



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. APPEAL NO. 11 OF 2019**

**CHARLES MURIU MWANGI .....APPELLANT**

**VERSUS**

**BENJAMIN MAKOKHA NYONGESA....RESPONDENT**

**RULING**

1. On 7<sup>th</sup> October, 2020, the Appellant's advocate made an oral Application to withdraw the Appeal. Although the Respondent's advocate, who had already filed a cross appeal, did not object to the withdrawal of the Appeal, he argued that the Respondent is entitled to costs. The issue of whether the Respondent is entitled to costs is the subject of this Ruling.

2. The Appellant's advocate submitted that the Appellant seeks to withdraw the Appeal with no order as to costs for the reasons that he was simply seeking for enforcement of the lower court Judgment on the understanding that it is bound to abide by the said decision until and unless it is set aside by the appellate court.

3. Counsel submitted that the said withdrawal was being pursued before the Respondent filed its Cross Appeal and before the Appeal was heard; that no prejudice has been occasioned to the Respondent and that the withdrawal is also being sought in furtherance of the promotion of alternative dispute resolution mechanisms envisaged under Article 159(2)(c) of the Constitution, and in particular, the aid of the Land Registrar to resolve the issue.

4. The Appellant's advocate submitted that the withdrawal of the Appeal does not amount to an admission that the withdrawn Appeal was frivolous, but an effort at faster resolution of the dispute using the means provided by law; that the said action will not only decongest the court system but will create an opportunity for judicial resources to be deployed in other matters and that the withdrawal of the Appeal was made within a very short period of time from the time the Appeal was lodged.

5. Counsel relied on the provisions of Section 27 (1) of the Civil Procedure Act which provides as follows:-

“(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 give all the necessary directions for the purposes aforesaid; and the fact that the court 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 direct.”

6. It was submitted that the above provision stipulates that the award of costs shall be in the discretion of the Court and that for good reasons, the Court may depart from the general rule that costs follow the event. Counsel relied on the case of *Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & another* [2016] eKLR, in which the Court cited the case of *Impressa Ing Fortunato Federice vs. Nabwire* [2001] 2 EA 383 in which the Supreme Court of Uganda held that:-

“The effect of section 27 of the Civil Procedure Act is that the Judge or court dealing with the issue of costs in any suit, action, cause or matter has absolute discretion to determine by whom and to what extent such costs are to be paid; of course like all judicial discretions, the discretion on costs must be exercised judiciously and how a court or judge exercises such discretion depends on the facts of each case. If there were mathematical formula, it would no longer be discretion... while it is true that ordinarily, costs should follow the event unless for some good reason the court orders otherwise, the principles to be applied are: -

i. under section 27 (1) of the Civil Procedure Act, costs should **follow the event unless the court orders otherwise**. This

provision gives the judge discretion in awarding costs, but that discretion has to be exercised judicially.

ii. A successful party can be denied costs if it is proved that but for his conduct the action would not have been brought... It is trite law that where judgement is given on the basis of consent of parties, a court may not inquire into what motivated the parties to consent or to admit liability..."

7. It was submitted that the issue is what qualifies as a good reason for deviation from the general rule. Counsel relied on the case of **Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & another [2016] eKLR** in which Justice Mativo J. stated that:-

"To my mind, in determining the issue of costs, the court is entitled to look at inter alia (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, (vii) the relationship between the parties and (viii) the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of the Constitution. In other wards the court may not only consider the conduct of the party in the actual litigation, but the matters which led to the litigation, the eventual termination thereof and the likely consequences of the order for costs."

8. Counsel also relied on the case of **Samson K.A. Tim vs. D.M. Machage [2019] eKLR** in which the court held that:

"It is a settled principle of costs that costs follow the event, meaning that the successful party takes the costs unless the Court for sufficient reason orders otherwise. In considering this exercise of the discretion, the Court may properly take into account the length of time that the suit or proceedings has been going in Court before the withdrawal or other determination; the nature of the relief sought; the steps taken in the proceedings; the stage of hearing of the suit or proceedings; the need to promote access to justice by indigent suitors; and other sufficient reason in the interest of justice."

9. It was submitted that the Appellant had a valid cause of action in instituting the Appeal which the Appellant is abandoning for purposes of utilizing the alternative dispute resolution mechanisms which are envisaged under Article 159(2)(c) of the Constitution, which this Honourable Court is under a duty to promote.

