



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. E198 OF 2021

ANTHONY KAGO..... PLAINTIFF

VERSUS

PETER GITAU KARIUKI.....1ST DEFENDANT

BENSON NGIGE NDUNGU.....2ND DEFENDANT

NELSON GITAHI WANUNA3RD DEFENDANT

ATTORNEY GENERAL

(sued on behalf of the Land Registrar Nairobi and Principal

Registrar of deaths).....4TH DEFENDANT

RULING

1. This is a case where the court is called upon to make a determination on whether or not the defendants should be paid costs upon withdrawal of the suit by the plaintiff.

2. The plaintiff brought this suit against the defendants on 5th June 2021, seeking for;

a) A declaration that the suit property, DAGORETI/RUTHIMITU/6 lawfully belongs to the estate of the deceased, Gitau Irungu alias Stephano Gitau Irungu.

b) A declaration that the 1st and 2nd Defendants' purported title to DAGORETI/RUTHIMITU/6 is illegal, null and void and does not confer on them or any other person proprietary interest.

c) An order directing the 4th Defendant to rectify its register and to nullify the 1st and 2nd Defendants' registration in respect to that entire parcel of land known as DAGORETI/RUTHIMITU/6.

d) Delivery of vacant possession of the suit land by the Defendants to the Plaintiff.

e) General damages.

f) Costs

g) Interest on (e) and (f) above.

3. The 1st and 2nd defendants filed a memorandum of appearance and notice of preliminary objection both dated 17th August 2021 and filed on 17th August 2021 and 19th August 2021 respectively. In their notice of preliminary objection, they stated that the court lacked jurisdiction on the grounds that the subject matter DAGORETI/RUTHIMITU/6 in the suit is a matter of the succession cause of the deceased Gitau Irungu and thus should be handled before the family court which dealt with the succession cause HC SUCC No. 2889 of 2012 in the matter of the Estate of Gitau Irungu (deceased) under which title to the subject matter was transmitted to the 1st and 2nd Defendants. The 3rd Defendant filed a memorandum of appearance (under protest) and statement of defense dated and filed simultaneously on 13th August 2021 and 24th August 2021 respectively. The 3rd defendant denied the plaintiff's claim in its entirety. In his defence he averred *inter alia* that he

has always been and still is the rightful owner of the suit premises by virtue of being the sole administrator of the beneficiary of the deceased father's estate (Wagachie Irungu Kiiru). He further stated that there is a pending suit concerning the suit property in SUCCESSION CAUSE NO. 86 OF 2019 (IN THE MATTER OF WAGACHIE IRUNGU KIIRU (DECEASED) PETER GITAU KARIUKI & BENSON NGIGE NDUNG'U VS NELSON GITAHU WANUNA), wherein the 3rd Defendant is seeking to administer the Estate of his father (Wagachie Irungu Kiiru) and where the said parcel of land known as DAGORETTI/RUTHIMITU/6 is one of the subject matters in the said Petition.

4. On 29th September 2021 when the matter came up for directions on the hearing and determination of the suit and for the purposes of getting a hearing date, **Mr. John Mwariri** Advocate for the Plaintiff informed the court that he wished to withdraw the suit since he had learnt that there are succession proceedings that have already been filed. He urged the court to mark the suit as withdrawn with no orders as to costs. **Ms. Chege** counsel for the 1st and 2nd Defendant stated that she had attended the previous court session when the matter came up on 25th August 2021, wherein the court directed her clients' Notice of Preliminary objection to be heard first. She prayed for costs. **Mr. J.P. Machira** counsel for the 3rd Defendant stated that he had already filed his clients defence and prepared for hearing. He further stated that while he had no objection to the withdrawal of the suit, he was objecting to the same being withdrawn with no orders as to costs. He equally prayed for costs.

5. **Mr. Mwariri** gave a detailed response in reply outlining four reasons as to why costs should not be granted to the defendants. These reasons included the following: -

- i) The basis of the suit was a transfer from the deceased (Gitau Irungu) to the 1st defendant and that he was not aware at the time of filling suit that the transfer had been affected. He became aware after he had seen the response from the 1st defendant.
- ii) His client was acting on behalf of the estate of the deceased and he only came to know that the administrators were actually the 1st and 2nd defendants.
- iii) The case touches on the family members, they are all related and they are all following up on the deceased's property. The 1st and 2nd defendants are nephews and his client too was related to them.
- iv) There are ongoing negotiations between the family and that if costs are awarded it would prejudice the ongoing negotiations and the relationship of the parties.

On the basis of his response, he further urged the court to mark the suit as withdrawn with no orders as to costs.

6. I have considered the oral submissions made by the parties herein.

7. The general rule as to costs is provided for in section 27(1) 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 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”

This provision has been the subject of several judicial pronouncements. In the case of **SUPERMARINE HANDLING SERVICES LTD VS. KENYA REVENUE AUTHORITY CIVIL APPEAL NO. 85 OF 2006** the Court of Appeal expressed itself thus:

“Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance...Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where the reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule...In the instant case the learned Judge gave no reasons whatsoever for his decision to deprive the successful plaintiff of its costs and yet it was not shown that the defendant had been guilty of some misconduct which led to litigation. In the

court's view the learned Judge's order was wrong and for the foregoing reasons, the plaintiff's appeal succeeds as to the award of interest and costs on the principal sum awarded”.

