



REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CITATION CAUSE NO. 151 OF 2014

IN THE MATTER OF THE ESTATE OF KIPTOO LAGAT(DECEASED)

JOSEPH KIPSANG BOIT.....CITOR

VERSUS

KONGATO LAGAT.....1ST CITEE

CATHERINE LAGAT.....2ND CITEE

JACKSON LAGAT.....3RD CITEE

JANE LAGAT.....4TH CITEE

GILBERT KIPLAGAT.....5TH CITEE

BETSY LAGAT.....6TH CITEE

RULING

1. The background of the case is that on 11th September, 2014, the Citor **JOSEPH KIPSANG BOIT** (a purchaser and/or a debtor) to the estate of **KIPTOO LAGAT** (deceased) moved court citing **KONGATO LAGAT, CATHERINE LAGAT, JACKSON LAGAT, JANE LAGAT, GILBERT KIPLAGAT, and BETSY LAGAT** (the Citees) who were served and they entered appearance through the firm of Kiplenge & Kurgat Advocates.

2. It is contended that on several occasions the Citor fixed a date for hearing or mention but often the court was either one way or another not sitting. That all along the Citees went silent till sometimes in December 2018, when they started interfering with the Citor's quiet possession of the portion he purchased, thus prompting him to move this court for conservatory orders.

3. It is pointed out that the replying affidavit dated 17th May 2019 and sworn by Jackson Lagat, exhibits that the Citees petitioned the High Court at Nakuru vide ***Succession Cause Number 796B of 2014*** on 26th November, 2014. This was over two months after they were in receipt of the Citation herein.

The Citees ended up confirming the grant whose revocation the Citor has since sought.

4. According to the Citor, he is entitled to costs of this Citation because he acted diligently when he filed these proceedings. He points out that the Citees, were aware of these instant proceedings so any other subsequent proceedings ought to have been brought to the attention of the Citor and also this court.

The Citor relied on the following cases; **In the Matter of the Estate of Dominic Kasona Kalele (Deceased) [2014] eKLR & In Re Estate of Musyimi Mbavu Kola (Deceased) [2016] eKLR** to buttress his submissions.

ANALYSIS AND DETERMINATION

5. The only issue for consideration before me is, who should bear the costs of the citation proceedings filed herein on 15th September, 2014 by the Citor against the Citees. The court directed that the issue be canvassed by way of written submissions and I have considered the Citor's submissions on record, and also note that the Citees did not file any written submissions. Is the Citor is entitled to costs of the Citation proceedings herein.

Sitati (J) considered the purpose of citation proceedings in the case of **John Osicho v Hana Omolo Osewe & Another [2013] eKLR** where she said that;

“(11) A Citation is a document issued by the Probate Registry, whereby the person being the claimant (Citor) calls upon the person cited (Citee) to provide a reason why a particular step should not be taken;

(12) Citation occur in both contention and non-contentious probate. In non-contention Probate, they serve the purpose of bullying along or fast tracking the issue of a grant of letters of administration.”

6. There is no doubt that the on 11th September, 2014 the Citor, had filed **Citation Cause No.151 of 2014 in Eldoret** against the estate of **KIPTOO LAGAT** (deceased) who was the father of the Citees. It is also not in dispute that the said suit was still pending in court when the Citees petitioned the High Court in Nakuru vide **Succession Cause No. 796B of 2014**. The Citor has submitted that on 18th September 2014 the Citees herein were served with the Citation. Upon perusal of the pleadings on record and the Affidavit of Service dated 23rd March, 2015 It is clear that, the Citees were aware of these Citation proceedings. The Citees herein do not in any way deny having been aware of this present cause.

7. I take into account the submissions by Counsel for the Citor and the facts of this case as outlined above, it’s important at the outset to set out the provisions of Section 27 of the Civil Procedure Act on costs which is as follows;

27 (1) 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.

8. In **Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd** the court held;

“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.

Writing on the same subject in his text **Judicial Hints on Civil Procedure Vol 1, Kuloba (J) (Retired)** stated;

“Costs are [awarded at] the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise...”

