



REPUBLIC OF KENYA



KENYA LAW
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**Odongo v Attorney General & 2 others (Environment & Land Case
57 of 2021) [2022] KEELC 3085 (KLR) (5 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3085 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 57 OF 2021**

AY KOROSS, J

MAY 5, 2022

BETWEEN

THOMAS ONGWEN ODONGO PLAINTIFF

AND

ATTORNEY GENERAL 1ST DEFENDANT

DISTRICT LAND REGISTRAR, SIAYA 2ND DEFENDANT

SIAYA COUNTY COUNCIL 3RD DEFENDANT

RULING

Introduction

1. By a ruling of this court dated 27/01/2022, the plaintiff's application seeking reinstatement of his dismissed suit was allowed by this court subject to several conditions including that the plaintiff pays the 1st and 2nd Defendants throw away costs of Ksh 20,000/- within 21 days from the date of the ruling.
2. Instead of paying these costs within the stipulated timelines, the plaintiff filed a motion dated 8/02/2022 that is the subject of this ruling.

The plaintiff's case

3. The motion is brought within the provisions of Order 45 Rules 1, 2, 3 and Order 51 Rule 1 of the [Civil Procedure Rules](#) and Sections 1A, 1B, 3, 3A and 80 of the [Civil Procedure Act](#). Prayer 1 is spent and the only prayers pending determination are prayers 2 and 3 which are follows;
 - a) The court do review, set aside or vary its orders delivered on 27/01/2022; in particular order 2;
 - b) That upon the above prayer being granted, that the court do allow the plaintiff to prosecute his case without paying the 1st and 2nd Defendants any costs.



4. The Notice of Motion is supported by the grounds set out on the face of the motion and on the supporting affidavit of the plaintiff's counsel Fredrick Ooro Awana dated 8/02/2022.
5. In summary, the motion is anchored on the grounds that; the plaintiff is unable to pay costs to the 1st and 2nd defendants, the court erred in awarding costs to them (1st and 2nd defendants) and that the award of costs would occasion a miscarriage of justice to the plaintiff.

The defendants' case

6. The 1st and 2nd defendants filed a replying affidavit dated 14/03/2022 wherein they stated that the orders sought were vague and that the plaintiff did not demonstrate that he was unable to pay the costs as ordered by the court and that it was only fair and just that the motion be dismissed with costs to the defendants.

The plaintiff's submissions

7. The plaintiff filed written submissions dated 10/02/2022. Founded on Order 45 Rule 1 of the Civil Procedure Rules, the plaintiff submitted that he sought to review the orders of the court on two grounds; (i) the court erred in awarding costs to the 1st and 2nd defendant because the 1st defendant represented the 2nd defendant and that the 2nd defendant had never participated in the proceedings (ii) the ruling was in his favour and he should have been exempted from paying costs because his application was unopposed and that he was financially incapacitated (iii) the defendants were government agencies hence not financially strained.
8. He placed reliance on Article 48 of *the Constitution* on access to justice, Section 27 of the *Civil Procedure Act* and the authority of *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another* [2016] eKLR which set out the judicious yardstick to be used by courts in exercising its discretionary powers in awarding costs to a party.

The defendants' submissions

9. The 1st and 2nd defendants filed written submissions on 15/03/2022. They submitted on the two issues they identified for determination; on the 1st issue, they contended that an award of costs by the court was not an error on the face of the record. In sustenance of their argument, they relied on the Ugandan case of *Edison Kanyabwera versus Pastori Tumwebaze* [2005] UGSC 1 and *National Bank of Kenya Limited versus Ndungu Njau* [1997] eKLR which stated that an error must be apparent on the face of the record.
10. They contended that the legal foundation for awarding costs was elaborated in the case of *R v Rosemary Wairimu Munene, ex parte Applicant Ihururu Dairy Farmers Cooperative Society JR Number 6 of 2014* and *Kenya Pipeline Company Limited v Grey Soil Investment Limited & 3 others* [2009] eKLR.
11. On the 2nd issue, they submitted that the plaintiff had contrary to the provisions of Section 107 of the *Evidence Act*, not adduced evidence that he was unable to pay the costs as ordered by the court.

