



REPUBLIC OF KENYA



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**Mwangi & another v Kamau & another (Environment and Land Appeal
E020 of 2024) [2025] KEELC 1072 (KLR) (11 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 1072 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E020 OF 2024
LN GACHERU, J
FEBRUARY 11, 2025**

BETWEEN

EDWIN MUCHIRI MWANGI 1ST APPELLANT

JACOB MAKUMI MWANGI 2ND APPELLANT

AND

MARY WAMBUI KAMAU 1ST RESPONDENT

**COUNTY SECRETARY, MURANGA COUNTY GOVERNMENT 2ND
RESPONDENT**

*(Being an appeal from the Ruling of the Court (Hon. S. MWANGI) dated
24th April, 2024 issued MURANGA CMELC case no. E059 of 2023)*

JUDGMENT

1. The 1st Respondent (then Plaintiff) instituted the suit before the trial Court vide a Plaint dated 26th July 2023, craving for the cancellation of the title deed held by the 2nd Defendant (now 2nd Appellant) over Plot number 1193/38B (the suit property), claiming that the said parcel of land lawfully belongs to the estate of her late husband Dan Mwangi Sila Kabugi, and was fraudulently and illegally transferred to the 2nd Appellant herein by the 1st Appellant who forged her late husband's signature.
2. On paragraph 12 of his Statement of Defence dated 25th September, 2023, the 1st Appellant raised a Notice of Preliminary Objection against the Plaintiff's (Respondent herein)suit on grounds that the entire claim offended the Limitation of Actions Act; and that the Plaintiff (1st Respondent) failed to establish that she is a legal representative of the estate of Dan Mwangi Sila Kabugi (deceased).
3. The 3rd Defendant (now 2nd Respondent) in the suit before the trial Court filed a Notice of Preliminary Objection dated 6th February 2024, arguing that the Plaintiff (1st Respondent herein) lacked locus standi to bring the suit having not obtained a Grant of Letters of Administration or Letters of



Administration Ad-litem in respect of the estate of her late husband Dan Mwangi Sila Kabugi. The two Notices of Preliminary Objection were canvassed together by way of written submissions.

4. The trial Court vide a Ruling delivered on 24th April 2024, upheld the 1st and 3rd Defendants' Notices of Preliminary Objection and determined that the Plaintiff was incapable of filing the suit before it in the absence of Letters of Grant of Administration in respect of her departed husband's estate. The trial Court struck out the Plaintiff's suit with "No Order" as to costs thereby provoking the instant appeal.
5. The Appellants herein were aggrieved by the said Ruling of the trial court and filed the instant Appeal, vide the Memo of Appeal dated 20th May, 2024, and sought for the following orders: -
 - "(1). That this appeal be allowed.
 - (2) The ruling/order of the trial Court be set aside with an Order that the suit be and hereby struck out with costs to the appellants.
 - (3) The cost of this appeal be awarded to the appellants."
6. The Appeal herein is premised on the following three (3) grounds:
 - (1). The trial Court erred in law in ordering striking out of the suit with no Orders as to costs, hence denying the appellants the costs of the struck out suit despite their success and despite the appellants not being guilty of any conduct militating against an award of costs to them.
 - (2) The trial Court erred in law and in fact in not apportioning any reason for her decision to deny the appellants their costs of the suit.
 - (3) The trial Court erred in law in its decision to deny the appellants the costs of the suit despite their having put in a massive effort in research and submissions so as to effectively counter a suit that would otherwise have taken precious judicial time.
7. After the Appeal was admitted under Section 79B of the *Civil Procedure Act*, the Court directed the same be dispensed by way of written submissions. The Parties complied and their respective written submissions are summarised as below: -

The Appellants' Submissions

8. The Appellants filed their written submissions dated 22nd October 2024, through J.n. Mbuthia & Co. Advocates, and submitted that they welcomed the striking out of the Plaintiff's suit, but were aggrieved by the trial Court's decision to strike out the same with "no orders as to costs".
9. Reliance was placed on the provisions of Section 27 of the *Civil Procedure Act*, and the decisions of the Court in the cases of *Kiteme Vs Kimanthi (Civil Appeal No. 61 of 2019)* [2023] KEHC 605 (KLR) (8 February 2023) (Judgment); and, *Gakio Vs Kurgat & 2 Others (ELC Case 155 of 2016)* [2024] KEELC 6231 (KLR) (30 September 2024) (Judgment), to anchor the argument that the successful party in a suit is always entitled to costs barring any exceptional circumstances.

The 1st Respondent's Submissions

10. The 1st Respondent filed her written submissions dated 22nd October, 2024 through T. M. Njoroge & Co Advocates, and relied on the holding of the Court in the cases of *Devsurinder Kumar Bij Vs Agility Logistics Ltd* [2014] eKLR; and, *Grace Wairimu Gakio Vs Emily Chelgat Kargat & 2 others* [2019] eKLR, to buttress the proposition that the striking out of pleadings without hearing the parties is a



drastic measure which should be exercised sparingly, pursuant to the provisions of Order 2 Rule 15(1) of the Civil Procedure Rules.

