



**Malu & 2 others v Kiveke (Environment and Land Appeal
211 of 2014) [2022] KEELC 3430 (KLR) (7 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3430 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 211 OF 2014**

CA OCHIENG, J

JUNE 7, 2022

BETWEEN

PATRICK MASILA MALU 1ST APPELLANT

**THE REGISTERED TRUSTEES OF TALA CATHOLIC
CHURCH 2ND APPELLANT**

THE COUNTY GOVERNMENT OF MACHAKOS 3RD APPELLANT

AND

GIDEON MWAKA KIVEKE RESPONDENT

RULING

- 1 What is before court for determination is the issue of costs emanating from this appeal. The appeal herein emanated from the decision of Hon. L. N. Mugambi in Kangundo SPMCC No. 53 of 2014 wherein he dismissed the 1st and 2nd appellants' preliminary objection dated the August 14, 2014. Upon filing the appeal herein against the ruling, they also filed an application seeking stay proceedings in the Lower Court, pending determination of the appeal, which application was dismissed by Justice Angote on May 15, 2020. The Lower Court case was eventually heard and dismissed with costs. Further, with the dismissal of the said lower court case, there was nothing left in the appeal and it was compromised on November 2, 2021 but the court directed parties to file submissions on costs.
- 2 The 1st and 2nd appellants in their submissions contend that they are entitled to costs of the appeal as they engaged an advocate who prepared a memorandum of appeal, record of appeal, filed and argued an application for stay of proceedings and has indeed been vindicated by the Lower Court that had made the impugned ruling. To buttress their averments, they relied on the following decisions: *Orix Oil (Kenya) Limited vs Paul Kabeu & 2 others* (2014) eKLR; Chuka Civil Appeal No. 3 of 2020 (*Southern Star Sacco Ltd Vs Vanancio Ntwiga*) and *Robert Mwaniki Ndwiga vs Agatha Kaugi Riungu* (2018) eKLR.



- 3 The 3rd appellant in its submissions insists it is entitled to costs. It explains that since no order for stay of proceedings was granted, the Lower Court matter proceeded concurrently with the appeal herein and the trial court case was concluded before this court would render its decision on appeal. In the said Lower court matter, the Respondent's suit was dismissed in totality with costs to the appellant. To support its arguments, it relied on the following decisions: *Beijing Industrial Designing & Researching Institute vs Lagoon Development Limited* (2015) eKLR; *Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & 4 others* (2014) eKLR; *Canyon Properties Limited & 3 others vs Eliud Kipchirchir Bett & 2 others* (2017) eKLR.
- 4 The respondent in his submissions argued that it is the appellants who dragged him into the appeal, which was never prosecuted. Further, the appellants never served him with the record of appeal. He insists the withdrawal of the appeal does not connote success of the appellants. To buttress his averments, he relied on the following decisions: *Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & 4 others* (2014) eKLR; *Republic v Rosemary Wairimu Munene, Ex parte v Ihururu Dairy Farmers Cooperative Society Ltd* Judicial Review No 6 of 2014; and *Cecilia Karuru Ngayu V Barclays Bank of Kenya & another* (2016) eKLR.
- 5 On the issue for determination of costs, I wish to make reference to order 25 of the *Civil Procedure Rules* as well as section 27 of the *Civil Procedure Act*. Order 25 rule 1 & 2 of the *Civil Procedure Rules* provides that:
- 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) Discontinuance (order 25 rule 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 of 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.”

While Section 27 of the *Civil Procedure Act* provides that:

- (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.
- (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”



On award of Costs, the *Halsbury's Laws of England*, 4th Edition (Re-issue), [2010], Vol.10. para 16, states that:

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 added).

In *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR the court noted that;

The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

6 See also the decisions in *Canyon Properties Limited & 3 others V Eliud Kipchirchir Bett & 2 others* (2017) eKLR and *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* (2014) eKLR.

7 In the current scenario, the 1st and 2nd appellants lodged the instant appeal but the proceedings in the lower court were never stayed. Further, the lower court proceeded to dismiss the respondent’s suit before the appeal was determined. The parties agreed that there was no need of proceeding with the appeal, hence the only issue in contention is award of costs. I note the 1st and 2nd appellants filed a memorandum of appeal, record of appeal and an application to stay proceedings in the lower court, pending appeal which application was dismissed. Insofar as the respondent insists the appellants are not entitled to costs, however based on the circumstances at hand while associating myself with the decisions I have cited and relying on the quoted legal provisions, I opine that the appellants are entitled to costs since they had already undertaken certain steps in the appeal by filing documents as well as making several court appearances. In the circumstance, I will proceed to award the appellants costs but this will be subject to taxation by the Taxing Officer.

I so order.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 7TH DAY OF JUNE, 2022

CHRISTINE OCHIENG

JUDGE

