



**Buluma v Wanyama & 2 others (Enviromental and Land Originating Summons E002 of 2020) [2024] KEELC 7334 (KLR) (6 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7334 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2020  
BN OLAO, J  
NOVEMBER 6, 2024**

**BETWEEN**

**MICHAEL SIBI BULUMA ..... PLAINTIFF**

**AND**

**MARGARET AKOTH WANYAMA ..... 1<sup>ST</sup> DEFENDANT**

**ANJELINE AOKO OJIAMBO ..... 2<sup>ND</sup> DEFENDANT**

**JUDITH WANYAMA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Michael Sibi Buluma (the Plaintiff) filed an Originating Summons dated 17<sup>th</sup> September 2020 seeking various orders against Margaret Akoth Wanyama, Anjeline Aoko Ojiambo and Judith Wanyama (the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein) with respect to the land parcel No Bunyala/Mudembi/1195 (the suit land). The orders sought are no relevant to this ruling. What is relevant is that the Defendants vide their replying affidavit signed by the 3<sup>rd</sup> Defendant opposed the Originating Summons. The Originating Summons was amended on 22<sup>nd</sup> September 2022 and the names of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were deleted leaving only the 1<sup>st</sup> Defendant as the sole Defendant. The hearing then commenced on 25<sup>th</sup> July 2024 and the Plaintiff testified. Ernest Oduori (PW2) testified on 3<sup>rd</sup> October 2024 after which the Plaintiff closed his case.
2. The 1<sup>st</sup> Defendant closed her case stating that she would be relying on her replying affidavit.
3. The Court gave the parties upto 5<sup>th</sup> November 2024 to file their submissions.
4. Meanwhile, on 25<sup>th</sup> July 2024, Mr. Okutta counsel for the Defendants addressed the Court urging the Court that since the Plaintiff had withdrawn the suit against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, their costs should be paid.



5. Mr. J. V. Jumacounsel for the Plaintiff took the view that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are not entitled to costs because when the suit was filed, the suit land was registered in the names of all the three Defendants but they sub-divided the land and created another parcel of land being Bunyala/Mudembi/3258 which is now the subject of this suit. Therefore, it is MR J. V. JUMA'S view that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are not entitled to costs of the withdrawn suit against them.
6. I had initially informed counsel that in order to move on with the suit which was ready for trial, I would address that issue in my final judgment. However, on 3<sup>rd</sup> October 2024 when the parties closed their cases, I instructed counsel that I would deliver a ruling on the issue of costs of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants by a separate ruling and not in the final judgment. That is the purpose of this ruling.
7. It is not in dispute that the Plaintiff filed this suit against all the three (3) Defendants. A replying affidavit was filed in opposition to the Originating Summons prior to the amendment. Another replying affidavit was filed following the amendment. MR. J. V. JUMA'S proposition in not penalizing the Plaintiff with costs of the withdrawn suit as against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants is because they sub-divided the suit land when the suit was still pending.
8. The rule is that costs of any suit are at the discretion of the Court. Section 27 (1) of the [Civil Procedure Act](#) provides that:

27 (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."

It is true, as submitted by Mr. Juma, that the land parcel No Bunyala/Mudembi/3258 which the Plaintiff now claims, was created during the pendency of this suit. It is common ground, however, that the Plaintiffs application to restrain the Defendants from utilizing the suit land was dismissed by OmolloJ vide a ruling delivered on 10<sup>th</sup> February 2021. Therefore, the Defendants were at liberty to utilize the suit land as they wished including sub-dividing it because there was no order injuncting them. I do not think the Defendants should be denied their right to costs simply because of doing so.

9. Order 25 Rule 2 of the [Civil Procedure Rules](#) is worded in the following terms:

- 2 "Where a suit has been set down for hearing it may be discontinued, or any
- (1) part of the claim withdrawn, upon the filing of a written consent signed by all the parties.
- (2) Where a suit has been set down for hearing the Court may grant the Plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just.
- (3) The provisions of this rule and rule 1 shall apply to counterclaims." Emphasis mine.



That costs are at the discretion of the Court or judge was further enunciated by the Supreme Court in the case of *Jasbir Singh Rai & 3 Others -v- Tarlochan Singh RAI & 4 Others* S.C. Petition No 4 of 2012 [2014 eKLR] where it was stated thus; at paragraph 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 ...

Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.” Emphasis mine.

What is clear from Section 27 of the *Civil Procedure Act* as well as the precedent cited above is that the Court will consider several factors in determining who to award costs of a suit. The paramount rule however is that costs are at the discretion of the Court or Judge.

10. In the circumstances of this case, it is on record that the Defendants had filed their responses to the Originating Summons before it was amended. The suit against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was withdrawn at the point when the suit came up for hearing on 25<sup>th</sup> July 2024. It would be unfair and an injustice to deny the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants the costs of the withdrawn suits.
11. The up-shot of all the above is that having considered the submissions by counsel on the issue of costs, I find that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are entitled to costs of the withdrawn suit against them agreed or taxed. Orders accordingly.

**BOAZ N. OLAO**

**JUDGE**

**6<sup>TH</sup> NOVEMBER 2024**

**RULING DATED, SIGNED AND DELIVERED ON THIS 6<sup>TH</sup> DAY OF NOVEMBER 2024 BY WAY OF ELECTRONIC MAIL WITH NOTICE TO THE PARTIES.**

**BOAZ N. OLAO**

**JUDGE**

**6<sup>TH</sup> NOVEMBER 2024**