10. The Respondent's counsel submitted that the award of costs arises as a matter of cause, unless there exists "good reasons" to deny the deserving party costs and that several decisions, including decisions of the Supreme Court, have consistently cited public interest, conduct of parties or novelty of the question under determination as "good reasons" that might persuade a court to exercise its discretion and deny costs to a deserving party. Counsel relied on the Supreme Court decision in **Jasbir Singh Rai & 3 others vs. Tarlochan Singh Rai & 4 others [2014] eKLR** in which the court states as follows:

"[14] So the basic rule on attribution of costs is: costs follow the event. But it is well recognized that this principle 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 Justice Kuloba's words [Judicial Hints on Civil Procedure, at p.94]:

"[T]he object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure... Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action."

[15] It is clear that there is no prescribed definition of any set of "good reasons" that will justify a Court's departure, in awarding costs, from the general rule, costs-follow-the-event. In the classic common law style, the Courts have proceeded on a case-by-case basis, to identify "good reasons" for such a departure. An examination of evolving practices on this question, shows that, as an example, matters in the domain of public-interest litigation tend to be exempted from award of costs. In **Amoni Thomas Amfry and Another v. The Minister for Lands and Another, Nairobi High Court Petition No. 6 of 2013**, Majanja, J concurred with the decision in **Harun Mwau and Others v. Attorney-General and Others, Nairobi High Court Petition No. 65 of 2011, [2012] eKLR**, in which it was held [para.180]:

"In matters concerning public-interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a party who has brought a case against the State but lost. Equally, there is no reason why the State should not be ordered to pay costs to a successful litigant."

[16] Another example is the landmark Presidential election petition Ruling in **Raila Odinga and Others v. The Independent Electoral and Boundaries Commission and Others, Sup. Court Petition No. 5 of 2013**, in which the parties were required to bear their own respective costs; the Court's reasoning being given as follows [paras. 309, 310]:

"Yet we have to take into account certain important considerations. It is already clear that the nature of the matters considered in a Presidential-election petition is unique. Although the petitions are filed by individuals who claim to have moved the Court in their own right, the constitutional issues are of a public nature – since such an election is of the greatest importance to the entire nation.

"Besides, this is a unique case, coming at a crucial historical moment in the life of the new Kenyan State defined by a new Constitution, over which the Supreme Court has a vital oversight role. Indeed, this Court should be appreciative of

those who chose to come before us at this moment, affording us an opportunity to pronounce ourselves on constitutional questions of special moment. Accordingly, we do not see this instance as just another opportunity for the regular professional-business undertaking of counsel” [emphasis supplied].

[17] Falling well within the cast of the foregoing reasoning, which this Court sustains, a kindred set of fact-manifestations has in another case, **Samuel Kamau Macharia and Another v. Kenya Commercial Bank and Two Others, Sup. Ct. Application No. 2 of 2011 [2012] eKLR**, led to this Court ordering that each party bear their own costs. This particular case is notable for the fact that it arose from the fact that a provision of statute law stood in conflict with that of the Constitution – and action to resolve the discord was not perceived by this Court as a proper occasion for awarding costs against the losing party.

[18] It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.”

11. Counsel also relied on the case of **Joseph Oduor Anode vs. Kenya Red Cross Society [2012] eKLR** in which Odunga J. held as follows:

“In the present case an application was made by the plaintiff to transfer the suit. The defendant filed grounds of opposition. Confronted with the said grounds the plaintiff threw in the towel and promptly sought to withdraw the application. Either way, the defendant succeeded in depriving the plaintiff of the orders he had sought to obtain. In the foregoing premises I am not convinced that the defendant’s conduct in the said proceedings was such that it did not deserve costs being awarded in its favour. I agree with Mr. Kuloba that whereas this Court has discretion when awarding costs, that discretion must, as usual, be exercised judicially. The first point of reference, with respect to the exercise of discretion is the guiding principles provided under the law. In matters of costs, the general rule as adumbrated in the aforesaid statute is that costs follow the events unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words, where the Court decides not to follow the general principles the Court is enjoined to give reasons for not so doing. In my view it is the failure to follow the general principles without reasons that would amount to arbitrary exercise of discretion and not the other way round.”

12. It was submitted that in the present case, no reason exists to warrant this Honourable Court to deny costs to the Respondent; that the dispute is of a very private nature concerning private land ownership and that there is no iota of public interest in the dispute subject of the withdrawn Appeal and Cross Appeal.

13. Furthermore, it was submitted, there was no novel issue which had been raised for determination; that the question of boundaries disputes and/or ownership and/or trespass are old legal issues which have been determined over and over and that the law on the same is well established and/or settled.

14. The Respondent’s counsel submitted that there is no allegation that the Respondent conducted himself in a non-judicious and/or non-equitable manner to disentitle him costs due; that as a matter of fact, the Respondent’s lawyer has attended all the court sessions, responded to both Application and the Appeal and even filed a Cross Appeal and that the Respondent’s counsel has gone even further to fix dates for the Appeal and served upon the Appellant the hearing/mention notices.

