



**Chituyi v Ondwasi (Environment & Land Case 118 of 2016)
[2023] KEELC 456 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 456 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 118 OF 2016**

BN OLAO, J

FEBRUARY 2, 2023

BETWEEN

GEORGE ALFRED CHITUYI PLAINTIFF

AND

JOHN MUNYOBI ONDWASI DEFENDANT

RULING

1. George Alfred Chituyi (the plaintiff herein) filed this suit against John Munyobi Ondwasi (the defendant) seeking his eviction from the land parcel No Bukhayo/Malanga/1414 as well as an injunction and damages on 15th September 2016.
2. The parties thereafter canvassed an application for temporary injunction which was issued in favour of the plaintiff on 27th September 2017. On 5th May 2020, the plaintiff filed a Notice of withdrawal of suit dated 30th March 2020 wholly withdrawing his claim vide Order 25 Rule 1 of the *Civil Procedure Rules*. The Notice of withdrawal of suit was brief. It reads:

“Notice of Withdrawal of Suit (Under Order 25 Rule 1 of the Civil Procedure Rules)

Take Notice that the plaintiff has wholly withdrawn the claim herein.”

It was duly signed by counsel for the plaintiff and served upon the defendant then acting in person. The Deputy Registrar subsequently endorsed the Notice on 7th July 2020 as an order of this Court.

3. The defendant felt he was wrongly denied costs of the withdrawn suit. He therefore approached the Court for orders of review under Order 45 of the Civil Procedure Rules and Section 80 of the *Civil Procedure Act* seeking the following remedies vide his Notice of Motion dated 28th July 2020:
 - 1) That this Honourable Court be pleased to review the orders made on 7th day of July 2020.



- 2) That consequently to the above, this Honourable Court be pleased to award costs of the suit to the defendant/Applicant herein.
- 3) That costs of this application be provided for.
- 4) The application was opposed and fell for hearing before Omollo J. By a ruling delivered on 12th November 2020, Omollo J in the final sentences delivered herself as follows:

“The issue of costs is always left to the discretion of the Court to be exercised judiciously. In light of the foregoing analysis, the application dated 7th July 2020 (sic) is founded as merited and is allowed with an order that each party shall bear its own costs.”

5. The reference to “application dated 7th July 2020” above was clearly an error because the application before the Judge was dated 28th July 2020 not 7th July 2020. Indeed the Judge’s ruling commences as follows:

“The defendant/Applicant has filed the application dated 28th July 2020 ...”

Buoyed by that ruling, the defendant filed his Bill of Costs on 11th December 2020 to which the plaintiff filed both grounds of opposition dated 5th February 2021 and a Preliminary Objection dated 23rd February 2021 in opposition to the defendant’s bill of Costs. Directions were taken that the same be canvassed by way of written submissions. Those have been filed by Mr Ndalila instructed by the firm of Ndalila & Company Advocates for the plaintiff and by Mr Okutta instructed by the firm of Ouma-okutta & Associates for the defendant. I have considered those submissions.

6. Counsel for both parties submitted at length on whether or not the Preliminary Objection filed against the defendant’s Bill of Costs fits the criteria set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* 1969 EA 696. Counsel for the defendant took the view that the Preliminary Objection raised by the defendant does not meet the criteria in that it does not raise pure points of law. It is of course correct that a Preliminary Objection must raise points of law – *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors* 1969 EA 696. In this case, however, the plaintiff filed both a Preliminary Objection and Grounds of Opposition. The view I take of the matter is that I need not delve into whether the Preliminary Objection meets the test laid down in the case of *Mukisa Biscuit Manufacturing Co Ltd -v- West End Distributors Ltd* (supra). This is because, vide order 51 Rule 14 of the Civil Procedure Rules a party who wishes to oppose any application may file any one or a combination of the following:

- (a) Notice of Preliminary Objection and/or;
- (b) Replying affidavit and/or;
- (c) Statement of grounds of opposition.

In the circumstances, there are grounds of opposition properly filed in response to the plaintiff’s Bill of Costs.

7. As is clear from both the Notice of withdrawal of the plaintiff’s claim endorsed by the Deputy Registrar on 7th July 2020 as well as the ruling delivered by Omollo J on 12th November 2020,



there is no mention of whether the defendant is entitled to any costs. The Notice of Motion dated 28th July 2020 and which I have already reproduced above sought three main prayers:

- 1) Review of the order dated 7th July 2020.
- 2) The court to subsequently award costs.
- 3) Costs of the application.

And as is clear from the disposal orders contained in the ruling delivered on 12th November 2020, Omollo J found the Notice of Motion dated 28th July to be:

“... merited and is allowed with an order that each party shall bear it’s own costs.”

