



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC CASE NO. 27 OF 2015**

SUSAN TIRINDI M'MIRITI.....1<sup>ST</sup> PLAINTIFF

DOREEN MAKENA MURUNGI.....2<sup>ND</sup> PLAINTIFF

DORIS KIENDE.....3<sup>RD</sup> PLAINTIFF

SARAH NGUGI.....4<sup>TH</sup> PLAINTIFF

PURITY NTINYARI.....5<sup>TH</sup> PLAINTIFF

**VERSUS**

GLADYS NKUENE.....1<sup>ST</sup> DEFENDANT

JAMES MURIUKI MURIUNGI.....2<sup>ND</sup> DEFENDANT

FRANKLIN KIMATHI MURUNGI.....3<sup>RD</sup> DEFENDANT

PETER MUTHURI MURUNGI.....4<sup>TH</sup> DEFENDANT

BONFACE KIRIMI.....5<sup>TH</sup> DEFENDANT

MUTAI MANYARA.....6<sup>TH</sup> DEFENDANT

**RULING**

1. A notice for withdrawal of the suit was filed herein on 10.4.2017 by the plaintiff and the same was duly endorsed by the court on 20.4.2017.
2. On 6.4.2018, this file was before me where counsel for 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants addressed the court as follows: ***“We aver that we are entitled to costs either to be taxed by the DR or to be agreed upon...”*** The said counsel appear to have repeated this request on 7.5.2018 and the court allowed the same, hence triggering the application dated 4.7.2018.
3. In the aforementioned application, the plaintiffs are seeking for the review, variation and or setting aside of the order given by the court on 7.5.2018. The grounds in support of the application are contained on the face of the application and in the sworn affidavits of 1<sup>st</sup> plaintiff filed on 4.7.2018 and on 16.8.2018.
4. Applicant avers that the parties herein are family members. In paragraph 3 of her affidavit of 16.8.2018 she gives a vivid description of the family ties as follows:

***“That the parties to this suit are family members in that the 1<sup>st</sup> defendant is the plaintiff’s mother, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs’ and the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants are sons and daughters of Nelson Murungi M’Miriti who is the son of Gladys Nkuene (the 1<sup>st</sup> defendant) and Miriti Kiambati (deceased). That the 5<sup>th</sup> defendant is the son of the 1<sup>st</sup> defendant and the step son of Miriti Kiambati (deceased). The 5<sup>th</sup> plaintiff is a daughter of Karambu who is the daughter of Gladys Nkuene (the 1<sup>st</sup> defendant)”***

5. Applicants contend that they instituted this suit against the defendants/respondents (in their capacity as beneficiaries to the

family/Ancestral land parcel no. Abogeta/U-Kithangari/481), to stop the respondents from evicting the plaintiffs and or selling the said land to third parties leaving them homeless”

6. Applicants further averred that while this suit was in pendency they learnt that the 2<sup>nd</sup> and 4<sup>th</sup> respondents, in cahoot with the other respondents, and in furtherance of their fraudulent ways to disinherit them, had rushed to file a succession cause with regard to the said land in Meru Succession Cause No. 138 of 2015.

7. The applicants took into consideration their financial tribulations and they found it proper to withdraw this suit in order to raise objections in the said succession suit, as the same would enable them proceed with one suit only, reducing the expenses. Their sole reason of instituting this was for purposes of protecting their property as opposed to bringing anarchy in the family, hence issues they had raised in this suit are the same issues they have raised in the said succession cause.

8. Applicants aver that condemning them to pay costs will only bring more acrimony in the family.

9. The 3<sup>rd</sup> defendant one Franklin Kimathi Murungi has filed a replying affidavit on 25.9.2018 where he avers that the suit was defended and that there is no law barring award of costs to family members. He avers that the court exercised its discretion judiciously and reasonably and that no proper grounds for review have been advanced.

10. The 2<sup>nd</sup> and 4<sup>th</sup> defendant have filed replying affidavits in support of the application. In essence they have jumped ship.

11. I have not seen any response from 1<sup>st</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants. The replying affidavit of 3<sup>rd</sup> defendant doesn't indicate that he was swearing the same for and on behalf of any other defendants. I will hence take it that 3<sup>rd</sup> defendant has opposed the application on his own behalf only.

12. I have considered all the issues raised herein as well as the submissions of the parties.

13. Order 45 rule 1 provides that:

***“Any person considering himself aggrieved— (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay”.***

14. A perusal of the record shows that the issue of costs was not addressed when the notice of withdrawal of suit was filed and when it was endorsed. The proceedings of 6.4.2018 and on 7.5.2018 reveal that it is counsel for 1<sup>st</sup> – 5<sup>th</sup> defendants who had requested for costs to be agreed upon or to be taxed by the DR.

15. The counsel for the present applicant was not in attendance on 6.4.2018 but had sent one Mr. Kaimenyi who had told the court “*Ngunjiri is coming*”. Perhaps if counsel for applicant had been present, he could have been in a better position to raise all the issues he is raising now.

16. Be that as it may, it has emerged that parties are close family members. The applicant has given a vivid account of this relationship which has not been rebutted by the respondents. I therefore find that there are sufficient reasons to warrant review of the orders on costs.

17. Section 27 (1) of the Civil Procedure Act provides that;

***“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; .....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”.***

18. In the case of **Cecilia Karuru Ngayu vs Barclays Bank of Kenya & another (2016) eKLR** cited by the applicant it was stated 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 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”.***

19. The exercise of discretion by the court must be anchored on facts. – See **Super marine handling services Ltd vs Kenya Revenue Authority (2010) eKLR** (also cited by the applicant).

20. In the instant case applicants have given plausible reasons as to why they filed this case. A succession cause had been filed by 2<sup>nd</sup> & 4<sup>th</sup>

respondents whereby applicants feared that they would be disinherited. The said 2<sup>nd</sup> and 4<sup>th</sup> respondents have acknowledged this claim in their respective replying affidavits. That is why they have joined ranks with the applicants in this matter of costs for the sake of maintaining peace and harmony and in order to provide an enabling environment for parties to pursue litigation in the succession cause.

21. In the final analysis, I conclude that the orders sought by applicants are merited. The application herein is allowed whereby this suit remains as withdrawn pursuant to the notice of 10.4.2017 but each party to bear their own costs of this suit and the present application.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 10<sup>TH</sup> DAY OF JULY, 2019 IN THE PRESENCE OF:-**

C/A: Kananu

Gikonyo for plaintiff/applicant

Ngugi holding brief for Mwirigi Kaburu for 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> defendants Muthomi K. for 6<sup>th</sup> defendants

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**