8. In **DEVRAM MANJI DALANI VS. DANDA [1949] 16 EACA 35** it was held that a successful litigant can only be deprived of his costs where his conduct has led to litigation, which might have been averted.

9. In **PARTY OF INDEPENDENT CANDIDATE OF KENYA & ANOTHER VS. MUTULA KILONZO & 2 OTHERS HCEP NO. 6 OF 2013**, it was held:

“The main reason why this Petition should be withdrawn is due to the demise of the 1st Respondent. This would call upon the Court considering ordering each party to bear their own costs. In the case of Nedbank Swaziland Ltd versus Sandile Dlamini No. (144/2010) [2013] SZHC30 (2013) Maphalala J. referred to the holding of Murray C J in the case of Levben Products VS Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227, who stated as follows:

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp vs Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at...In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

10. In determining the issue of costs, the Court is entitled to look at *inter alia* the conduct of the parties, the subject of litigation, the circumstances which led to the institution of the legal proceedings, the events which eventually led to their termination, the stage at which the proceedings were terminated, the manner in which they were terminated, the relationship between the parties and 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 up to litigation, the eventual termination thereof and the likely consequences of the order for costs. See **HUSSEIN JANMOHAMED & SONS VS. TWENTSCHE OVERSEAS TRADING CO. LTD [1967] EA 287** and *Mulla (12thEdn) P. 150*.

11. In my view section 27 of the *Civil Procedure Act* provides for the general rule which ought to be followed unless for good reasons to be recorded.

12. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In **MORGAN AIR CARGO LIMITED V EVREST ENTERPRISES LIMITED [2014] eKLR** the court noted that

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the Civil Procedure Act is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

13. Furthermore, this discretion must be exercised judiciously and courts should not deprive a plaintiff/defendant of his or her costs unless it can be shown that they acted unreasonably. The **Halsbury's Laws of England, 4th Edition (Re-issue), {2010}, Vol.10. para 16**, notes that:

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice” (Emphasis added).

14. As earlier stated at paragraph 9, the court must therefore ask itself what factors should be taken into consideration when determining the costs of suit. This issue was addressed by the learned judge in **MORGAN AIR CARGO LIMITED V EVREST ENTERPRISES LIMITED (SUPRA)** to include:

- a. the conduct of the parties*
- b. the subject of litigation*
- c. the circumstances which led to the institution of the proceedings*
- d. the events which eventually led to their termination*
- e. the stage at which the proceedings were terminated*
- f. the manner in which they were terminated*

g. the relationship between the parties and

h. The need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of the Constitution.

15. Noteworthy, the list is not exhaustive. In other words, the court must be guided not only by the conduct of the parties in the actual litigation, but also other matters including likely consequences of the order for costs.

16. In the present case, the Plaintiff stated that the basis for the suit that was filed on 5th June 2021 was a transfer from the deceased to the 1st defendant and were it not for such action, he could not have filed the suit. The Plaintiff further contents that he was acting on behalf of the estate not for his individual benefit since this was a dispute involving family members and that immediately he became aware that succession proceedings had already been filed he chose to withdraw the suit pronto.

17. It was also not disputed by either party that the suit involves a dispute between family members. It is worth noting that when faced with such suits at the initial stage, courts have endeavoured to encourage the family members embrace alternative dispute resolution mechanisms with a view of ensuring that the dispute before court is amicably resolved without further staining the relationship of the family members. I therefore agree with oral submissions made by the counsel for the plaintiff that imposing costs to either party in such a matter would further stain the relationship of the family members.

18. The plaintiff applied for withdrawal of the suit before a hearing date could be confirmed, he thus took the said action immediately he learnt of the existing succession proceedings that was brought to his attention through the defendants' pleadings.

19. I have considered the proceedings and the entire circumstances of the case and I am satisfied that the same were not frivolous. The plaintiff clearly without not being aware of the pending succession proceedings had a reasonable belief even if mistaken that the actions of the defendants were to deny him his interest to the suit property. I am further satisfied that the reasons advanced by the plaintiff and his conduct in this matter is one which should not be penalised on costs. The defendants on the other hand did not adduce any cogent reasons or justification which in my view would warrant their entitlement to the costs of the proceedings.

20. Having stated as much, I find that this is a proper case that meets the threshold where the plaintiff should not be penalised to pay costs to the defendants upon withdrawal of his suit.

21. In the circumstances, I direct that each party will bear own costs of these proceedings.

22. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29TH DAY OF SEPTEMBER 2021

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. John Mwariri for the Plaintiff

Ms. Chege for the 1st and 2nd Defendant

Mr. Kamau h/b for Mr. J. P. Machira for the 3rd Defendant

N/A for the 4th Defendant

Court Assistant; Caroline