



Phillen International Limited v Kipkoech & 3 others (Environment and Land Case Civil Suit 157 of 2009) [2022] KEELC 15423 (KLR) (15 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15423 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 157 OF 2009
AA OMOLLO, J
DECEMBER 15, 2022**

BETWEEN

PHILLEN INTERNATIONAL LIMITED PLAINTIFF

AND

SAMUEL ALAN KIPTISIA KIPKOECH 1ST DEFENDANT

CHARLES B. OTIENO 2ND DEFENDANT

WINFRED WANGUI GATHUNGU 3RD DEFENDANT

NATIONAL HOUSING CORPORATION 4TH DEFENDANT

RULING

1. This determination is whether or not the 4th defendant should be awarded costs following the withdrawal of the suit by the plaintiff. Each side presented their arguments for and against the award of the costs with the 4th defendant and the plaintiff filing their submissions dated July 14, 2022 and October 5, 2022 respectively.
2. The 4th defendant submitted that the suit was commenced by way of a plaint dated April 7, 2009, amended plaint dated December 20, 2010 and a further amended plaint dated June 28, 2011 and it incurred cost in defending the suit by filing a notice of appointment dated July 19, memorandum of appearance dated August 19, 2011, statement of defence dated September 26, 2011 and amended statement of defence dated November 23, 2011.
3. Further, the 4th defendant submitted that they attended court on March 7, 2012 for the hearing of a preliminary objection filed by the 2nd and 3rd defendant and filed a replying affidavit sworn on March 20, 2012 by its advocate, list of documents dated May 13, 2013 together with the list of witnesses and their statements.



4. The 4th defendant submitted that it was ready to proceed with the hearing but the plaintiff's counsel adjourned the matter when it came up for hearing on July 10, 2018 and April 10, 2019 and three days to March 2, 2020 when it was coming for hearing, a consent was proposed with no order as to costs.
5. The 4th defendant submitted that the plaintiff withdrew the matter with no order as to cost having sensed that the same will be dismissed with order as to costs to the defendant if the same proceeded to a full hearing.
6. The 4th defendant further submitted that costs follow the event and are granted at the discretion of the court as provided in section 27 of the [civil procedure Act](#) and that courts must have regard that cost awards are all about indemnification or the expenses incurred in hiring a counsel to enforce legal rights citing the case of [Harold vs Smith](#) 1860,5H & N 381 and [British Columbia \(Ministry of forests\) v Okanagan Indian Band](#) {2003} SCR 371,2003 SCC 71.
7. The 4th defendant submitted that they should be awarded costs to discourage parties from filing a suit, sitting on their own rights and ten years later withdrawing it without paying costs and in support cited the decision in [Peter Muriuki Ngure v Equity Bank \(K\) Ltd](#) [2018] eKLR where it was held that the defendant be paid costs after the prayer for general damages was withdrawn because he had instructed a lawyer to defend the suit and filed statement of defence ,witness statements and list of documents.
8. The plaintiff submitted that the matter was ready to be heard after the pretrial stage with all parties having filed their requisite documents and complied with Order 11 of the [Civil Procedure Rules,2010](#) but it was settled out of court after the 1st,2nd and 3rd defendants were agreeable to have the matter withdrawn with no order as to costs.
9. The plaintiff submitted that its case was meritorious from the beginning and it was supported with proper documentation that would have warranted the court to listen to the suit and base a decision on its merits and that courts have been mandated to try all civil suits unless the same have been barred and the 4th defendant's counsel is warranted to put in a response.
10. The plaintiff submitted that they had the right to withdraw the matter before court and cited the supreme court decision in [Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others](#) [2014] eklr and therefore should not be penalized in doing so. The plaintiff also submitted that the effect of the suit being discontinued, the court becomes *fuctus officio* in the suit and parties cease to be parties as was observed in [Smt Rais Sultana Begam v Abdul Qudir & others](#).
11. The plaintiff submitted that the issue of costs is the discretion of the court and it is not to penalize a party rather it is for compensating a party for the trouble taken in prosecuting or defending the case citing the case of [Republic v Rosemary Wairimu Ex-parte Applicant vs Ihuru Diary Farmers' Co-operative Society](#) and that there was no losing or successful party in this case.
12. The plaintiff cited the principles underlying in awarding costs as laid out in [Party of Independent Candidate of Kenya v Mutula Kilonzo and 2 others](#) that the court is given discretion in awarding costs and that the costs should be awarded to a successful party and not based on the activities done in a matter as proposed by the 4th defendant.
13. The plaintiff relied on the decision by Justice Mativo in [Cecilia Ngayu v Barclay Bank of Kenya and Another](#) (2016) Eklr in outlining what the court is entitled to look at *inter alia*
 1. The conduct of the parties
 2. Subject to litigation



3. Circumstances which led to the institution of the proceedings
 4. The events which eventually led to their termination
 5. The stage at which the proceedings were terminated
 6. The manner in which they were terminated
 7. The relationship between the parties
 8. The need to promote reconciliation amongst the disputing parties pursuant to Article 159(2) of the Constitution.
14. The plaintiff submitted that the spirit of the 4th defendant's submission is to penalize it which goes against the principle behind costs following events as in Peter Muriuki Ngure case (supra) and prayed that the matter be discontinued with no orders as to costs and in the alternative that each party bears its own cost.
15. The parties have elaborately submitted on the law and principles governing awarding of the costs. It is not disputed that the case was withdrawn after it had been pending for a while and when parties had prepared for hearing. Therefore, in relation to conduct of the parties, the plaintiff does not explain why the same should be decided in his favour given that the matter had been in court for over 10 years.
16. The plaintiff has also not offered any background information why the 4th defendant was served and the reasons that led to the termination of the proceedings. The plaintiff argues that he withdrew the suit after the 1st to 3rd defendants agreed to have the matter withdrawn with no order as to costs. No mention is made whether the 4th defendant was requested to concede. The plaintiff seems to suggest that the withdrawal of his suit was only pegged on the 1st to 3rd defendants not demanding for costs.
17. The plaintiff submitted that the 4th defendant intention for demanding for costs to penalize them yet the 4th defendant also incurred costs I defending the suit and making court attendances for the duration the matter was live in court. Thus, I am persuaded by the 4th defendant that they are entitled to costs because the proceedings were terminated after being in court for too long and had incurred costs in filing documents in defending the suit as well as preparing for hearing. In the result, the costs of the withdrawn suit is awarded to the 4th defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 15TH DAY OF DECEMBER 2022

A. OMOLLO

JUDGE

