



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. E173 OF 2021

CATHERINE KAVATA MUSUVAPLAINTIFF

VERSUS

SAFARICOM INVESTMENT

COOPERATIVE SOCIETY LIMITEDDEFENDANT

RULING

1. Parties herein filed a consent dated 13th September 2021, which consent agreed to settle the suit as per the following terms: -
 - a) *THAT prayer (a) and (b) be marked as settled noting that the Plaintiff was paid the entire amount sought on 26th May 2021.*
 - b) *THAT prayer (c) on costs be left for determination by this Honourable Court.*
 - c) *THAT the defendant's application dated 30th June 2021 be marked as withdrawn.*
2. When the matter came up for mention for directions on 22nd September 2021, the parties urged the court to adopt the said consent as an order of this court and further to proceed and determine the issue of costs. The said consent was subsequently adopted as requested by the parties and the court now proceeds to issue a determination on costs.
3. The Plaintiff brought this suit against the Defendant on 19th May 2021, seeking for;
 - a) *An order directing the Defendant to forthwith refund the Plaintiff Ksh 2,268,480/- being purchase price for properties as Plot Number 55 (Machakos/Mua/Hills1410, Plot Number 56 (Machakos/Mua Hills/1411), Plot Number 69 (Machakos/Mua Hills1424) and Plot No. 70 (Machakos/Mua Hills 1425)*
 - b) *Interest on (a) above at court rates*
 - c) *Costs of the suit.*
4. The Defendant filed a memorandum of appearance dated 7th June 2021 and later filed a Notice of Motion application dated 30th June 2021 which sought the following orders: -
 - a) *THAT the Honourable Court be pleased to strike out the Plaint and all documents.*
 - b) *THAT costs of this application and the entire suit be borne by the Respondent.*
5. The Application was supported by the affidavit of **Peter Gichangi** on the following grounds:
 - a) *THAT the sum of Ksh 2,268,480/- as prayed for in the Plaint was settled before summons to appearance were served on the Defendant.*
 - b) *THAT in view of the settlement, the cause of action was extinguished and the suit is therefore unsustainable.*
 - c) *THAT the suit is an abuse of the Court process and will continue to prejudice the defendant.*

d) *THAT it is therefore in the interest of justice that the suit be dismissed.*

6. The said application was never canvassed since it was marked as withdrawn in line with the terms of the consent that was filed and subsequently adopted by the Court.

7. The issue of costs was canvassed through written submissions. The Plaintiff's submissions were filed on 13th October 2021 while the Defendant's submissions were filed on 12th October 2021.

8. In her submission, the Plaintiff gave a detailed background and chronology of the matter and circumstances that led to the commencement of the suit. She submitted that the Defendant had breached key terms of the four sale agreements dated 1st April 2020 wherein she had agreed to purchase four plots bearing description numbers; Plot Number 55 (Machakos/Mua/Hills1410); Plot Number 56 (Machakos/Mua Hills/1411) Plot Number 69 (Machakos/Mua Hills1424) and Plot No. 70 (Machakos/Mua Hills 1425) for a sum of Ksh 590,750/ each.

9. It was the Plaintiff's submission that as per the sale agreements, the Defendant was to undertake value addition to the property at its own costs which the Defendant failed to comply despite several notices and reminders. The Plaintiff further stated that owing to the said frustrations she decided to seek refund for the purchase price amounting to a total of Ksh 2,268,480/-

10. According to the Plaintiff, several unsuccessful requests for the refund were made promoting her to file the instant suit.

11. It was the Plaintiff's contention that the conduct of the Defendant led to the institution of this suit on 19th May 2021 seeking for recovery of the purchase. The Plaintiff further stated that the Defendant made a refund on 26th May 2021 after the suit had been filed even though they were served with the summons to enter appearance on 27th May 2021.

12. On this aspect, the Plaintiff submitted that the service of summons to enter appearance cannot be attributed to her indolence disentitling her costs of the suit since no prejudice had been occasioned against the Defendant as at that time.

13. The Plaintiff contended that the issue of costs was moot since the Court had entered an interlocutory judgment against the Defendant awarding costs to the Plaintiff and which judgement had not been set aside.

14. The Plaintiff referred to **Section 27 (1) of the Civil Procedure Act** and the following authorities in support of her case; **Raila Odinga & 2 Others v IEBC & 3 Others [2013] eKLR**, **Nairobi Aviation Limited v Nation Media Group Limited [2020] eKLR**, **Farah Awad Gullet v CMC Motors Group Limited [2018] eKLR**.