Analysis and determination

12. I have carefully considered the plaintiff's motion, grounds in support, supporting affidavit, the 1st and 2nd defendants' replying affidavit, parties' submissions and authorities cited and the issues falling for determination is whether the motion is merited.



I will proceed to analyze the legal and jurisprudential framework on the issue.

13. In my view and rightfully so as pointed out by the 1st and 2nd defendants' replying affidavit, the 2nd prayer that has been sought by the plaintiff is rather composite, vague and ambiguous. Does the plaintiff want this court to review, set aside or vary all the orders it issued on 27/01/2022 thus essentially throwing away the baby out with the bathwater or does he seek the review or variation of the order compelling him to pay throw away costs to the 1st and 2nd defendant?

14. It is trite law that courts as independent arbiters and are bound by the pleadings of the parties and are refrained from entering into the realm of litigation. The position of the courts was well encapsulated in the case *David Sironga Ole Tukai v Francis Arap Muge & 2 others* [2014] eKLR

“It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded.... parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way”

15. It is not the duty of the court to undertake a fishing expedition to infer the intent of the parties but rather it is the litigants who are called upon to be precise and clear in their pleadings. It is trite law that court orders cannot be issued in vain and ultimately it is the finding of this court that prayer no. 2 is vague, ambiguous and incapable of being issued and because prayer number 3, was hinged on it, it equally fails.

16. Even if this court was wrong, which it is not, the motion that is before this court does not meet the legal threshold to warrant this court to review or set aside its orders. The plaintiff is of the mistaken belief that the court ordered him to pay costs to the 1st and 2nd defendant in respect of the motion dated 14/09/2021. Had he taken time to read the ruling, he would have found that the court awarded the 1st and 2nd defendant throw away costs for the inconvenience that they would suffer as a result of reinstatement of the plaintiff's case.

17. Costs are hinged on Section 27 of the *Civil Procedure Act* which states that costs are discretionary and from the plaintiff's pleadings, he is dissatisfied with the findings of this court on costs and it is the humble view of this court such dissatisfactions are usually grounds for appeal and not review. In the case of *Robert Tom Martins Kibisu v Republic* (2018) eKLR, the Supreme Court of Kenya held thus;

“An application could not be said to be for correction of errors when it was anchored and replicate with allegation of discontentment with the Court's finding and/or appreciation of legal principles and their interpretation thereof. Such dissatisfaction was normally a ground for appeal”

18. Throw away costs is not novel and has been granted by our courts in a line of decisions including; *Mathias Nasubo Ogama v Rebman Ambalo Malala* [2012] eKLR, *Phill Limited & another v Mbeke Muisyo And Francis Mutinda Muisyo (Suing on Behalf of The Estate of Walter Musyoki Muisyo (Deceased))* [2022] eKLR, and *Onsomu Onchonga v Forty Place Limited* [2021] eKLR. The plaintiff was alive of this position of law when he contended in his submissions dated 30/11/2021 that the defendants could be compensated by way of costs if his suit was reinstated and he went ahead to rely on the authority of *Chelelgo Kulei v Republic & 9 Others* (2014) eKLR. This court considered the plaintiff's submissions when rendering its determination and it is quite unfortunate that the plaintiff is backtracking on his submissions which form part of the court record. Needless to say, public bodies draw funds from tax payers and they are accountable to the public and in my view, just like any other



party to a suit, they are entitled to costs. It therefore follows that there is no error apparent on the face of the record.

19. Ultimately, it is my finding that the motion is not merited and I hereby dismiss it. It is trite law that costs follow the event and I award the costs of this motion to the 1st and 2nd defendant.

JUDGMENT DELIVERED VIRTUALLY.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 5TH DAY OF MAY 2022.

In the Presence of:

Mr. Ooro F. present for the plaintiff.

M/s Ndombi h/b for M/s Essendi present for 1st and 2nd defendants.

Court assistant: Ishmael Orwa

HON. A. Y. KOROSS

JUDGE

5/5/2022

