



REPUBLIC OF KENYA



Shamsher Kenya Limited v Faryd Abdulrazak Sheikh & 7 others (Environment & Land Case 139 of 2011) [2022] KEELC 3644 (KLR) (12 August 2022) (Ruling)

Neutral citation: [2022] KEELC 3644 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 139 OF 2011**

**MAO ODENY, J
AUGUST 12, 2022**

BETWEEN

SHAMSHER KENYA LIMITED PLAINTIFF

AND

FARYD ABDULRAZAK SHEIKH & 7 OTHERS DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated November 26, 2021 by the 1st defendant seeking the following orders; -
 1. Spent
 2. That there be a stay of proceedings pending the hearing and determination of this application.
 3. The honourable court be pleased to apportion the cost payable by each of the defendants.
 4. Costs of and incidental to this application be provided for.
2. Counsel agreed to canvas the application vide written submissions which were duly filed.

1st defendant/applicant's submissions

3. The application is premised on the grounds on the face of the application together with the sworn affidavit of Faryd Abdulrazak Sheikh the applicant who deponed that the taxation ruling was delivered on November 17, 2020 in which the deputy registrar taxed the bill at kshs 736,205/- and that December 21, 2020, the plaintiff's advocates wrote to the 1st defendant's advocates informing them of the bill of costs and a further reminder on February 19, 2021 requesting settlement for the taxed amount plus kshs 20,000/- being thrown away costs.



4. He further deponed that since the court did not specify how much each defendant was to pay it was only prudent that the said amount be equally apportioned among the eight defendants. The applicant also stated that the 1st defendant due to threats of execution by the plaintiff, the 1st defendant paid kshs 112,306/- being his eighth share of the total cost plus the thrown away costs vide cheque no 21988. That plaintiff's advocate acknowledged receipt of the forwarding letter together with the cheque but stated that the said amount had not been paid in full and threatened to execute for the remainder of the costs.
5. Counsel submitted that stay of decree and judgment is discretionary and relied on the of cases *Francis Ndabebwa Twala V Ben Nganyi* [2018] eKLR and *Butt vs Rent Restriction Tribunal* (1982) KLR 417. Counsel also relied on order 22 Rule 22 of the *Civil Procedure Rules* together with section 3A of the *Civil Procedure Act* and submitted that allows the court to make such orders as may be necessary for the ends of justice.
6. According to counsel the court did not apportion the costs arising out of the plaintiff's claim between the eight defendants instead the court entered judgement but failed to apportion costs as provided by order 21 rule 7 (2) of the *Civil Procedure Rules*. Counsel therefore submitted that it would be great injustice if the 1st defendant were to bear the costs on his own and relied on the case of *Oasis Park Self Help Group petitioning through John Mutinda & 2 Others v Joinven Investments Limited & 2 other* [2016] eKLR.
7. Further counsel relied on the cases of Republic v Rosemary Wairimu Munene (*ex parte* Applicant) v Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review Application no 6 of 2004 and *Cecilia Karuru Ngayu vs Barclays Bank of Kenya & Another* [2016] eKLR where the court held that the issue of costs is the discretion of the court and is used to compensate the successful party for the trouble taken in prosecuting or defending the case and not to penalize the losing party.

Plaintiff/respondent's submissions

8. The plaintiff filed a response through a Replying Affidavit dated December 9, 2021 deposing that the other defendants did not participate in the proceedings and the necessary implication is that the costs were to be paid by the 1st defendant who actively participated in the suit including filing a counter-claim.
9. Counsel submitted that the applicant is asking the court to review the order for costs which was made by the trial court without justification for the review and submitted that costs follow events as provided for under section 27 of the *Civil Procedure Act*.
10. It was counsel's submission that costs cannot be apportioned as section 27 (1) of the *Civil Procedure Act* gives the court the discretion to determine which party ought to pay the costs of the suit and his judgment dated May 27, 2020, Honourable Justice J O Olola awarded the costs of the suit to the plaintiff.
11. Counsel also submitted on the principles to guide the court when awarding costs or apportionment as (i) the conduct of the parties, (ii) the subject of litigation, (iii) the circumstances which led to the institution of the proceedings, (iv) the events which eventually led to their termination, (v) the stage at which the proceedings were terminated, (vi) the manner in which they were terminated.
12. It was counsel's submission that in this case the court found that the 1st defendant was guilty of defrauding the plaintiff leading to the case being filed and determined in favor of the plaintiff and as such the costs should be paid by the 1st defendant in full as taxed.



