



**Kongo'acheke Clan Community Based Organization (C.B.O. Suing Through Henry Mwenda, the Chairman) v Ngera & another (Environment & Land Case E003 of 2023) [2024] KEELC 3790 (KLR) (8 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3790 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE E003 OF 2023**

**CK NZILI, J  
MAY 8, 2024**

**BETWEEN**

**KONGO'ACHEKE CLAN COMMUNITY BASED ORGANIZATION (C.B.O. SUING THROUGH HENRY MWENDA, THE CHAIRMAN) ..... PLAINTIFF**

**AND**

**ANTHONY KIAMA NGERA ..... 1<sup>ST</sup> DEFENDANT  
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 2<sup>ND</sup>  
DEFENDANT**

**RULING**

1. The general rule is that costs follow the event. In this suit, parties recorded a consent dated 6.3.2024, marking the matter as settled to the effect that the 1<sup>st</sup> defendant shall not construct or put up a mortuary, funeral home, morgue, or an incinerator on parcel LR No Ntima/Ntakira/7534, 7404 and 7405.
2. The issue as to whether costs are payable or not was left for the court to determine. The 1<sup>st</sup> defendant submitted that costs are discretionary, and in determining whether or not to grant costs, regard must be had on the conduct of parties, the subject matter of litigation, and circumstances that led to the institution of the proceedings. Further, the court has to consider the events that eventually led to the termination, the stage at which the proceedings were terminated, the manner in which the termination occurred, the relationship between the parties, the public interest, and the need to promote reconciliation amongst the disputing parties. See *Haraf Traders Ltd v County Government of Narok* (2022) eKLR.
3. To this end, the 1<sup>st</sup> defendant submitted that the parties herein are neighbors, it was a public interest litigation, the case was brought to pursue public good and not individual interest, and lastly, it has



- terminated at an early stage. Reliance was placed on *Okoti & 2 others v AG & 14 others* (2023) KESC 31 K.L.R.
4. In this matter, the plaintiffs came to court with a plaint dated 7.2.2023 accompanied by an application of even date seeking interim orders. The 1<sup>st</sup> defendant opposed the same through a preliminary objection and a statement of defense dated 6.3.2023 and 20.6.2023, respectively.
  5. By a ruling dated 10.5.2023, the court dismissed the preliminary objection and issued an injunction restraining the 1<sup>st</sup> respondent from constructing the intended mortuary or funeral home on LR No Ntima/Ntakira/7534, 7404 and 7405.
  6. Parties were directed to comply with Order 11 of the *Civil Procedure Rules*, which they did on 7.7.2023 and 28.9.2023. When the matter came up for hearing on 28.7.2023, the 1<sup>st</sup> defendant expressed an interest to abandon the intended project. The 1<sup>st</sup> defendant filed no formal withdrawal notice. The court, by a ruling dated 28.2.2024, observed that the element of costs could not be determined without a formal application under Order 25 of the *Civil Procedure Rules* without consent to mark the matter as settled.
  7. The effect of the consent dated 6.3.2024 is that prayer No (1) of the plaint dated 7.2.2023, has been agreed upon by the parties. In effect, the 1<sup>st</sup> defendant has conceded to the suit.
  8. Section 27 of the *Civil Procedure Act* grants the court full power to determine by whom and out of what property and to what extent such costs are to be paid, and for good reason direct otherwise, that costs should not be payable.
  9. For a court to depart from the general rule, there must be good reasons to do so, as held in *Rai v Rai* (2014) eKLR. In *Okoti & 2 others v A.G. & others* (*supra*), the court said public interest litigation ought not to seek costs should they succeed in litigation in order to avoid apparent self-interest. The court considered *Rai v Rai* (*supra*) that the exceptional circumstances of the case, the need to achieve the end of justice, motivation, and the conduct of parties prior to, during and subsequent to the actual litigation are some of the considerations.
  10. Further, the court cited *Mumo Matemu v Trusted Society of Human Rights Alliance & others* (2014) eKLR that the court has to evaluate the terms and public nature of the matter vis-a-vis the status of the parties before it. Additionally, the court cited *Biowatch Trust v Registrar Genetic Resources & others* CCT 80/08 (2009) 2 A.C.C. 14 South Africa, that equal protection under the law requires that costs awarded need not be dependent on whether the parties are acting on their interest or in the public interest or whether they are financially well endowed or indigent but would be on whether costs would hinder or promote the advancement of constitutional justice.
  11. Turning to the suit before this court the plaintiffs described themselves in the plaint as inhabitants of Kongo Acheke village and officials of a C.B.O. who were opposed to a project propounded by the 1<sup>st</sup> defendant to build a mortuary, funeral home/morgue, or an incinerator in the locality without an Environmental Impact Assessment (EIA) report.
  12. The plaintiffs pleaded that they had filed an enforcement notice against the 1<sup>st</sup> defendant with the County Government of Meru since the project posed health or environmental hazards to them for present and future generations, more particularly since a vital water source was next to the village and was likely to be polluted. The plaintiffs blamed the 2<sup>nd</sup> defendant for not conducting an Environment Impact Assessment (EIA). to seek their opinions on the environmental dangers posed by the project. In paragraph 19 of the plaint, the plaintiffs averred that notices and pleas to the 1<sup>st</sup> defendant were ignored, leading to this suit.



