



REPUBLIC OF KENYA



**KENYA LAW**  
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**Sutton Holdings Limited v Said (Civil Case 75 of 2017)  
[2023] KEELC 16658 (KLR) (7 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16658 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
CIVIL CASE 75 OF 2017  
LL NAIKUNI, J  
MARCH 7, 2023**

**BETWEEN**

**SUTTON HOLDINGS LIMITED ..... PLAINTIFF**

**AND**

**ABDULAHI OMAR SAID ..... DEFENDANT**

**RULING**

**I. Introduction**

1. Before this honorable court for its determination is an of who bears the costs. The issue emerged after the plaintiff filed a notice of withdrawal of the counter claim dated October 12, 2022 under the provision of Order 25 Rule 1 of the [Civil Procedure, 2010](#) filed in Court on October 17, 2022.
2. On October 13, 2022, the plaintiff filed a Notice of withdrawal of the entire suit dated October 12, 2022 and filed in Court on October 13, 2022 under Order 25 Rule 2 of the [Civil Procedure Rules, 2020](#) with no orders to costs.
3. On 8<sup>th</sup> March, 2017, the Plaintiff instituted this suit against the Defendant. The Plaintiff who claimed to the legal and beneficial owner to all that parcel of land known as CR No 64897 LR No. MN/I/21152 (Hereinafter referred as “The Suit Land”) whilst the Defendant was a trespasser on the suit land. He sought for the following reliefs.
  - a. A declaration that the defendant is a trespasser on the plaintiff’s parcel of the suit land and the adjacent public road reserve being Plot No. 1501/I/MN;
  - b. A declaration that the said construction/development undertaken by the defendant is illegal and prohibited.



- c. An order for demolition of the said illegal construction/development/ structures that have encroached into the plaintiff/applicant's subject property and the public access road adjacent to the suit property.
  - d. An injunction compelling/barring the defendants from proceeding with any illegal construction/development on the subject properties.
  - e. Costs of this suit.
4. Pursuant to this and upon being served with Summons to Enter Appearance, on March 31, 2017 the defendant not only entered appearance but filed a defence and counter claim dated even date. While this was going on the honorable court was informed that the parties had instituted a Constitution Petition being Petition No. 37 of 2020 over the same subject matter and which eventually would have a direct bearing to the matter before this court.
  5. Resultantly, upon the parties fully complying with the provision of Order 11 of the Civil Procedure Rules, 2020, the matter was fixed for full trial commencing from February 21, 2022 whereby PW – 1 testified, cross examined and re – examined and brought to the close of the plaintiff's case. On April 27, 2022 the Defence hearing commenced whereby DW – 1 and 2 testified, cross examined and re – examined. The defendants indicated there were to summon two more witnesses – the Land Surveyors then close their case. They applied for adjournment which was allowed by court. The case was fixed for further hearing on October 11, 2022. However, on October 11, 2022 the Counsels informed court of their intention to withdraw this part heard case for the reason that on September 28, 2022, a Judgement in the Constitution Petition Number 37 of 2020 had been delivered and as they had earlier on predicted it had a direct effect to this suit. Thus, they both felt it needful to have this suit withdrawn under the provision of Order 25 Rule 1 and 2 of the Civil Procedure Rules, 2010. However, the Counsel for the defendant, Mr. Kazungu Advocate felt they ought to be paid the Costs of the Suit as they had expended a lot of time on the matter. The plaintiff opposed that application for Costs taking that the defendant had also filed a Counter Claim in the matter and likewise the Plaintiff had spend equal time on the matter.
  6. In view of the above issues, parties agreed to record a Consent and which was adopted by court as its orders save for the contested issue of costs. For good order the Court directed that a notices for the withdrawal of the suit be filed and parties orally submit on the issue of Costs on November 3, 2022.