15. On the contrary, it was submitted, the Appellant’s conduct has been wanting; that the Appellant had initiated many parallel processes including filing this Appeal challenging the finding of the subordinate court that the dispute herein is a boundary dispute not within the jurisdiction of the court to determine; filing Machakos ELC. JR. No. 33 of 2019 seeking to compel the Chief Land Registrar to resolve the “boundary dispute” between the parties herein and declaring a boundary dispute before the Machakos Land Registrar for purposes of resolving the same.

16. It was submitted that the Appellant initiated three parallel processes over the same subject land in clear and wanton abuse of the court process; that failure by this court to condemn the Appellant to pay costs would send a very wrong message and that whereas this Appeal was initiated by the Appellant, he has never been keen on prosecuting it until when the Respondent moved this court and fixed a date for the Appeal, just for the Appellant to file a Notice of Withdrawal.

17. By a Plaint dated 21<sup>st</sup> February, 2018 and filed in court on 28<sup>th</sup> February, 2018, the Appellant instituted an action against the Respondent herein seeking the following orders:

- a. A declaration that the Respondent is not entitled to enter or use the Suit Property;
- b. A mandatory injunction compelling the Respondent to demolish and restore the Suit Property to its previous condition within such time as the Court may order;
- c. A mandatory injunction directing the Respondent to give the Plaintiff vacant possession of the Suit Property;
- d. General damages for trespass; and
- e. Costs.

18. By a Judgment delivered on 15<sup>th</sup> March, 2019, the Senior Principal Magistrate’s Court at Mavoko in Civil Case No. 208 of 2018 found

that the issue at hand was a boundary dispute and as such, it did not have jurisdiction to entertain the dispute pursuant to Section 18(2) of the Land Registration Act. Accordingly, the Court found that either party was at liberty to refer the dispute to the Land Registrar for alignment of the boundaries. Each party was ordered to bear his own costs.

19. Pursuant to the Court Order, the Appellant requested the Chief Land Registrar on 22<sup>nd</sup> March, 2019 to resolve the boundary dispute between Mavoko Town Block 2/5314 and Mavoko Town Block 2/7680. Aggrieved by the decision of the lower court, the Appellant also filed the Appeal herein through a Memorandum of Appeal on 12<sup>th</sup> April, 2019 and subsequently filed the Record of Appeal on 3<sup>rd</sup> December, 2019.

20. The Appellant also filed an Application dated 31<sup>st</sup> July, 2019 in which he sought for an injunctive order restraining the Respondent from trespassing or developing the suit property pending the hearing and determination of the Appeal.

21. In response to the Application, the Respondent filed a Notice of Preliminary Objection in which he argued that the Appellant had filed parallel proceedings including referral of the dispute to the Land Registrar and Machakos ELC. Judicial Review Application number 33 of 2019.

22. The Respondent also filed a Cross Appeal in which he averred that the lower court gravely erred by ordering that each party bears its own cost. The Respondent prayed that the Appeal be dismissed with costs and the costs in Mavoko CMCC No. 208 of 2018 be awarded to him.

The principle law on the award of costs is Section 27 of the Civil Procedure Act, which provides:

“(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.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

24. Furthermore, Order 25 of the Civil Procedure Rules, 2010 deals with the consequences of withdrawal of a suit. Rule 3 thereof provides:

“Upon request in writing by any defendant the registrar shall sign judgment for the costs of a suit which has been wholly discontinued, and any defendant may apply at the hearing for the costs of any part of the claim against him which has been withdrawn.”

25. The award of costs therefore arises as a matter of cause, unless there exists “*good reasons*” to deny the deserving party costs. Several decisions, including decisions by the Supreme Court, have consistently cited public interest, conduct of parties or novelty of the question under determination as “*good reasons*” that might persuade a court to exercise its discretion and deny costs to winning party.

26. The Supreme Court in *Jasbir Singh Rai & 3 others vs. Tarlochan Singh Rai & 4 others [2014] eKLR* authoritatively pronounced itself on the discretionary aspect of the rule in the following terms:-

“[14] So the basic rule on attribution of costs is: costs follow the event. But it is well recognized that this principle 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 Justice Kuloba’s words [Judicial Hints on Civil Procedure, at p.94]:

“[T]he object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure...Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action.”