Analysis and determination.

13. The issues for determination are as to whether the court should grant an order of stay of proceedings pending the hearing of this application and whether the court can apportion costs payable by each defendant after judgment.
14. The parties in this application agreed to canvas the same vide written submissions which takes time to be determined due to the processes of exchanging submissions and in most cases the parties do not adhere to the timelines given by the court seeking for extension of time for one reason or another. This essentially has made the applicant achieve the first limb of the application for stay of the proceedings pending the hearing and determination of this application informally.
15. I will therefore only deal with the issue of apportionment of costs.
16. The general rule as to costs is provided for under section 27 of the [Civil Procedure Act](#) which provides as follows: -
17. 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:
18. 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.
19. By a Plaint dated September 6, 2011 Shamser Kenya Ltd (the plaintiff) sued Fayard Abdulrazak Sheikh (the 1st defendant) seeking a declaration that it is the lawful proprietor of plot no Kilifi/Jimba/332. The plaintiff sought the following orders: -
 - a. A declaration that the 1st defendant has no lawful and valid right, claim and/or interest in the suit property and that the constructions, developments and or activities undertaken or carried out by the 1st defendant on the suit property are unlawful and in breach of the plaintiff's proprietary interest, claim and or title in the suit property;
 - b. A declaration that the allotment letter dated August 26, 2010 together with the lease thereof dated September 17, 2010 fraudulently granted, entered and registered by the 2nd and 3rd defendants herein .in favour of the 1st defendant.in respect of the plaintiff's plot number Kilifi/Jimba/332 are unlawful, irregular, null and void;
 - c. An order for the cancellation, revocation, nullification and/or rescission of the Letter of Allotment dated August 26, 2010 with the lease thereof dated September 17, 2010 granted, entered and/or registered by the 2nd and 3rd defendants...in favour of the 1st defendant. with respect to plot no Kilifi/Jimba/332;
 - d. An order for the 1st defendant to forthwith, at (his) own costs and expenses remove, demolish and or clear any constructions and or developments unlawfully undertaken and or carried out on the suit property;
 - e. A permanent injunction restraining the 1st defendant...from (in any manner dealing) with the suit property; and



- f. Costs and interest.
20. From the prayers sought, it is clear that they are against the 1st defendant who is the defendant whose action are to be impugned. The other defendants namely the Attorney General, The district land registrar, National Land Commission, commissioner of lands were later brought in the case as a formality for purposes of the implementation of the plaintiff's order against the 1st defendant. They were never active participants in the case and they never participated. It is on record that the 1st defendant participated fully and even filed a counterclaim to the suit which was dismissed by the court.
21. The court heard the case and gave the following orders: -
- In the premises, I am persuaded that the plaintiff has proved its case to the required standard and that the 1st defendant's claim is without basis. Accordingly, the 1st defendant's counterclaim is dismissed and judgment is hereby entered for the plaintiff as prayed in the Plaint. The plaintiff shall have the costs of his suit as well as of the defendant's Counterclaim."
22. The court's judgment was very clear that the plaintiff had proved its case as per the plaint and that the plaintiff was entitled to costs of the suit as well as the defendant's counterclaim which was dismissed. There were only two parties participating in this proceedings and it is the 1st defendant who filed a counterclaim which was dismissed.
23. I have considered the application, the submissions by counsel and the relevant authorities and find that the judgment was clear on the payment of costs hence the application is dismissed with costs for lack of merit.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 12TH DAY OF AUGUST, 2022.

M A ODENY

JUDGE

NB: In view of the Public Order No 2 of 2021 and subsequent circular dated March 28, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

