



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ELC CASE NO. 1566 OF 2014**

**HUSSEIN ISAAK HASSAN .....1<sup>ST</sup> PLAINTIFF**

**YEBYO MARBATHTU TSADIK.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MUGUGA INVESTMENT COMPANY LIMITED.....1<sup>ST</sup> DEFENDANT**

**NUNI GENERAL TRADING COMPANY LTD.....2<sup>ND</sup> DEFENDANT**

**RULING**

The background to this dispute is that the Plaintiffs filed suit on 18/12/2014 seeking to restrain the Defendants from interfering with their quiet possession and lease over the shop premises on land reference (L.R. No.) 36/VII/499 situated in Eastleigh. The 1<sup>st</sup> Defendant was the owner of the land on which he had erected several shops. It leased two shops to the 1<sup>st</sup> Plaintiff in January 2012 for six years. In November 2012 it leased two other shops to the 2<sup>nd</sup> Plaintiff for six years. In July 2014 the 1<sup>st</sup> Defendant leased to the 2<sup>nd</sup> Plaintiff two more shops. During the pendency of the leases, the 1<sup>st</sup> Defendant gave the 2<sup>nd</sup> Defendant a long term lease of 15 years over the entire suit property which in effect subsumed the short term leases held by the Plaintiffs. Part of the agreement between the Defendants was that the 2<sup>nd</sup> Defendant would demolish the entire building comprising the shops which the Plaintiffs had leased. The court entered interlocutory judgement against the Defendants on 19/3/2015 for failure to file defences.

It would seem that leadership wrangles arose among the directors and shareholders of the 1<sup>st</sup> Defendant leading to the filing of HCCC No. 126 of 2015 before the Commercial Division. Tuiyott J. (as he then was) delivered a judgement on 17/4/2020 in that suit. The Plaintiffs argued that that judgement did not determine the question of liability in this case. Following that judgement, the Defendants proceeded to demolish the suit property sometime in May 2020, the effect of which made this suit superfluous or overtaken by events. In essence, the substratum of this case was extinguished. The parties engaged in discussions with a view to having the suit marked as overtaken by events. However, they could not agree on who should bear the costs. The court directed parties to file submission on the issue of costs.

The Plaintiffs submitted that at the time they entered into the leases with the 1<sup>st</sup> Defendant and when they filed suit the lease terms had not expired. Further, that the leases over two shops had not expired by the time the Defendants demolished the suit property. The Plaintiffs argued that in as much as the present suit was not heard on its merit, the Defendants' actions clearly constituted an event entitling the Plaintiffs to costs. The Plaintiffs relied on the decision in **Morgan Air Cargo Limited v Everest Enterprises Limited [2014] eKLR** in which the court found that in the absence of a consent stating that no costs are payable, the court falls back to its discretion which is to be exercised in accordance with established legal principles and the circumstances of each case. The Plaintiffs urged the court to grant them costs so as to be indemnified from the actions of the Defendants who in addition to breaching the terms of the lease also destroyed the suit property. They relied on **Peter Muriuki Ngure v Equity Bank (K) Limited [2018] eKLR** where the court observed that the award of costs is all about indemnification and that the purpose of costs was to indemnify the successful party for the expenses they incurred in hiring a counsel to enforce or defend their legal rights. The Plaintiffs urged the court that it was only reasonable for them to be awarded costs to cushion them from the losses occasioned by the adverse actions of the Defendants. They implored the court to consider the circumstances under which the suit was terminated and the general conduct of the parties. They submitted that the conduct of the Defendants is what led to this suit being overtaken by event.

The 1<sup>st</sup> Defendant submitted that the Plaintiffs had not given any good reason as to why costs should not be awarded to the Defendants pursuant to Section 27 of the Civil Procedure Act. It submitted that this suit was stayed pending determination of **HCCC No. 126 of 2015** which was determined in April 2020 by the High Court. The 1<sup>st</sup> Defendant relied on **Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others [2014] eKLR** where the court reiterated that the relevant question when dealing with the issue of costs was whether or not the circumstances merited an award of costs to the applicant.

The 1<sup>st</sup> Defendant submitted that the Plaintiffs sought to withdraw the suit. Further, that parties had made several appearances in court in the case including prosecuting the Defendants' notices of preliminary objection and filing two applications which were never determined. The 1<sup>st</sup> Defendant submitted that the Plaintiffs had not demonstrated any special circumstances as to why costs should not be awarded to the Defendants.

The Plaintiffs having withdrawn the suit following the judgment of Tuiyott J. in **HCCC No. 126 of 2015**, the only issue that falls for determination by this court is who should bear the costs of the withdrawn suit. The Plaintiff filed suit seeking orders of injunction, general damages and for the Defendants to allow them to continue enjoying quiet possession of the shops they had leased until those leases expired. The 1<sup>st</sup> Defendant entered into a long term lease with the 2<sup>nd</sup> Defendant which entitled the 2<sup>nd</sup> Defendant to demolish the building and put up another structure on that land. Based on the new arrangement, the shops which the Plaintiffs had leased were demolished.

Taking into consideration the conduct of the 1<sup>st</sup> Defendant in dealing with the suit premises which it had leased to the Plaintiffs, the court

awards the Plaintiffs the costs of the suit. Those costs will be borne by the 1<sup>st</sup> Defendant since it is the common denominator in both sets of leases.

**DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF JULY 2021.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. Valentine Ataka for the Plaintiffs

Mr. Sammy Waweru for the 1<sup>st</sup> Defendant

Mr. Anyegah Ondieki for the 2<sup>nd</sup> Defendant

Mr. V. Owuor- Court Assistant