## II. The oral Submissions

7. On November 3, 2022, each of the parties orally submitted as directed on the issue of Costs as follows.

### A. The oral Submissions by the Defendant.

8. Mr. Kazungu Advocate of the Law firm of Messrs. Lumatete Muchai & Company Advocates for the Defendant started by stating that they would demonstrate to Court on how they were entitled to Costs of this suit. The Learned Counsel submitted that the provision of section 27 ( 1) of the Civil Procedure Act, cap. 21 held that Costs followed the events. He held that they had fully participated in this case to its advanced stage and for them to be pressing for Costs was not in any way punishing the plaintiff at all. They were only concerned and pursuing for compensation for trouble they had gone through and the resources they had incurred on the matter. To support his argument, he relied on the two cases of the Court of Appeal – “*Cecilia Ngaro – versus – Barclays Bank* (2015) eKLR, and *Rosemary Wambui Munene – Versus – Ibururu Dairy Co – operativus Societies Limited*, 2014, eKLR” the Court held that where it was faced with an issue of Costs it should consider the following factors. These were:-



- i. The Subject matter.
  - ii. Circumstances that led to the filing of the case;
  - iii. Events that constituted to the filing of the case;
  - iv. State at when it was terminated;
  - v. The relationship of the party.
9. In applying these principles to the instant case, the Learned Counsel held that the plaintiff unnecessarily rushed to court alleging that the defendant was trespassing onto his land and a public land set aside for road reserve. The circumstances upon which the plaintiff's suit was terminated was due to the Judgement in the Petition No. 37 of 2020 which had a far reaching effects to this case. By that time, the Defendant had already engaged and requested for witness summons to issue against two land Surveyors who were to come and testify as the defendant witnesses an issue of expenses incurred. The parties herein were neighbours. ich the case.
10. Its for this reasons, therefore, that the Counsel pressed to be granted Costs for the Counter Claim in the matter.

### **B. The oral submissions by the Plaintiff**

11. Mr. T. Mutungi Advocate from the Law firm of Messrs. Muthee Kihiko Soni & Associates for the Plaintiff commenced the submission by providing the Honorable Court with a brief background of the case from the time it's filing, the partial hearing by both was the plaintiff and the defendant upto the point of its withdrawal as a result of the Judgement from the Constitution Petition No. 37 of 2020. filed upto the haring and the closure of the Plaintiff's case.
12. He submitted that the Constitution Petition moved faster than this suit and got concluded while this matter was still pending hearing. The Plaintiff while filing this case had not anticipated there would another suit inform of the Petition herein and its outcome. He submitted that this suit was never frivolous and had gone to a point where the Plaintiff closed their case. In any case the Defendant had also filed a Counter Claimed which called for the defence and also pursuing for its costs by the Plaintiff herein. This case was being withdrawn on a mutual understanding and the spirit of an out of court negotiation which needs to be encouraged by court. As a result, they both filed their notices of withdrawal under the provision of Order 25 Rules 1 and 2 of the Civil Procedure, 2010. There was no losing party but based a win - win perspectives.
13. According to him, the matter by theplaintiff involved a public property and thence a public interest. He cited the provision of section 27 (1) of the Civil procedure Act, cap. 21 whereby the issue of Costs was at the discretion of the Court and it followed the vent. By event here it meant the withdrawal of the suit in good faith. the plaintiff should not be punished for that good gesture. To buttress his case he also relied on the cases of "*Rosemary Wambui Munene (supra)*" and "*Cecilia Ngaro (supra)*".
- He urged court not to allow the application for Costs by the defendant.

### **III. Analysis & Determination**

14. I have considered the pleadings and the oral submissions of both Counsels, various authorities and the relevant provisions of the statutes. Strictly speaking, there is only one single issue before to be considered for determination – Whether the parties herein are entitled to the relief of being awarded



Costs after the withdrawal of the Plaintiff and Counter Claim under the provision of Order 25 Rules 1 and 2 of the [Civil Procedure Rules, 2010](#) by both the plaintiff and the defendant herein.