[15] It is clear that there is no prescribed definition of any set of “good reasons” that will justify a Court’s departure, in awarding costs, from the general rule, costs-follow-the-event. In the classic common law style, the Courts have proceeded on a case-by-case basis, to identify “good reasons” for such a departure. An examination of evolving practices on this question, shows that, as an example, matters in the domain of public-interest litigation tend to be exempted from award of costs. In **Amoni Thomas Amfry and Another v. The Minister for Lands and Another, Nairobi High Court Petition No. 6 of 2013**, Majanja, J concurred with the decision in **Harun Mwau and Others v. Attorney-General and Others, Nairobi High Court Petition No. 65 of 2011, [2012] eKLR**, in which it was held [para.180]:

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[16] Another example is the landmark Presidential election petition Ruling in **Raila Odinga and Others v. The Independent Electoral and Boundaries Commission and Others, Sup. Court Petition No. 5 of 2013**, in which the parties were required to bear their own respective costs; the Court's reasoning being given as follows [paras. 309, 310]:

“Yet we have to take into account certain important considerations. It is already clear that the nature of the matters considered in a Presidential-election petition is unique. Although the petitions are filed by individuals who claim to have moved the Court in their own right, the constitutional issues are of a public nature – since such an election is of the greatest importance to the entire nation.

“Besides, this is a unique case, coming at a crucial historical moment in the life of the new Kenyan State defined by a new Constitution, over which the Supreme Court has a vital oversight role. Indeed, this Court should be appreciative of those who chose to come before us at this moment, affording us an opportunity to pronounce ourselves on constitutional questions of special moment. Accordingly, we do not see this instance as just another opportunity for the regular professional-business undertaking of counsel” [emphasis supplied].

[17] Falling well within the cast of the foregoing reasoning, which this Court sustains, a kindred set of fact-manifestations has in another case, **Samuel Kamau Macharia and Another v. Kenya Commercial Bank and Two Others, Sup. Ct. Application No. 2 of 2011 [2012] eKLR**, led to this Court ordering that each party bear their own costs. This particular case is notable for the fact that it arose from the fact that a provision of statute law stood in conflict with that of the Constitution – and action to resolve the discord was not perceived by this Court as a proper occasion for awarding costs against the losing party.”

27. The Honourable Court thus concluded:

“[18] It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.”

28. In **Joseph Oduor Anode vs. Kenya Red Cross Society [2012] eKLR** Odunga J. held as follows:

“In the present case an application was made by the plaintiff to transfer the suit. The defendant filed grounds of opposition. Confronted with the said grounds the plaintiff threw in the towel and promptly sought to withdraw the application. Either way, the defendant succeeded in depriving the plaintiff of the orders he had sought to obtain. In the foregoing premises I am not convinced that the defendant's conduct in the said proceedings was such that it did not deserve costs being awarded in its favour. I agree with Mr. Kuloba that whereas this Court has discretion when awarding costs, that discretion must, as usual, be exercised judicially. The first point of reference, with respect to the exercise of discretion is the guiding principles provided under the law. In matters of costs, the general rule as adumbrated in the aforesaid statute is that costs follow the events unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words, where the Court decides not to follow the general principles the Court is enjoined to give reasons for not so doing. In my view it is the failure to follow the general principles without reasons that would amount to arbitrary exercise of discretion and not the other way round.”

29. In the present case, the Appellant was guided accordingly by the lower court to have the dispute resolved by the Land Registrar in accordance with the law, which advise he undertook by authoring a letter. Indeed, the lower court did not penalize the Appellant with costs despite having lost the case.

30. Instead of pursuing the issue of having the boundary dispute resolved by the Land Registrar, the Appellant filed the current Appeal, an action that made the Respondent engage an advocate who filed a Notice of Preliminary Objection and a Cross Appeal. The advocate hired by the Respondent will have to be paid for his services, a cost that would have been avoided if the Appellant had not filed the current Appeal.

31. That being the case, and having perused the record, it is my finding that no good reason exists to warrant this Court to deny costs to the Respondent. The dispute herein is of a very private nature concerning private land ownership. Furthermore, there was no novel issue which had been raised for determination. The question of boundaries disputes or trespass are old legal issues which have been determined over and over and the law on the same is well settled.

32. On the question of conduct of parties, there is no evidence to show that the Respondent conducted himself in a non-judicious and/or non-equitable manner to disentitle him costs due to him. As a matter of fact, the Respondent's advocate has attended all the court sessions and responded to both the Application and the Appeal.

33. The Appellant herein initiated several parallel processes including the filing of this Appeal challenging the finding of the subordinate court that the dispute is a boundary dispute not within the jurisdiction of the court to determine and filing Machakos ELC. JR. No. 33 of 2019 seeking to compel the Chief Land Registrar to resolve the “*boundary dispute*” between the parties herein. That being the case, it is my finding that the Appellant, having withdrawn the Appeal, should pay the costs of the Appeal.

34. Consequently, the court makes the following orders:

**a. The Appeal filed by the Appellant is marked as withdrawn.**

**b. The Appellant to pay the costs of the Appeal.**

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 19<sup>TH</sup> DAY OF FEBRUARY, 2021.**

**O.A. ANGOTE**

**JUDGE**