



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 51 OF 2018

NAOMI MUTIO NZOKA.....PLAINTIFF

VERSUS

WILLIAM KUMUREN

CHIRCHIR CHEPKUT.....1ST DEFENDANT

LEXTUM INVESTMENTS LIMITED.....2ND DEFENDANT

RULING

1. Coming up for determination is the issue of costs for the 2nd defendant, who stated that they ought to be granted costs of the suit following adoption of a consent as the judgement of court on 12th November 2020. The court order by Justice Eboso reads:

1) The above consent is adopted as an order of the court.

2) Because the consent does not cover the 2nd defendant's costs and parties have agreed to canvass the issue of the 2nd defendant's costs, I direct that parties file affidavits and written submissions on the issue of the 2nd defendant's costs.

2. In that consent order rendered into by the 1st defendant and the plaintiff recorded on 12th November 2020, the 1st defendant agreed to pay the plaintiff Ksh. 4,000,000 all-inclusive and based on this, the 2nd defendant stated that they were also entitled to costs.

3. In the affidavit sworn by S.K. Kiplagat (director of the 2nd defendant) dated 19th March 2021, he averred that the 2nd defendant was entitled to costs since they should not have been part of the suit. He stated that they were purchasers for value of a property that had no defect and they became the registered owners on 14th August 2017. To defend the suit, they had engaged services of advocates, hence they were entitled to costs.

4. This application was canvassed by way of written submissions.

2nd Defendant's Submissions

5. The submissions of the 2nd defendant are dated 19th January 2021, where it is argued that costs should follow the event. Reference was made to **Section 27** of the **Civil Procedure Act** and the following cases that had made pronouncements on the issue of costs: **Morgan Air Cargo Limited v Everest Enterprises Limited (2014) eKLR**; **Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another (2016) eKLR**; **Republic v Rosemary Wairimu Munene (Ex parte applicant) v Ihururu Dairy Farmers Cooperative Society Ltd (2014)eKLR**.

6. The 2nd defendant stated that the above cases highlighted that as much as the issue of costs was a judicial discretion, the general rule was that costs should be awarded to the successful party unless there were good grounds to depart from doing so.

7. The 2nd defendant further submitted that with the recording of the settlement between the 1st defendant and the plaintiff, the 2nd defendant was exonerated of any wrongdoing and in that regard ought to have been struck out of the proceedings and paid. Other cases cited were **Peter Muriuki Ngure v Equity Bank (K) Ltd (2018) eKLR**, and **British Columbia (Minister of Forests) v Okanagan Indian Band, (2003) 3 S.C.R 371, 2003 SCC 71** where it was stated that the essence of costs was to indemnify the successful party.

8. The case of **Devram Manji Daltani v Danda [1949] 16 EACA 35**, was also cited where the court stated that *...a successful litigant can only be deprived of his costs where his conduct has led to litigation which might have been averted*. The case of **Jasbir Singh & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR** was also proffered to buttress the 2nd defendant's arguments. Additionally, it was argued that no fault was proven on the part of the 2nd defendant, and to this end, reliance was made to the case of **Jesse Mburu Gitau & 3 others v Attorney General (2003) eKLR** where it was held that a successful party should not be denied costs except where he is at fault. Reference was also referred to the case of **Little Africa Kenya Ltd v Andrew Mwiti Jason (2014) eKLR**, where the court stated that *...Even when parties settle cases through consent it does not mean costs should not be awarded*

Plaintiff's submissions

9. The plaintiff in the submissions dated 4th March 2021 stated that the 2nd defendant failed to prosecute an application dated 6th December 2019 which was dismissed for non-appearance and had also been in contempt of court for registering the property against court orders. It was argued that the 2nd defendant was a necessary party to the suit since he had purchased property that was in contention and any orders would have affected him. If they deemed that they should not have been party to the suit, then they should have applied to be struck out. But instead they appointed counsel to represent them and even filed an application that was dismissed. Plaintiff submitted that the 2nd defendant ought to pay them for the dismissed application and the 2nd defendant's claim for costs from the plaintiff was unmerited.

Analysis and determination

10. This court finds that the issue for determination is:

i. Whether the 2nd defendant should be awarded costs of the suit and by who.

11. A brief history of this matter is that the plaintiff sued the defendants on grounds that she had entered into a sale agreement with the 1st defendant for purchase of the suit property and later discovered that the 1st defendant had sold and transferred the same property to the 2nd defendant. As per her plaint dated 6th February 2018, she therefore moved the court for orders *inter alia* that the 2nd defendant had trespassed into his premises and that the 1st defendant was in breach of his contractual obligations and should pay damages.

12. The 1st defendant and the plaintiff later entered into a consent and the same was recorded in court for the 1st defendant to refund the plaintiff Kshs. 4,000,000 all inclusive.

13. The consent judgement recorded in court on 12.11.2020 reads as follows:

i. That the 1st defendant shall pay the plaintiff the sum of Ksh. 4,000,000 (four million) all inclusive, payable within 6 months of today's date;

ii. The 1st instalment shall be Kshs. 1,000,000 (one million) payable on or before 11/12/2020;

iii. The balance of Kshs. 3,000,000 shall be paid in five equal monthly instalments of Kshs. 600,000 within five months from the date of payment of the 1st instalment;

iv. In the event of breach of the timelines spelt above, execution shall issue against the 1st defendant, and any amount outstanding shall be subject to interest at the rate of 14% per annum from today.

14. From the pleadings and subsequent agreement, the court finds that the 1st defendant was liable for entering into a sale agreement contract with the plaintiff and 2nd defendant over the same property. That is why he was refunding the monies back to the plaintiff. The amount included claims on costs to the plaintiff. The consent did not cover the 2nd defendant's costs hence this ruling.

15. It is trite law that the court has discretion to determine the issue of costs as stipulated under **Section 27(1) of the Civil Procedure Act**. In the Court of Appeal case of **Farah Awad Gullet v CMC Motors Group Limited [2018] Eklr**, it was stated that;

"... it is our finding that the position in law is that costs are at the discretion of the court seized of the matter with the usual caveat being that such a discretion should be exercised judiciously... Secondly that a Court can only withhold costs either partially or wholly from a successful party for good cause to be shown..."

16. In the above mentioned case, the court also made reference to the High Court decision in **Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others [2013] eKLR** where the court had this to say on issue of costs:-

"... 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 a matter in which the trial Judge is given discretion... 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 is 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..."

17. From the foregoing, this court does not see any legitimate reason why it should depart from the norm. As such, the 2nd defendant is

entitled to costs. The 1st defendant being the one who entered into agreements with different parties over the same property, ought to bear costs for the suit. However, noting that the 1st defendant did not let the matter go full blast into hearing, I will grant half cost.

18. The disposal orders are as follows:

i. *The 2nd defendant is awarded half costs of the suit to be borne by the 1st defendant.*

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF NOVEMBER, 2021 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Ms Mutai for the 1st Defendant

M/S Nasambu holding brief for Wachira for 2nd Defendant

Court Assistant: Edel Barasa