### **Brief facts**

15. Before embarking on the said issue, the court feels it significant to extrapolate briefly on the fact of the case. From the filed pleadings and the proceedings herein, On March 8, 2017 the plaintiff filed this suit where he sought “interalia’ to stop the defendant’s construction and demolition of the structures on the suit land. He also sought for an injunction to restrain the defendant from dealing with the suit properties. The defendant filed a replying affidavit to the plaintiff’s application dated March 8, 2017 and a statement of defence and counterclaim on March 31, 2017 seeking interalia the demolition of the Plaintiff’s structures allegedly blocking the Defendant’s access to his property and mesne profit.
16. The plaintiff sought leave of court vide an application dated June 15, 2017 to amend its application dated March 8, 2017. On June 29, 2017 the court ordered parties to maintain the status quo. However, before court heard the application dated 15<sup>th</sup> June 2017, the defendant filed contempt proceedings against Aman Kurji, the plaintiff’s director for being in contempt of the orders of court to maintain status quo; which the plaintiff responded to vide a notice of preliminary objection and a replying affidavit. On January 30, 2020 the court ruled that the application dated April 16, 2019 lacked merit and dismissed it with costs. The plaintiff then filed a second application dated September 16, 2020 seeking injunctive orders against defendant restraining them from developing on Plot No. 1502/1/ MN, to which the defendant responded to vide a replying affidavit on September 28, 2020.
17. On February 21, 2022 when the matter came up for hearing, Mr. Mutugi Counsel for the plaintiff informed court that the County Government of Kenya had since removed the structures on the suit properties. As a result, there was filed a Constitution Petition 37 of 2020 and he urged court to stay this matter awaiting the hearing of the Petition. Nonetheless, the suit proceeded to hearing with PW - 1 (Amos Syengo) and DW – 1 & 2 (Abdullahi Omar Said) proceeded to give their evidence. The Counsel for the Defendant applied for summon to have two more witnesses appear to testify. However, on October 10, 2022 Mr. Mutugi Counsel informed Court that Judgement had already been delivered on September 28, 2022 in the [Constitution](#) Petition No. 37 of 2020 hence the parties wished to withdraw the suit with no order as to costs. AS stated the Counsel for the defendant insisted on being paid costs even after the withdrawal of the Suit and the Counter Claim. The honorable court directed parties to formally notify court of the withdrawal hence the need of this ruling. That is adequate on the facts of the matter.
18. Now turning to the issues of the subject of this ruling. As a general rule, the right of a party to discontinue a suit or withdraw his claim cannot be questioned. The emergence of [the Constitution](#) Petition No. 37 of 2020 seems to have an impact on this present suit to the extent of the parties herein wishing to be bound by it. However, it would have been wise for the parties herein to issue Court with a copy of the said Judgement to ascertain the same. After all the filing of a suit does not necessarily imply that parties have irrevocably chosen to resolve their dispute by litigation only.
19. Upon the filing of the two notices of withdrawal of the suit and the Counter Claim, there is nothing left in this suit for Court to hear. The only question before Court is that of who ought to be awarded costs.
20. Order 25 Rule 1 and 2 of the [Civil Procedure Rules](#) states:
  1. 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.



2.
  - (1) Where a suit has been set down for hearing it may be discontinued, or any 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.
21. The above rules point to three state of affairs when it comes to withdrawal of suits. The first is when the suit has not been set down for hearing, here the Plaintiff is allowed to at any time discontinue the suit all he ought to do is give notice in writing to all parties involved. The second is when the suit has been set for hearing, the suit may be discontinued by parties signing and filing a consent in court. The last is when the suit has been sent down for hearing but parties have not reached a consent on the withdrawal of the suit or any condition thereto. In this case, the plaintiff must obtain the leave of court to withdraw the suit which will be granted upon such terms as are just. Here the plaintiff right to withdraw the suit is conditioned on obtaining leave of court, which is granted on such terms as set by court.
22. In this case, the plaintiff filed the notice of withdrawal of the suit mid-hearing of the suit on the ground that there is a Judgement in another suit that has an impact on the suit property. The defendant too is in agreement that the suit ought to be withdrawn and went ahead to file his Notice of withdrawal of his Counterclaim. In my view, the issue before court falls under Order 25 Rule 2 (1). The parties herein ought to have filed a written consent signed by both Counsel for the plaintiff and defendant setting out the terms under which the suit has been withdrawn.
23. The parties have not filed a consent, instead they have followed the provision of Order 25 Rule 1, which is applicable in an instance where the suit has not been set down for hearing. Nonetheless, since both parties are in agreement in terms of withdrawing the suit and in the exercise of the Court's power as enshrined in section 3A of the *Civil Procedure Act*, and to meet the ends of justice, I shall regard the said Notices filed by both parties as applications for discontinuance and withdrawal of the whole suit on the ground that the judgement in Petition 37 of 2020 has concluded the cause of action herein.
24. It is now well established that costs are at the discretion of court. Costs means the award a party is granted at the conclusion of any legal action, process or proceedings in any litigation. As all the Counsels seem to be agreeing, that under the proviso of section 27 ( 1 ) of the *Civil procedure Rules, 2010* Costs follow the events and the cited cases of "Cecilia Ngaro and *Mary Wambui Munene (supra)* and also the Supreme Court case of "*Jasbir Rai Singh v Trachalon Singh* (2014) eKLR," costs follow the events. In this case, by event it meaning the results of the suits by the Plaintiff and the Counter Claim being terminated on mutual consent.
25. From these cited court precedents and the oral Submissions by both Counsels, this honorable court is persuaded by the parameters set out the Court of Appeal while considering the issue of Costs, These are:-
  - a. The Subject matter.
  - b. Circumstances that led to the filing of the case;
  - c. Events that constituted to the filing of the case;
  - d. State at when it was terminated;



