



REPUBLIC OF KENYA



**Butler v Koskei & 22 others (Environment & Land Case 11'B' of 2017)
[2023] KEELC 21205 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21205 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 11'B' OF 2017
MAO ODENY, J
NOVEMBER 2, 2023**

BETWEEN

MAURA KATHLEEN BUTLER PLAINTIFF

AND

CHUMO ARAP KOSKEI 1ST DEFENDANT
BARSEBE ARAP SANG 2ND DEFENDANT
CHAPKARIA LOSUTE 3RD DEFENDANT
WILLIAM KIPRONO CHEPKWONY 4TH DEFENDANT
MINYATTA SITOK 5TH DEFENDANT
FRANCIS SUYA MINYATTA 6TH DEFENDANT
RUTH JEPKEMOI SINGOE 7TH DEFENDANT
ECHAKARI NAIBEI 8TH DEFENDANT
KIPLANGAT KANGOGO 9TH DEFENDANT
MARY CHEPKEMOI 10TH DEFENDANT
LOUPETE LOMULE 11TH DEFENDANT
LOKITOI EKATO IKATO 12TH DEFENDANT
EZEKIEL EDOME 13TH DEFENDANT
EKIDOR ELEMEN 14TH DEFENDANT
ESTHER CHEBORE CHUMO 15TH DEFENDANT
ESTHER AKIRUI OMONDI 16TH DEFENDANT
LOKITELA AKOL 17TH DEFENDANT



AKUI CHEPUKOU IKORI	18 TH DEFENDANT
JOHN LOBEYOK EKIDOR	19 TH DEFENDANT
TOMITIK TONGU LONGORE (PETER	20 TH DEFENDANT
MODO LOKWAWI	21 ST DEFENDANT
NAWIYAKWAN LOMAE	22 ND DEFENDANT
ABOO EBADAL ABOK	23 RD DEFENDANT

RULING

1. By a plaint dated December 13, 2016 the plaintiff herein sued the defendants seeking orders of eviction against the defendants. The defendants filed their statement of defence on August 30, 2017 where they denied the plaintiff's claim.
2. On 18th April 2023, the plaintiff filed a Notice of Withdrawal of suit under order 25 rule 1 of the [Civil Procedure Rules](#) and on 24th April 2023 the court made the following orders:
 - a. That this matter be and is hereby marked as withdrawn.
 - b. That parties to file submissions on the issue of costs.
3. Following this court's directions, the plaintiff filed her submissions on 3rd May 2023 while the defendants filed their submissions on 7th June 2023.

Plaintiff's Submissions

4. The plaintiff submitted that she instituted the present suit against the defendants who were her former farm workers who became squatters on her land for trespass. It was her submissions that she withdrew the case in order to explore alternative dispute resolution mechanisms as per the provisions of article 159(2) of [the Constitution](#).
5. The plaintiff further submitted that since she has withdrawn the suit, there is no winner or loser in the dispute and the defendants are still in occupation of her property and so she sought not to be further burdened by the costs of the suit. The plaintiff argued that since the defendants were acting in person, they did not incur any legal costs and whatever expenses they incurred were minimal.
6. The plaintiff relied on section 27(1) of the [Civil Procedure Act](#), [Halsbury's Laws of England](#) 4th Edition (Re-issue), [2010], Vol. 10 Para 10 and submitted that the court has unfettered discretion to determine if any costs are payable.

Defendants' submissions

7. The defendants relied on section 27 of the [Civil Procedure Act](#), order 25 rule 1 & 2 of the [Civil Procedure Rules](#) and submitted that costs follow the event unless the court for good reason orders otherwise.
8. The defendants submitted that they have been in court for over six years and have gone through stress, incurred expenses of going to court and defending the matter only for the plaintiff to withdraw the suit.
9. The defendants relied on the cases of *Republic vs Rosemary Wairimu Munene (Ex parte Applicant) v Ihururu Dairy Farmers Co-operative Society Ltd* Judicial Review Application No. 6 of 2004 as was



cited in *DGM v EWG* [2021] eKLR, *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another* [2016] eKLR and submitted that the issuance of costs is at the discretion of the court which should be exercised judiciously and urged the court to grant them costs.

