



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Misc Civ Appli 370 of 2005

ESSENTIAL MOUNTAIN LINKS LIMITED.....PLAINTIFF

VERSUS

SECURITIES NOMINEES LIMITED.....1ST DEFENDANT

NATIONAL INDUSTRIAL CREDIT BANK LTD.....2ND DEFENDANT

R U L I N G

The plaintiff and the 1st defendant entered into an agreement whereby the plaintiff agreed to buy and the defendant agreed to sell property L.R. NO. 37/247/6 (the suit property). The parties executed an agreement for sale with a completion date of 90 days. That is on or before 7th February 2005. In accordance with one of the terms of agreement the plaintiff paid the 1st defendant a deposit of kshs 7 million.

It is not disputed that the 1st defendant failed to provide the original certificate of Title of the suit property. The plaintiff is on record having written several letters to the 1st defendant requesting the release of the said title deeds. Due to the 1st defendant's failure to positively respond to the request for release of title documents the plaintiff issued it with a 21 days notice to complete, dated 24th March 2005.

The plaintiff, due to the failure of the 1st defendant to respond to its aforesaid requests addressed a letter to the 2nd defendant, mortgagee of the suit property requesting that they be allowed to redeem the mortgage. The plaintiff also did not receive a respond from the 2nd defendant.

In an attempt therefore to protect its position and considering that kshs 7 million had been paid as deposit towards the purchase price, the plaintiff filed the present case.

When the case came up for hearing, inter partes, of the plaintiff's injunction application, the parties consent to the conclusion of the sale transaction and agreed that the 2nd defendant's costs of this suit would be paid by either the plaintiff or the 1st defendant. The said plaintiff and 1st defendant failed to agree who ought to pay those costs and they accordingly agreed to refer this matter to court for determination of the issue of costs of the 2nd defendant. Both parties provided written submission.

Part of the consent that was entered into by all the parties provided that “**subject to compliance to the terms**” of that consent this matter was to be marked as settled. According to the terms of that consent the only outstanding issue is the party that will pay the 2nd defendants costs. The consent did not include the issue of possession of the suit property or the issue of the rental income thereof. This court, therefore will not adjudicate over those issue.

The parties are in agreement, and indeed it is the provision of section 27 of the Civil Procedure Act, that, the decision of the award of costs is at the discretion of the court. Parties relied on the cases: MARIGA – V – MUSILA [1984] KLR 251 and SINGH – V – QURBANLITE LTD [1985] KLR 920.

These two cases supported the proposition of both parties regarding the discretion of the court on the award of costs.

The discretion afforded by section 27 of the Civil Procedure Act must be judicial discretion. In the exercise of that discretion I, dare say, that the court can consider the conduct of the parties and also the matters that may have led to the filing of the action in court. Having not heard viva voce evidence I will, in my determination of the issue before me, consider what led to this suit being filed. As stated herein before the plaintiff filed this suit due to its apprehension of loss of deposit it had paid to the 1st defendant and the loss of its opportunity to purchase the suit property.

Having found therefore that the 1st defendant’s actions led to the fling of this suit I do hereby find that the costs of the 2nd defendant will be payable by the 1st defendant.

The order of this court is that the 1st defendant will hereby pay the costs of the 2nd defendant of this suit.

MARY KASANGO

JUDGE

Dated and delivered this 14th June 2006.

MARY KASANGO

JUDGE