9. I have considered the above points and the arguments advanced by the Citor and having, found that the Citation Cause herein has already been spent, the only question that arises is whether or not the phrase “costs follow the event” is applicable in this instant case.

(Retired) Richard Kuloba in the earlier cited book states as follows;

“The words “the event” mean the result of all the proceedings to the litigation. The event is the result of the entire litigation. It is clear however, that the word “event” is to be regarded as a collective noun and is to be read distinctively so that in fact it may mean the “events” of separate issues in an action. Thus, the expression “the costs shall follow the event” means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it. An issue in this sense need not go to the whole cause of action, but includes any issue which has a direct and definite event in defeating the claim to judgement in the whole or in part”

In **James Koskei Chirchir versus Chairman Board of Governors Eldoret Polytechnic [2011] eKLR** (Civil Appeal No. 211 of 2005), the Court held *inter alia*, that:

“Notwithstanding the provisions of section 27, above costs is generally a matter within the discretion of the Court. The Court did not, however, explain why it denied the appellant his costs before the trial Court. In absence of any explanation in that regard we think that the learned Judge of the Superior Court erred in denying the appellant the costs of the suit before the trial Court”.

Where there is sufficient reason why a trial Court awarded costs, then the appellate Court will not interfere with that award as was the case in S.K. Njuguna & another versus John Kiarie Waweru & another [2009] eKLR (Civil Appeal No. 219 of 2008) where the Court stated that:

“We reiterate that the issue of costs is in the discretion of the Court and in this appeal, we are satisfied that there were justifiable reasons why the appellants herein were ordered to pay the costs although the Election Petition against them was

dismissed.”

10. Also, in **Margret Ncekei Thuranira versus Mary Mpinda & another [2015] eKLR** where the principles on the discretion to award or withhold costs were summarized as follows:

“22. On the issue of costs, rule 31 of the Rules of this Court enjoins us at the end of our determination to make any necessary, incidental or consequential order including orders as to costs. In Devran Dattan versus Dawda [1949] EACA 35, it was held that the decision as to whether the successful litigant has a right to recover his costs should be left to the discretion of the Judge who tried the case, a position reiterated in James Koskei Chirchir versus Chairman Board of Governors Eldoret Polytechnic [2011] eKLR (Civil Appeal No. 211 of 2005) when this Court ruled that notwithstanding, the provision of section 27 of Civil Procedure Act, costs are generally a matter within the discretion of the Court. See also the decision in the case of Super Marine Handling Services Limited versus Kenya Revenue Authority [2010] eKLR (Civil Appeal No. 85 of 2006) for the proposition that 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. Herein, the learned trial Judge properly exercised his discretion in awarding costs to the respondents. We find no good reason to interfere with the exercise of that discretion as the costs therein had followed the event considering that the respondents were the victorious party”.

11. 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. In my view Section 27 of the Civil Procedure Act provides for the general rule which ought to be followed unless good reasons are recorded. In determining the issue of costs, the court is required to look at *inter alia* the conduct of the parties, the subject of litigation, the circumstance which led to the institution of the legal proceedings, the events which eventually led to their termination, the stage at which they were terminated, the manner in which they were terminated, the relationship of the parties and the need to promote reconciliation amongst disputing parties pursuant to Article 159(2)(c) of the Constitution.

12. In this case the proceedings were initiated by the Citor on 14th September, 2014 and pleadings served on the Citees on 18th September, 2014. Before the same could be determined the Citees herein petitioned the High Court at Nakuru vide **Succession Cause No. 796B of 2014** for grant of letters of administration intestate on the 26th November, 2014 two months after being in receipt of the Citation proceedings herein. On 24th February, 2020 this court marked the Citation as spent. Considering, that the Citation is already spent, I concur with the submissions of the Citor that if the Citees had acted diligently, no costs for filing these proceedings would have been incurred.

13. The upshot is that there would be no reason to deny the Citor costs, and in exercise of my discretion in a manner that meets the interests of justice for both parties in the circumstances of this case, and guided by the law and relevant authorities. Consequently, the costs are awarded to the Citor

E-DELIVERED AND DATED THIS 9TH DAY OF MARCH 2021

H. A. OMONDI

JUDGE