



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC. NO. 399 OF 2015**

**EUCABETH AOKO OWIRA.....PLAINTIFF**

**VERSUS**

**JOHN OTIENO OWIRA.....1<sup>ST</sup> DEFENDANT**

**MUHORONI TOWN COUNCIL.....1<sup>ST</sup> DEFENDANT**

**RULING**

1. Eucabeth Aoko Owira, the Plaintiff, through the notice of motion dated 17<sup>th</sup> July 2017, seeks for the setting aside of the taxation of bill of costs of the 1<sup>st</sup> Defendant, an order that each party bear their own costs and costs of this application. The application is brought under **Sections 1A, 1B and 3A of the Civil Procedure Act and Article 159 of the Constitution**. It is based on the four grounds marked (a) to (d) on its face and supported by the affidavit sworn by the Plaintiff on the 18<sup>th</sup> July 2017. The Plaintiff's case is that as the case was withdrawn and marked settled on the 22<sup>nd</sup> march 2017 following an out of court settlement, then each party should bear their own costs and therefore, the 1<sup>st</sup> Defendant's bill of costs dated 10<sup>th</sup> April 2017 should be set aside.

2. The application is opposed by John Otieno, the 1<sup>st</sup> Defendant, through the five grounds of opposition filed through M/s Onsongo & Co. Advocates dated 17<sup>th</sup> August 2017. The grounds in summary are that the application is misconceived, incompetent, defective, abuse of the process of the court and law.

3. That M/s Ongele & Company Advocates entered appearance for the 2<sup>nd</sup> Defendant on the 17<sup>th</sup> January 2007 and thereafter filed pleadings on behalf of their client.

4. That the suit came up for the last time for hearing on the 24<sup>th</sup> September 2015 when it was stood over with directions that another date be fixed at the registry. That no further steps were taken with a view of prosecuting the case and after about one year and two months, the court issued the notice to show cause dated 24<sup>th</sup> November 2016 for hearing on the 20<sup>th</sup> March 2017. The notice was served on counsel for the Plaintiff and 1<sup>st</sup> Defendant who attended court. That the counsel for the Plaintiff informed the court that their client had informed them that they were discussing with the Defendants with a view of an out of court settlement and therefore applied to withdraw the suit, instead of having it dismissed for want of prosecution. That in reply the counsel for the 1<sup>st</sup> Defendant indicated that they had no objection to the application but sought for costs. That though counsel for the Plaintiff opposed the prayer for costs, the court rendered its ruling allowing the withdrawal of the suit but awarding costs to the Defendants.

5. The application dated 17<sup>th</sup> July 2017 came up for hearing on the 27<sup>th</sup> November 2017. That the counsel for the Plaintiff informed the court that they had already filed and served their written submissions on the 24<sup>th</sup> November 2017. He sought for prayer 2 of stay of proceedings and execution pending the hearing and determination of the instant application. That prayer was granted and the 1<sup>st</sup> Defendant counsel directed to file and served their written submissions in 21 days which they did on the 4<sup>th</sup> December 2017.

6. The following are the issues for determinations by the court;

- a) Whether the order settling or finalizing this suit was through parties consent or through one party's application.**
- b) Whether sufficient cause has been presented upon which the order on costs should be varied and or reviewed.**
- c) Who pays the costs of the instant application.**

7. The court has after considering the grounds on the notice of motion, the affidavit by the plaintiff, grounds of opposition by counsel for the 1<sup>st</sup> Defendant, and the record come to the following findings;

a) That the suit was commenced by the Plaintiff against the two Defendants through the plaint dated 2<sup>nd</sup> January 2007 seeking to have the process of planning, through which the 2<sup>nd</sup> defendant was to allocate the 1<sup>st</sup> Defendant a portion of the plot occupied by the Plaintiff, declared irregular and fraudulent. The suit also seeks for injunction against both Defendants over the said plot and costs.

b) The 1<sup>st</sup> Defendant entered appearance through M/s Onsongo & Company advocates who filed the memorandum of appearance dated 12<sup>th</sup> January 2007 among other pleadings for their client.

c) That by the time the notice to show cause under **Order 17 Rule 2 of Civil Procedure Rules** dated 24<sup>th</sup> November, 2016 for hearing on the 20<sup>th</sup> March 2017 was issued, the suit had stayed for about one year two, months from the 24<sup>th</sup> September 2015 without any steps aimed at prosecuting the case being taken. That further, when counsel for the parties attended the court on the 20<sup>th</sup> March 2017, no sufficient cause or any cause for that matter, was given to the court to explain the failure to take any steps for more than one year. That the court would definitely have gone ahead to dismiss the suit for want of prosecution under **Order 17 Rule 2 of the Civil Procedure Rules**, but instead allowed the oral application by counsel for the Plaintiff to withdraw the suit.

d) That in view of the finding in (c) above, the court finds it strange that the Plaintiff now prays for an order that each party bears their own costs when she was represented by counsel on the 20<sup>th</sup> March 2017 when their application to withdraw the suit was granted and the court awarded the costs of the suit to the Defendants. That this application not being one under **Order 45 of Civil Procedure Rules** for review of the orders of 20<sup>th</sup> March 2017, the court finds it to be an abuse of the courts process.

e) That the Plaintiff claim that the suit ought to have been marked settled under some terms of an out of court settlement is not based on facts as no duly signed and filed letter of consent had been presented to the court by 20<sup>th</sup> March 2017, and even to date. That if anything, the letter dated 30<sup>th</sup> October 2014 by the Plaintiff to her advocates on record and attached to her supporting affidavit is about her *“wish to withdraw this case as the dispute can be resolved outside court and a progress has been made.”* The Plaintiff in the letter talks about having *“talked to the town council and from our meeting, we agreed that the land in dispute herein be given to me.....”* That it is apparent the 1<sup>st</sup> Defendant was not involved in the said meeting and having defended this suit up to the point where it was withdrawn, he was entitled to costs. That the order on costs issued on the 20<sup>th</sup> March 2017 was within the discretion of the court pursuant to **Section 27 of Civil Procedure Act Chapter 21 of Laws of Kenya**.

8. That flowing from the foregoing, the court finds no merit in the Plaintiff’s notice of motion dated 17<sup>th</sup> July 2017. That the application is dismissed with costs to the 1<sup>st</sup> Defendant and the interim order of stay issued on the 27<sup>th</sup> November 2017, hereby vacated.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS 3<sup>RD</sup> DAY OF OCTOBER 2018**

**In the presence of:**

Plaintiff Absent

Defendants Absent

Counsel Absent

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**