing, considerable steps had



been taken in prosecuting the case in Court. I find a lot of similarity in this case that rhymes well with this Court's decision.

18. The Court finds that it is the conduct of the Plaintiff that actually led to the filing this suit that has unnecessarily consumed considerable judicial time as well as the Defendant's costs in defending it.
19. In the end, I find that for the reasons given above this is a suitable case for the Court to exercise its discretion and grant the Defendant costs.
20. Final orders and disposal;
 - a. The Defendant shall have the costs of the withdrawn suit.
 - b. The parties to agree on the costs payable to the Defendant within a period of 15 days in default the same shall be taxed by the Taxing Master of this Court.
21. It is so ordered

DELIVERED, DATED AND SIGNED AT THIKA THIS 9TH DAY OF JUNE 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Mbabu for Plaintiff

Opole holding brief for Kenneth Wilson for Defendant

Court Assistant - Phyllis

