REPUBLIC OF KENYA

HIGH COURT AT NYERI

Civil Case 206 of 1996

MARY WANJIRU MURIUKI ……..……...……..PLAINTIFF

VERSUS

NDIRANGU MWANIKI …….DEFENDANT

R U L I N G

By a Notice of Motion dated 28th July, 2004 and filed in court on 30th June, 2004, the applicant seeks that the judgment entered herein be reviewed and the order for costs be set aside in view of the fact that dispute giving rise to the suit involved family land. The applicant also sought that the execution proceedings if any pursuant to the order for costs be stayed and or be set aside. The application was expressed to be brought under **Section 3A, 27 and 80** of the Civil Procedure Act.

The application was premised on the grounds that the dispute giving rise to the suit was over family land involving a widow, the applicant herein and her brother in law, that the applicant would be rendered destitute if she was burdened with costs and that it would be in the interest of justice that each party be ordered to bear own costs. The application was further supported by the affidavit sworn by the applicant. In the main, the applicant depones that the dispute giving rise to the suit was family land. That the applicant is a widow of the defendant's late brother. The applicant further depones that she is not able to pay the taxed costs. That in bringing the action she was merely protecting her rights being the widow of one of the family members entitled to a share of the land and if she was condemned in costs she will be rendered destitute.

The application was opposed. The respondent in a replying affidavit dated 7th day of September 2004, depones that the application is misconceived and was mischievously filed to frustrate his enjoyment of the fruits of his judgment. That the applicant filed the suit knowing very well that she had no claim against the respondent as her husband did not claim any part of the land during his life time because he knew that the respondent had only given him temporary occupation rights. Further the respondent deponed that after the applicant lost her claim over the land, the respondent was ordered to compensate her for the coffee trees that they had planted on the subject piece of land. The respondent duly complied with the order. The respondent also depones on advice of his counsel that costs must of necessity follow the event.

In her oral submission in support of the application, the applicant reiterated that she should not have been condemned in costs as the dispute revolved around the family.

Mr. Mugo, Learned counsel appeared for the respondent and submitted as follows:-

- **That the application was brought under wrong provisions of the law and was overloaded.**

- **That the applicant consented to the outcome of the case.**

- **That she accepted the compensation awarded and therefore she cannot now challenge the judgment.**

- **That the bill of costs was taxed and no objection was raised.**

I have anxiously considered the application, the supporting and replying affidavits together with the annextures thereto. I have also born in mind oral submissions by respective parties to the suit. I am aware that costs normally follow the event. Further I am not aware of the rule that says that a party to a family dispute cannot be condemned in costs. From the history of the matter, I think the applicant is undeserving of the discretion of this court. She has conducted herself in a manner that this court frowns upon. As part of the settlement, the respondent was ordered to compensate the applicant. The respondent duly paid the applicant a sum of Ksh.29,632/= in compensation which she willingly accepted. How can she now turn around and challenge that aspect of the judgment that deals with costs. In my judgment, this is a clear case in which the applicant was rightly condemned in costs. She cannot be allowed to enjoy the fruits of the judgment that are favourable to her and frustrate or object to that part of judgment that does not find favour with her.

Ordinarily the issue of costs of and incidental to all suits is in the discretion of the court. Such discretion has however to be exercised judicially and not capriciously. From what I can gather from the record, there is no suggestion that in ordering the applicant to pay costs, the court exercised the discretion capriciously. The court bore in mind the correct principles in ordering that the applicant do pay costs of the suit.

The proviso to **Section 27 (1)** of the Civil Procedure Act is pertinent, very clear and unambiguous. It provides and I quote "…….**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 reasons otherwise order….."** The court by this proviso is directed to grant costs to a successful litigant as a matter of course. The court can only however refuse to award costs for good reasons. I do not see what other good reason would have been that would have persuaded the court to refuse to award costs to the respondent. To be rendered a destitute by an award of costs is certainly not one of the reasons that my force the court's hand not to award costs against an unsuccessful litigant. Similarly I do not think that merely because the dispute involved members of the same family would be ground enough to deny a successful litigant an award of costs.

For all the foregoing reasons I find the applicant's application unmerited and is accordingly dismissed with costs.

Dated and delivered at Nyeri this 9th July 2007

…….

M.S.A. MAKHANDIA

JUDGE