13. In a replying affidavit dated 6.3.2023, the 1<sup>st</sup> defendant swore that, indeed, he intended to construct an incinerator on the suit land to aid in the waste management from his medical facility known as Meru Doctors Plaza, by extending the user of the suit land to include an incinerator. He said his application for change of user had been approved and was seeking NEMA approval through an EIA said to be under consideration by the 2<sup>nd</sup> defendant, following some public participation in March and October 2022.
14. The 1<sup>st</sup> defendant admitted that a memorandum of complaint was filed with the 2<sup>nd</sup> defendant by the plaintiff dated 3.2.2023 and was yet to be issued with permits or licenses by the 2<sup>nd</sup> defendant; hence, the suit was premature and or should have gone to the NEMA Tribunal.
15. In the statement of defense dated 20.6.2023, the 1<sup>st</sup> defendant termed the plaintiff as lacking capacity. He denied knowledge of the project and stated that approval of an extension of user had been made by the County Government of Meru and to the 2<sup>nd</sup> defendant that the EIA report was still under consideration by the 2<sup>nd</sup> defendant.
16. The 1<sup>st</sup> defendant averred that the concerns of the plaintiff toward the project had been addressed in the EIA report, which the plaintiffs had participated in through various stakeholder forums. The 1<sup>st</sup> defendant averred that the project posed no danger at all to the plaintiff.
17. In the paginated bundle dated 27.9.2023, in readiness for the main hearing, the 1<sup>st</sup> defendant did not share with the court the EIA report and explain the manner in which the concerns of the plaintiff were addressed by the 2<sup>nd</sup> defendant to ensure that the project had no environmental effects on the life and livelihoods of the plaintiffs.
18. The 1<sup>st</sup> defendant urges this court to find that this was a public interest litigation and be guided by *Okoti & others case* (*supra*) and *Haraf Traders Ltd v Narok County Government* (*supra*).
19. The history of the suit can only be discerned from the pleadings as set in this ruling. It is from the pleadings that the court can establish the manner in which parties behaved before, during, and as the litigation progressed.
20. The plaintiffs' complaint was about an immediate neighbor wishing to change the user of his land in a manner posing environmental and health risks to them and who had not engaged them on the project and seeking approval from government agencies.
21. In his witness statements and documentation, the 1<sup>st</sup> defendant did not mention a single attempt to directly engage the plaintiffs before, during, and after the litigation commenced in line with Article 159 of the *Constitution* on alternative dispute resolution and alternative justice system.
22. Further, from the pleadings and the supporting documents, it is notable that the 1<sup>st</sup> defendant has withheld the EIA report from this court, which at the very least would have shed light on what remedial action the 1<sup>st</sup> defendant has undertaken to assuage the fears and concerns of his neighbors.
23. The general rule is that costs must follow the event unless there are good reasons to order the contrary. One of the reasons would be whether the 1<sup>st</sup> defendant reached out to the plaintiffs after their memorandum of complaints in March 2023 to avoid litigation.
24. Unfortunately, the plaintiff averred in the plaint that the 1<sup>st</sup> defendant ignored their pleas, making the litigation inevitable. What motivated the parties to consent and for the 1<sup>st</sup> defendant to admit liability is not clear.



25. Kuloba J RTD, in his book "*Judicial Hints on Civil Procedure*" 2<sup>nd</sup> Edition 2005 at 95 states the word "event" means the result of all the proceedings to the litigation. It is the plaintiffs who have succeeded in the suit. The plaintiff came to court to enforce their constitutional environmental rights.
26. I have not seen any omission, misconduct, or neglect on their part. They were not motivated by ill will, malice, or ulterior motives to mount the litigation. The 1<sup>st</sup> defendant had infringed on their rights. Instead of mitigating the loss or costs, the 1<sup>st</sup> defendant defended the suit and waited until the eve of the primary hearing to propose to settle the matter.
27. The court finds no reason to deviate from the general rule. The suit is hereby marked as settled with costs to the plaintiffs to be borne by the 1<sup>st</sup> defendant.

Orders accordingly.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 8TH DAY OF MAY, 2024**

**HON. C K NZILI**

**JUDGE**

In presence of

C.A Kananu

Mugo for the plaintiff

Kariuki for the 1<sup>st</sup> defendant