15. The Defendant opposed the Plaintiff's claim on the entitlement to costs. It was the Defendant's submission that the Plaintiff's claim had been settled even before service of summons had been effected.

16. The Defendant further submitted that parties herein had amicably settled the matter vide a consent dated 13th September 2021 before the same could proceed to full hearing and hence the just and fair order was to direct each party to meet their respective costs for the suit.

17. In support of its position, the Defendant relied on the case of **Rufus Njuguna Miringu & Another v Martha Muriithi & 2 Others [2012] eKLR**, where the Court directed each party to bear their own costs in a suit which had been settled by Consent.

18. I have considered the submissions by parties. I have also considered the authorities relied on by parties. The single issue for determination is whether or not costs should be awarded to the Plaintiff upon settlement of this suit.

19. 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”

20. 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”.

21. In **Devram Manji Daltani v 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.

22. 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**.

23. 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.

24. 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.”

25. Furthermore, this discretion must be exercised judiciously and courts should not deprive a party 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).

26. 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.

27. In the present case, the Plaintiff stated that the basis for the suit that was filed on 19th May 2021 was due to the Defendant’s failure to refund the purchase price in time. The Plaintiff also gave a narration of how she followed up with numerous emails and subsequently gave a demand notice notifying the Defendant of her intention to institute a recovery suit. Even after a demand notice, no action was taken, the Defendant did not budge. It was after this suit was filed that the Defendant made a refund to the Plaintiff. On this background the Plaintiff insisted that she was entitled to her costs for the suit.

28. The Defendant referred to the **Rufus case (supra)** where no costs were imposed pursuant to a suit that was settled by consent. I have considered the said case which in my view is not relevant to the circumstances herein.

29. It does not necessarily mean that, where parties have entered into consent to settle a proceeding, no costs should be awarded, or there is no successful party in the matter. The incidence of settlement by consent of the parties, to my mind, is just but a vital factor the court should consider, within the circumstances of each case, in deciding whether costs are payable or not. A consent recorded in settlement of a proceeding is not an automatic disentitlement of costs and I, would, therefore, hesitate profoundly to make any generalized propositions on the law that consent is an automatic disentitlement of costs without reference to the context of the particular case. There are obvious reasons I say so; the nature of settlement in the consent may determine the course of the event and, thus, the place of costs in the suit; parties may as well in the consent indicate that costs shall be borne by a particular party and I do not think that can be defeated on the argument that a settlement by consent of the parties means no party pays costs unless it is expressly stated or by implication inferred in the case. These are real legal as well as practical issues which abound in this subject. Even the **Rufus Njuguna Miringu Case (Supra)** which is most cited on this subject was decided...**in the circumstances...**of the case.

30. The Court should, therefore, look at the event within the circumstances of the case. And that exercise will inform the exercise of discretion by the Court. It should also be understood well; that a successful party does not refer to a person who has been taken through rigorous and convoluted motions of litigation by the other party. Similarly, a party does not cease to be a successful party merely because he met little or no contest in his claim against the Defendant. He is a successful party because he is declared so by the Court after looking at the result of the entire litigation, which includes; negotiations or steps which culminates to, and the recording of a consent thereto, conduct of the Plaintiff among other applicable reasons. On that basis, I believe settlement of a case by consent of the parties should be one of the factors the court should consider in deciding whether or not costs should be awarded to the successful party.

31. In the case of **Morgan Air Cargo Limited (supra)** the court held as follows:

“Looking at the nature of the consent filed herein and the entire circumstances of the case, the Plaintiff was the successful party and is entitled to costs”

32. It therefore follows that even where a consent has been recorded, the Court in considering whether or not to grant costs should look at the circumstances of each and every case.

33. As was aptly submitted by the Plaintiff, the Court also notes further that as per the Court’s record, an interlocutory judgment was entered herein on 16th July 2021 which judgment already awarded the Plaintiff costs and the same was never set aside. Curious to note the Defendant too did not chose to include any aspect on the interlocutory judgment as a term of the consent. That being so, the interlocutory judgment stands as a judgement of this Court and in the circumstances the Defendant is bound to comply.

34. Finally, in conclusion I have considered the proceedings and the entire circumstances of the case and I am persuaded that the Defendant is liable to the Plaintiff for the costs of this suit.

35. In the circumstances, I accordingly award the Plaintiff the costs of the suit.

36. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF OCTOBER 2021

E. K. WABWOTO

JUDGE

IN THE PRESENCE OF: -

MS. MUTHONI AND MR. KIMATHI FOR THE PLAINTIFF

MS. NKATHA H/B FOR MR. MBABU FOR THE DEFENDANT.

COURT ASSISTANT; CAROLINE