



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 24 OF 2018 (O.S)

DORIS KOKI.....APPLICANT

VERSUS

JUVENARIS A. WAMBUA.....1ST RESPONDENT

VICTORIA WAYUA KIIO.....2ND RESPONDENT

RULING

1. On 26th November, 2019, the Applicant filed a Notice to Withdraw this suit pursuant to Order 25 Rule 1 of the Civil Procedure Rules. When the Applicant's advocate sought to have the said suit withdrawn without costs, the 1st Respondent's counsel opposed the Application. The court directed the parties to address it on the issue of costs.

2. Counsel for the Applicant submitted that indeed they filed their Notice of Withdrawal of the suit and since the Applicant was the wife of the 1st Respondent; that the court should exercise its discretion on the issue of costs by disallowing the same.

3. Counsel referred the court to the provisions of Section 27 of the Civil Procedure Act which provides as follows:-

“ 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 give all the necessary directions for the purposes aforesaid; and the fact that the court 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 direct.”

4. Counsel relied on the case of **Republic vs. Rosemary Wairimu Munene, Ex-parte Applicant vs. Ihururu Dairy Farmers Co-Operative Society Ltd Nairobi Judicial Review Application No. 6 of 2014** where the court held as follows: -

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

5. Counsel for the Applicant submitted that it was necessary to note that the issues in such cases are normally a murky waterway for the courts in general since it involves parties who are married and that it was imperative to bear in mind the various steps taken by the parties in the case so as to appreciate the trouble taken by both parties since the suit was filed.

6. It was submitted that the Applicant in her Application dated 6th February, 2018 only sought to secure her matrimonial property as any spouse would do in normal circumstances where the marriage seemed to be failing. Counsel submitted that it would be greatly prejudicial for the court to issue costs against the Applicant yet she was pursuing a genuine claim against the 1st Respondent.

7. Counsel submitted that it has been a common jurisprudence by most courts 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.*

8. Counsel submitted that 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; that the commencement of this suit was not ill-motivated but only to secure the interests of the Applicant as a wife and that the suit was prompted by the fact that the 1st Respondent had deserted his matrimonial home and opted to live with the 2nd Respondent.

9. Counsel submitted that if this court was inclined to issue costs against the Applicant, it would have the effect of having the Applicant evicted from her matrimonial home since she does not own any other property; that the Notice of Withdrawal filed by the Applicant was done in good faith so as to prevent any further court proceedings and that in the interest of promoting the provisions of the Constitution and in particular Article 159, this court ought not to issue any orders regarding costs since this was a matter involving two married people.

10. This suit was commenced by way of an Originating Summons and a Notice of Motion Application dated 2nd February, 2018. The Application was dismissed vide a Ruling dated 20th July, 2018. After the Ruling of the court, the Plaintiff did not fix the matter for pre-trial directions or hearing. On 25th October, 2019, the 1st Respondent filed an Application for the dismissal of the suit for want of prosecution.

11. Indeed, by the time the Notice of Withdrawal was filed on 26th November, 2019, the matter had remained inactive for over one (1) year. The Civil Procedure Rules, under Order 25, Rule 1 provides as follows:

“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.”

12. The award of costs of a suit or other proceedings is always in the discretion of the Court in terms of Section 27 of the Civil Procedure Act, which provides as follows:

“(i) 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.”

13. The general rule is that costs follow the event, meaning that the successful party is entitled to costs unless the Court, for sufficient reason, orders otherwise. While exercising this discretion, the Court is required to take into account the length of time the suit or proceedings has been going on in Court before the withdrawal or other determination; the nature of the relief sought; the steps taken in the proceedings; the stage of hearing of the suit or proceedings; the need to promote access to justice by indigent suitors; and any other sufficient reason in the interest of justice.

14. The Court of Appeal in **Canyon Properties Limited & 3 others vs. Eliud Kipchirchir Bett & 2 Others [2017] eKLR** in allowing an Appeal for costs quoted the Supreme Court in **Jasbir Singh Rai & 3 others vs. Tarlochan Singh Rai & 4 others [2014] eKLR** where the court expressed itself as follows:

“It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or Respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation... Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the applicant.” (Emphasis added)

15. On the question of the conduct of the parties, it is my finding that although the Applicant and the 1st Respondent were husband and wife, the 1st Respondent had the marriage dissolved vide a decree nisi dated 15th December, 2020. The parties herein are therefore not married anymore.

16. The circumstances of this case are that after filing the Originating Summons, and the court having dismissed the Applicant's Application for injunction, the Applicant did not withdraw the suit until the 1st Respondent filed the Application dated 25th October, 2019 for dismissal of the suit for want of prosecution. Indeed, the withdrawal of the suit seems to have been motivated by the filing of the said Application.

17. The 1st Respondent in this matter did not only file a response to the Originating Summons, but also opposed the Application for injunction. The 1st Respondent further had his advocate file an Application to have the suit dismissed for want of prosecution. All these endeavours must have cost the 1st Respondent in terms of time and legal fees.

18. Having perused the record, and the Applicant having not filed the Notice to Withdraw the suit before the Applicant incurred expenses in terms of defending the Application for injunction and filing the Application for the dismissal of the suit, it is my finding that the Applicant should cater for the 1st Respondent's costs. For those reasons, this court makes the following orders:

a) This suit is marked as withdrawn.

b) The Applicant to pay to the 1st Respondent the costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 30TH DAY OF JULY, 2021.

O. A. ANGOTE

JUDGE