- e. The relationship of the party
26. The Subject matter: - The plaintiff and the defendant voluntarily and freely filed two notices by consent while the matter was almost at its tail end of being concluded the plaintiff having closed its case and the defendant's two witnesses testified and was only awaiting two more witnesses – the Land Surveyors. It was a win – win out of court situation. The Subject matter was that the plaintiff's claim herein according to the amended Plaint dated April 13, 2017 is related to the title, use and occupation of the suit property and none for monetary value. The defendant's claim as per his Counter - claim dated March 30, 2017 are similarly related to occupation and use of the suit property however he has included Mesne profits at a sum of Kenya Shillings Ninety Thousand (Kshs. 90,000/=) for his shops. Since the mesne profit has not been proved during the trial the court cannot consider it on merit. It is prudent at this stage to mention that the plaintiff did not file a Defence to the Defendant's counterclaim.
27. The Circumstances of terminating the case:- Based on the legal ratio from the cited decisions herein, the circumstances under which it was terminated was on mutual understanding and consent arising from the Judgement in the Constitution Petition no. 37 of 2020. The Court still feels the need to be furnished with a copy of this Judgement to be part of the records notwithstanding the finalization of the matter. The records need to be complete.
28. The relationship:- The Court has taken Judicial notice that the Plaintiff and Defendants are neighbours and in order to sustain that good, cordial brotherhood, love peace and tranquility as envisaged under the Alternative Judicial System (AJS) and the provision of article 159(1) and (2)(c) of the Constitution of Kenya, 2010.

## VI. Conclusion & Disposition

27. From the oral submissions made by both counsel, it seems to me that the abandonment on the suit by both parties was not because there was no evidence to sustain the same but because of the Judgement in Petition 37 of 2020.

The prudent step then was for the parties to discontinue the suit and save on costs. Since both parties made a claim against the other and they are both in agreement they should withdraw the suit, it is only just and proper for each party to bear its costs.

For these reasons, and in the interest of Justice, Conscience and Equity, I make the following orders:-

- a. That an order of this court made that the suit by the plaintiff and the counter claim by the defendant herein be and are hereby withdrawn pursuant to the duly executed and filed Notices of Withdrawal dated October 12, 2022 and filed in court on October 13, 2022 by the defendant herein and another dated 12<sup>th</sup> October, 2022 and filed in court on October 17, 2022 by the plaintiff herein respectively
- b. That the plaintiff to file in court a copy of the Judgement in Petition No. 37 of 2020 within 21 days from the date of the delivery of this Ruling to be part of the records of this case.
- c. That the parties herein to sign a consent for the discontinuation/withdrawal of the suit herein and file the same within 14 days of this Ruling.
- d. That each party to bear their own Costs.

IT IS SO ORDERED ACCORDINGLY.

**RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS DAY OF 7<sup>TH</sup> MARCH 2023**



**HON. JUSTICE L. L NAIKUNI (JUDGE)**  
**ENVIRONMENT & LAND COURT AT,**  
**MOMBASA**

**In the presence of**

- a. M/s. Yumnah, Court Assistant.**
- b. Mr. Mutugi Advocate for the Plaintiff.**
- c. Mr. Kazungu Advocate for the Defendant.**