When the above is broken down, the ruling delivered on 12th November 2020 only allowed prayers (1) and (3) of the Notice of Motion dated 28th July 2020 which are review of the orders dated 7th July 2020 and the costs of the application itself. Prayer NO (2) and by which the plaintiff sought the orders that;

“... this Honourable Court be pleased to award costs of the suit to the defendant/Applicant herein.”

was not addressed. The only order which was made with regard to costs was that the costs of the application dated 28th July 2020 would be met by each of the parties themselves. Indeed the judge was very clear “that each party shall bear it’s own costs.” Therefore, an important limb of the Notice of Motion dated 28th July 2020 and which really is the foundation upon which the defendant’s Bill of Costs is premised was not determined. The result is that no costs were awarded when the Notice of withdrawal dated 7th July 2020 was endorsed by the Deputy Registrar and neither were costs awarded to the defendant vide the ruling dated 12th November 2020 notwithstanding the fact that the judge fully appreciated that under the law, costs are within the discretion of the Court and that they follow the event.

8. Order 25 Rule 1 of the Civil Procedure Rules provides that:

“At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.”

Order 25 Rule 3 of the Civil Procedure Rules on the other hand provides that:

“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.” Emphasis mine.

From the record herein, the defendant neither made any request for the registrar to sign a “judgment for costs” of the withdrawn suit nor applied for any costs of the same. All that the defendant did was to file his Bills of Costs dated 9th December 2020 and filed on 11th



December 2020 but which clearly was not founded on any orders for costs of the withdrawn suit.

9. In his submissions on that issue, counsel for the defendant has made a case for costs of the withdrawn suit as follows:

“The plaintiff seems to know the existence of Section 27 of the *Civil Procedure Act* but does not seem to appreciate when it clearly expresses ‘costs follow the event’ and the event is that upon withdrawal of suit, it was only trite that costs expended by the defendant in terms of propping a defence prompting such withdrawal should be met.”

It is of course true that costs follow the event. Section 27(1) of the *Civil Procedure Act* reads:

“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.”

Clearly therefore, not only do costs follow the event but they are also at the discretion of the Court. However, before a party can make a claim for costs by filing a Bill of Costs like has happened in this case, there must be evidence that the Court made an award of costs in his favour. The Court cannot presume that an order for costs was made in favour of one party against the other in the absence of a direct and clear order awarding costs. The defendant was obviously aware about this and that is why he moved the Court by an application for review seeking to be awarded costs of the withdrawn suit. Unfortunately however, even in the ruling delivered pursuant to that application for review, no order was made granting him costs of the withdrawn suit. The only order made with regard to costs was that each party would meet their costs of the application for review.

10. Counsel for the defendant has made the following submissions with regard to the ruling delivered on 12th November 2020 following the application for review:

“We do submit that there are two considerations the trial court had in mind when it reviewed its ruling of 12/11/2020 upon application by the defendant, and on sound grounds awarded costs to the defendant upon withdrawal of the suit. This is a fact the plaintiff did not want to disclose to this Court that upon such revision and award of costs, the Bill of Costs dated 9/12/2020 became due and taxable. No appeal was preferred against the review order not any stay of execution was sought.”

However, as I have already stated above, the prayer for review was made in the ruling dated 12th November 2020 but the award for costs of the withdrawn suit, though sought by the defendant in prayer No 2, of the application, was not granted. And as stated in Odunga’s Digest On Civil Case Law And Procedure 3rd Edition at page 2238 paragraph (g):

“It is therefore incorrect that costs for the defendant were automatic after the discontinuance of the suit.”



Further, in Halsbury's Laws Of England 4th Edition (Re-issue 2010 Vol 10 paragraph 16, it reads:

“The Court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the Court, a party has no right to costs unless and until the Court awards them to him, and the Court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice.” Emphasis mine.

Therefore, since no costs were awarded to defendant, he is not entitled to any. The Bill of Costs dated 9th December 2000 and filed herein on 11th December 2020 was filed in Vacuo.

11. The up-shot of all the above is that this Court makes the following orders:

- 1) The Bill of Costs dated 9th December 2020 is struck out.
2. Each party meets their own costs of this application.

BOAZ N. OLAO

JUDGE

2NDFEBRUARY 2023

RULING DATED, SIGNED AND DELIVERED AT BUSIA ON THIS 2ND DAY OF FEBRUARY 2023 BY WAY OF ELECTRONIC MAIL.

BOAZ N. OLAO

JUDGE

2NDFEBRUARY 2023