Analysis And Determination

10. The plaintiff withdrew this matter on April 24, 2023 to engage in alternative dispute resolution which is provided for under article 159(2) of *the Constitution*.
11. The issue for determination is whether the defendants are entitled to costs after the plaintiff withdrew the case. order 25 rule 1 and 2 of the *Civil Procedure Rules* provides as follows:
 - “ 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.
12. Order 25 rule 2(2) of the *Civil Procedure Rules* provides that a party may withdraw a suit subject to the terms that the court considers just including payment of costs. The Supreme court in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR held as follows:

“ A party’s right to withdraw a matter before the court cannot be taken away. A court cannot bar a party from withdrawing his matter. All that the court can do is to make an order as to costs where it is deemed appropriate.”
13. As indicated before, the defendants entered appearance and filed their statement of defence on 30th August 2017. The matter proceeded for hearing and the plaintiff gave part of her evidence on 13th May 2019 when the plaintiff was stood down and on subsequent dates, the matter could not proceed because the plaintiff was unwell. When the matter was mentioned on 25th January 2021, the court was informed that counsel for the plaintiff was deceased.
14. On 19th July 2022 the court set the matter down for defence hearing on 23rd November 2022 but the same did not proceed. The matter was set down for mention on 30th January 2023 and on 24th April 2023 the Plaintiff filed a Notice to withdraw the suit and the same was marked as withdrawn.
15. It is on record that the defendants had instituted a suit against the plaintiff vide Nakuru HCCC No 43 of 2014 seeking to be allocated portion of the suit property to settle and by a consent judgment,



the defendants were allocated 49 acres of land through a Self Help Group known as Kilombe Butler Squatters Self Help Group. The donation was approved and the 49 acres was surveyed and given to the defendants and their families. The current defendants did not relocate prompting the filing of this suit.

16. It is upon this backdrop that the court is to determine whether the defendants are entitled to costs. The defendants are still in occupation of the plaintiff's parcel of land.
17. In the case of *Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & another* [2016] eKLR, where the Court cited the case of *Impressa Ing Fortunato Federice vs. Nabwire* [2001] 2 EA 383 the Supreme Court of Uganda held that:

“The effect of section 27 of the *Civil Procedure Act* is that the Judge or court dealing with the issue of costs in any suit, action, cause or matter has absolute discretion to determine by whom and to what extent such costs are to be paid; of course like all judicial discretions, the discretion on costs must be exercised judiciously and how a court or judge exercises such discretion depends on the facts of each case. If there were mathematical formula, it would no longer be discretion... while it is true that ordinarily, costs should follow the event unless for some good reason the court orders otherwise, the principles to be applied are: -

- i. under section 27 (1) of the *Civil Procedure Act*, costs should follow the event unless the court orders otherwise. This provision gives the judge discretion in awarding costs, but that discretion has to be exercised judicially.
- ii. A successful party can be denied costs if it is proved that but for his conduct the action would not have been brought... It is trite law that where judgement is given on the basis of consent of parties, a court may not inquire into what motivated the parties to consent or to admit liability...”

18. Similarly, in the above case the court held that:

“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*. In other wards the court may not only consider the conduct of the party in the actual litigation, but the matters which led to the litigation, the eventual termination thereof and the likely consequences of the order for costs.”

19. I had laid down the backdrop of the case and considered the circumstances that led to the institution of this suit, the conduct of the parties before and after institution of the suit, the relationship of the parties, the defendants were ex- workers of the plaintiff, the manner in which the termination was done, ill health and promotion of alternative dispute resolution mechanism as per article 159(2) of *the Constitution*.
20. The court has discretion to order for costs or deny a party costs but has to explain the reasons for not awarding the costs as costs follow the event. Costs are not supposed to be punitive or to punish a party but to compensate the successful party. In this case, there is no winner or loser, it is a win-win situation as the defendants are still in occupation of the plaintiff's parcel of land. There is also room for alternative dispute resolution. It would be double jeopardy for the plaintiff to be ordered to pay costs in the circumstances.



21. The court therefore orders that each party to bear their own costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 2ND DAY OF NOVEMBER 2023.

M. A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules

