



**Bob and Brenneisen & 7 others v Shanzu Waterfront Limited & another (Civil Suit 103 of 2014) [2022] KEELC 13818 (KLR) (5 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13818 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
CIVIL SUIT 103 OF 2014  
M SILA, J  
OCTOBER 5, 2022**

**BETWEEN**

**BOB AND URSULA BRENNEISEN ..... 1<sup>ST</sup> PLAINTIFF  
SIMON AND MELISA PHILLIPS ..... 2<sup>ND</sup> PLAINTIFF  
PETER AND ANNELIES LOCHARI - MUIRE ..... 3<sup>RD</sup> PLAINTIFF  
ANNE SUTTCLIFE ..... 4<sup>TH</sup> PLAINTIFF  
ALLAN AND THEA JENNINGS ..... 5<sup>TH</sup> PLAINTIFF  
ADRIAN AND ULLA GRIMWOOD ..... 6<sup>TH</sup> PLAINTIFF  
BOB AND NICOLE WEYN ..... 7<sup>TH</sup> PLAINTIFF  
HARISH AND MAMTA PATEL ..... 8<sup>TH</sup> PLAINTIFF**

**AND**

**SHANZU WATERFRONT LIMITED ..... 1<sup>ST</sup> DEFENDANT  
MOMBASA COUNTY GOVERNMENT ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**(Plaintiffs filing suit against the defendants protesting a development being undertaken by the 1<sup>st</sup> defendant and said to have been illegally licenced by the 2<sup>nd</sup> defendant; suit listed for hearing but plaintiffs failing to attend and suit dismissed for non-attendance and failure to prosecute; court directing that any party is at liberty to apply for costs; 2<sup>nd</sup> defendant making an application for costs ; general rule being that costs follow the event; situations when the court may depart from this general rule; in the circumstances of the case, court not**



**persuaded that there is any good reason to depart from the general rule; court persuaded that 2<sup>nd</sup> defendant deserves costs)**

1. The application before me is that dated July 28, 2021 filed by the 2<sup>nd</sup> defendant and seeking to be awarded the costs of this suit which was dismissed on February 8, 2021 for non-attendance on the part of the plaintiffs.
2. The background is that through a plaint filed on May 8, 2014, the plaintiffs sued the 1<sup>st</sup> defendant, Shanzu Waterfront Limited, principally complaining about a development that the 1<sup>st</sup> defendant proposed to undertake comprising of ten blocks of four apartments of opinion that the proposed development did not meet the required statutory compliance, and would also disrupt the existing ecosystem. In the suit, they sought orders for a permanent injunction to have the development stopped. I need to mention that together with the plaint, the plaintiffs filed an application for an interlocutory injunction. The same was heard and ruling delivered on July 30, 2015. The court did grant a conditional order of injunction for a period of 90 days to allow the 1<sup>st</sup> defendant make available measures that would protect the ecosystem to be done through an environmental audit. There was an environmental audit report which was filed, and after the same was interrogated, the court discharged the orders of injunction on September 9, 2016.
3. Through an application filed on October 28, 2015 the plaintiffs sought to join the County Government of Mombasa as 2<sup>nd</sup> defendant, which application was allowed, now resulting in the suit having two defendants. The cause of action against the 2<sup>nd</sup> defendant was that it ought not have issued a letter dated April 16, 2014, to the 1<sup>st</sup> defendant, and the plaintiffs sought orders for a declaration that the said letter was in contravention of the Development Control Verification Committee's report dated March 16, 2014 issued by the 2<sup>nd</sup> defendant's Lands, Planning and Housing Department. I believe the letter relates to planning permission being granted to the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant filed a statement of defence which was basically a denial of all that was pleaded in the plaint.
4. The matter was fixed for hearing during service week (a programme where other judges visit the station in order to assist in clearing case backlog) on September 3, 2020 before Matheka J Mr Ondego, who appeared for the plaintiff, sought an adjournment for reason that his witnesses were out of the country. The court obliged and adjourned the case to February 8, 2021 for hearing. On February 8, 2021, the matter came up for hearing before me and Ms Mutune who appeared for the plaintiff applied for adjournment on the ground that parties have commenced negotiations and were at an advanced stage. There was no appearance for the 1<sup>st</sup> defendant, but Ms Kiboss, who appeared holding brief for Mr Ngonze for the 2<sup>nd</sup> defendant stated that she was not aware of any negotiations. Ms Mutune clarified that the negotiations were between the plaintiffs and 1<sup>st</sup> defendant. I was not persuaded to adjourn considering that the matter had been in court for close to 7 years and I thought that there had been ample time to undertake and finalize any negotiations. Ms Mutune had no witness and I therefore dismissed the case of the plaintiffs for non-attendance with an order that any party is at liberty to apply for costs. After I made the foregoing orders, Ms Mutune applied for copies of proceedings and leave to appeal. I ordered that copies of proceedings be availed subject to payment of any court fees and also granted leave to appeal, assuming that leave was required.
5. This application was thereafter filed seeking costs on behalf of the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant argues that as a general rule costs should follow the event.
6. The motion is opposed through grounds of opposition in the following fashion :-
  - a. The 2<sup>nd</sup> defendant herein was joined into these proceedings given that they abdicated their statutory duties and in condemning the 1<sup>st</sup> defendant's wrongful and illegal conduct.



- b. Since its joinder on November 15, 2016 and apart from filing an appearance and filing defence, in March 2018, the 2<sup>nd</sup> defendant has not made any appearances in court nor filed any documents nor witness statements in the matter.
  - c. The matter did not progress given that the 1<sup>st</sup> defendant abandoned the project once the wrongful conduct and illegalities were pointed out and did not pursue it and the 2<sup>nd</sup> defendant did not comply with the orders of this honourable court on October 3, 2020 to file their documents and witness statements.
  - d. No costs were awarded on February 8, 2021 when the matter was dismissed for the foregoing reason and leave to appeal was granted – no liberty to apply was given as is now alleged.
  - e. The present application is therefore misconceived and ought to be dismissed particularly given the orders of this honourable court given on February 8, 2021 were not appealed against.
7. In his submissions to support the application, Mr Apollo Muinde, learned counsel for the 2<sup>nd</sup> defendant/applicant, *inter alia* that the 2<sup>nd</sup> defendant went through the trouble of defending this suit, and in so doing, used public resources that could have been put to better use elsewhere. He referred me to section 27 of the [Civil Procedure Act](#), which relates to the award of costs, and the case of [Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another \(2016\) eKLR](#) which examined the principles governing the award of costs. He pointed out that the plaintiffs’ suit was dismissed for non-attendance and the court gave any party liberty to apply for costs contrary to paragraph (d) of the grounds of opposition. On ground (a) of the grounds of opposition, he submitted that it was the plaintiffs to prove their case and that they did not prove their allegations that the 2<sup>nd</sup> defendant abdicated her statutory duties; on this he relied on the case of [Karugi & Another v Kibaya & Another \(1983\) eKLR](#).
  8. On the part of the plaintiffs, Mr Khagram, learned counsel, more or less rehashed the grounds of opposition and added that the court did not award costs when the suit was dismissed and that the avenue is to appeal. He referred me to the case of [Elite Intellogent System Limited v HFC Limited; Hassan Zubeid & 2 Others \(interested parties\) \(2019\) eKLR 41](#), on situations where the court may depart from the principle of “costs follow the event.” He submitted that this court in its own wisdom chose not to award costs and that when the matter was dismissed the 2<sup>nd</sup> defendant’s counsel had stated that he did not wish to scuttle any ongoing negotiations.
  9. I have considered all the above. I hold as follows :-
  10. There is an impression created by the plaintiffs that this court dismissed the plaintiffs’ suit without making any order as to costs. That is a misconception. What the court did was to dismiss the suit and give liberty to any party to apply for costs. It is arising out of that order that this application was filed giving reasons why costs should be awarded to the 2<sup>nd</sup> defendant. It is not therefore correct to assert that this court dismissed the plaintiffs’ suit but made no order as to costs. The order, whether to award costs or not, was reserved for later in the event that any party applied for costs. This application is therefore properly premised on the orders given by the court.
  11. Section 27 which I have been referred to by Mr Muinde, does indeed address the issue of the award of costs in civil suits. That section states as follows :-
27. Costs
    - (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.
12. From the above, it will be seen, that firstly, the award of costs is in the discretion of the court, and the court has full power to determine the extent of such costs, who is to pay the costs, and out of what property the costs should be paid. However, and this is canvassed in the proviso to subsection 1, costs should follow the event unless for good reason the court otherwise orders. Thus, the general rule is that costs should follow the event and if the court is of the view that this should be departed from then there must be good reason given for this.
13. It was stated by the Supreme Court in the case of *Jasbir Singh Rai & Others v Tarlochan Rai & Others, Petition No 4 of 2022, (ruling of 4 March 2014) (2014) eKLR*, that :-
- “(15) It is clear that there is no prescribed definition of any set of “good reasons” that will justify a court’s departure, in awarding costs, from the general rule, costs-follow-the-event. In the classic common law style, the courts have proceeded on a case-by-case basis, to identify “good reasons” for such a departure.
14. One of the examples given in the *Jasbir Singh Rai case* (above) for departing from the general rule is public interest litigation. In the case of *Cecilia Karuru Ngayu v Barclays Bank of Kenya*, cited by Mr Muinde, Mativo J (as he then was) was of the view that :-
- “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 words 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.”
15. In my view, what Mativo J was expressing is a demonstration of the wide discretion that the court has, and some of the factors that the court may consider, when determining whether or not to depart from the general rule that costs follow the event.
16. In this case, the plaintiffs had sued complaining of a development that did not conform to the legal requirements. I have no problem with such litigation which in fact can be considered to be one that is aimed at protecting the environment. I note however, that at the interlocutory stage, the court (Omollo J then dealing) discharged preliminary orders of injunction because she was of opinion, given the material presented at that time, that the 1<sup>st</sup> defendant had prima facie complied with its obligations.



After that determination, the plaintiffs never attended court to present their case and in all respects appear to have abandoned pursuit of the case. Before the case came up for hearing before me, it had previously been adjourned for lack of witnesses. At the time I dismissed the suit, no witnesses were available. I was informed at that time that the parties are pursuing negotiations. The 2<sup>nd</sup> defendant was not aware of any negotiations and neither was the 1<sup>st</sup> defendant's counsel present to confirm whether or not there were negotiations. I therefore had, and still have even within this application, no iota of evidence that the plaintiffs and the 1<sup>st</sup> defendant had embarked on any negotiations. Even assuming that there were negotiations, the suit had been in court for 7 years, and if there were any negotiations, the plaintiffs ought to have ensured that the same were concluded by the time the matter was fixed for hearing so that if the negotiations had failed by that time, they would then proceed to present their case. The court is not a forum for people to park cases that they have no intention of proceeding with.

17. In the grounds of opposition, ground (c) states that the matter did not progress because the 1<sup>st</sup> defendant abandoned the project "once the wrongful conduct and illegalities were pointed out and did not pursue it." These are not matters that you put in grounds of opposition for they are matters of fact. They are supposed to be put in an affidavit which has not been done here. As I had earlier stated, Omollo J was not persuaded to stop the project at the interlocutory stage and allowed for it to proceed, and I am at a loss as to what the very broad and non-specific "wrongful conduct and illegalities" the grounds of opposition allude to. If indeed the project was abandoned then the plaintiffs ought to have been gracious enough to attend court and state that their suit has been overtaken and need not proceed. I observe further that none of the plaintiffs thought of swearing any affidavit to oppose this motion, which by itself, given the circumstances of this case, is very telling.
18. The other grounds such as failure to file statements or documents do not in any way disentitle the 2<sup>nd</sup> defendant from being awarded costs.
19. Given the above, I am afraid that I do not find any good reason to depart from the general principle that costs shall follow the event. I allow this application and the plaintiffs will thus shoulder the costs of this suit to the 2<sup>nd</sup> defendant.
20. Orders accordingly.

**DATED AND DELIVERED THIS 5<sup>TH</sup> DAY OF OCTOBER 2022**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**In the presence of :-**

Ms Namulala h/b for Mr Apollo Muinde for the 2<sup>nd</sup> defendant/applicant

Ms Mutune h/b for Mr Khagram for the plaintiffs/respondents

Court Assistant – Wilson Rabong'o