11. Further reliance was sought in the case of *Civicon Limited Vs Kivumatt Limited & 2 others* (2015) eKLR, and also in the reasoning of the Court in the cases *Justus Tureti Obara Vs Peter Koipetai Nengisoi* (2014) eKLR; *Party of Independent Candidates Vs Mutula Kilonzo & 2 others* (2013) eKLR; *Republic Vs Rosemary Wairimu Munene (Ex parte Applicant) Vs Ihururu Dairy Framers Cooperative Society Ltd*; and, *Cecilia Karuru Ngayu Vs Barclays Bank of Kenya & Another* [2016] eKLR.
12. The court has considered the Memo of Appeal, the impugned ruling of the trial court as contained in the Record of Appeal, the rival written submissions, cited authorities and relevant provisions of law and finds the issues for determination are;
 - i. Whether the Appeal is merited.
 - ii. Who shall bear the costs of the Appeal.
13. This being a first Appeal, the Court is guided by the holding of the Court in the case of *Mursal & another v Manese* (suing as the legal administrator of *Dalphine Kanini Manesa*) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022) (Judgment), where the Court stated as follows:

A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first Appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.”
14. Further, the duty of a first Appellate Court was elaborated in the case of *Peter M. Kariuki vs Attorney General* [2014] eKLR, where it was held that:

“We have also, as we are duty bound to do as a first appellate Court, re-consider the evidence adduced before the trial Court and re-evaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.”
15. See also the decision of the Court in *Selle & another v Associated Motor Boat Co. Ltd. & Others* [1968] EA 123 where the Court declared as follows:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”
16. The Appellants’ main ground of Appeal is that the trial Court misdirected itself in striking out the suit before it with “No Orders” as to costs. They argued and submitted that as the successful parties in the foregoing suit, they were entitled to the costs thereof, and no exceptional factors arose that would operate to deny them the said costs.



17. Section 27(1) of the *Civil Procedure Act* provides as hereunder: -

“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.”

18. In the case of Party of Independent Candidates of Kenya versus Mutula Kilonzo & 2 others, HC EP No. 6 of 2013, the Court found and held as follows:

“It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs is a matter in which the trial judge is given discretion But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, is a rule which should not be departed from without the demonstration of good grounds for doing so.”

19. Further, in the case of Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review Application No 6 of 2014, which the 1st Respondent has relied upon, the Court held as follows:

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event 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 case.”

20. The import and meaning of the phrase “trouble taken in prosecuting or defending the case” was described by the Court in the case of Haraf Traders Limited v Narok County Government [2022] eKLR, as follows:

“Trouble taken in prosecuting or defending the suit does not mean trouble in the dictionary meaning say suffering or woes or distress. It refers to the various lawful and legitimate steps taken by the parties in the case in pursuit of remedy.”

21. There is no doubt that in the suit before the trial Court, the 1st and 2nd Appellants as well the 2nd Respondent herein were the successful parties. Section 27 of the *Civil Procedure Act* provides that costs are awarded at the discretion of the court, but ordinarily costs follow the event, and are granted to the successful litigant, unless in exceptional circumstance. There are plethora of decided cases in support of this provision of law.

22. In the case of Orix (K) Limited vs Paul Kabeu & 2 others [2014] eKLR, the Court held as follows:

“...the court should have been guided by the law that costs follow the event, and the plaintiff being the successful party, should ordinarily be awarded costs unless its conduct is such that it would be denied costs or the successful issue was not attracting costs. None of the deviant



factors are present in this case and the court would still have awarded costs to the plaintiff, which I do.”

23. The same issues were considered in the case of Cecilia Karuru Ngayu vs Barclays Bank of Kenya & another [2016] eKLR, where the Court enumerated the following factors which ought to be considered in determining a claim for the award of costs of a suit:

“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.”

24. The 1st Respondent herein submitted that the trial Court determined that the suit before it required a trial to ascertain the point in time when the Plaintiff discovered the fraud related to the suit land, which finding entailed that each party should bear its own costs.

25. In his book, Judicial Hints on Civil Procedure, 2nd Edition, (Nairobi) Law Africa) 2011 at page 99, Richard Kuloba stated as follows:

“The law of costs as it is understood by courts in Kenya, is this, that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part-no omission or neglect, and no vexatious or oppressive conduct is attributed to him, which would induce the court to deprive him of his costs-the court has no discretion and cannot take away the plaintiff's right to costs. If the defendant, however innocently, has infringed a legal right of the plaintiff, the plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course.”

26. The Court has carefully considered the pleadings, evidence and rival submissions tendered by the parties before the trial Court as well as the impugned decision of the trial Court and is satisfied that the trial Court did not hold that the conduct of the Appellants herein, being the successful parties in the suit, debarred them from an award of the costs thereto. Furthermore, contrary to the 1st Respondent's submissions, the trial Court did not enter any finding of fault on the part of the Appellants herein regarding the alleged fraudulent transfer of the suit property, and only proclaimed that the question of fraud needed to be canvassed at a trial.

27. This court finds and holds that the Respondent did drag the Appellants to court; they filed pleadings and participated in the Application that led to the striking out of the said suit. The Appellants are therefore the successful litigants, who are deserving of costs, since no factors existed to warrant the trial court not to award them costs.

28. Consequently, this court finds and holds that the Appellants herein are deserving of costs of the suit before the trial court, and that the trial court erred in failing to award them costs, as prayed. Thus the finding of the trial court is upset/ and or set aside on the aspect of finding that the Appellants did deserve costs. This court awards the Appellants costs of the suit before the trial court and for this Appeal.

29. Accordingly, this Court in its appellate jurisdiction, allows the instant Appeal in terms of the prayers marked (1) and (2) of the said Appeal as contained in Memorandum of Appeal dated 20th May, 2024.



30. Further, the Appellants are awarded costs of this Appeal being the successful parties as provided by Section 27 of the *Civil Procedure Act*.

Appeal allowed accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 11TH DAY OF FEBRUARY, 2025.

L. GACHERU

JUDGE

17/2/2025

Delivered online in the presence of;

Joel Njonjo - Court Assistant.

Ms. Mr. J. N. Mbutia for the Appellant

N/a for the 1st Respondent

N/a for the 2nd Respondent

L. GACHERU

JUDGE

17/2/2025

