



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KAJIADO
ELC CASE NO. 819 OF 2017
JULIANA MUTHONI KITOLOLO.....PLAINTIFF
-VERSUS-
HOUSING FINANCE COMPANY LIMITED.....DEFENDANT

RULING

This ruling is simply on which of the two parties herein should pay the costs of the suit.

According to the Plaintiff, each party should bear its own costs. Simply put, no party should pay costs to the other.

On the other hand, the Defendant wishes that the Plaintiff should be condemned to pay the Defendant's costs.

The Defendant filed written submission on 23rd September, 2021 and again on 18th October, 2021 while the Plaintiffs submissions were filed on 18th October, 2021.

In urging that the costs be borne by each party, the Plaintiff gave the following reasons;

Firstly, it is submitted that the suit was prompted by illegalities by the Defendant over the exercise of its statutory power of sale.

Secondly, that the Plaintiff's property was on the brink of sale.

Thirdly, the amount demanded by the Defendant was more than what was negotiated and eventually settled for.

Finally, there was no winner per se as both parties ceded something in exchange of the settlement.

Counsel cited several authorities which include; *Rufus Njuguna Miringu and another- vs Martha Muriithi & 2 others.(2012) eKLR* whose ratio decidendi is that **"the successful party is the one that is normally awarded the costs:.**

On the other, hand Counsel for the Defendant replied as follows;

Firstly, the Defendant was the successful party albeit by compromise.

Secondly, Counsel said that consenting to settle a proceeding does not mean that costs should not be awarded. In making this proposition, Counsel relied on the authority of *Morgan Air Cargo Limited –vs- Evrest Enterprises Limited (2014) eKLR* where he cited the following words;

"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".

I have carefully considered all the submissions by the learned Counsel for the parties as well as the record and I find that two (2) issues arise namely;

1. Who is the successful party in this case?

2. If the successful party can be identified, is there any room in law to disentitle that party to lawfully ordained costs?

On the first issue, I find that the Defendant is the successful party. I say this because when this suit was filed on 21st July, 2017, the Plaintiff had defaulted on her loan repayment. She did not file any evidence of up to date payment.

That is the reason why the Plaintiff's application dated 20th July, 2017 was dismissed on 25th January, 2018.

Secondly, the Plaintiff did not issue any notice of intention to sue the Defendant. This means that she did not mind the consequences of the suit. One such consequence is payment of costs.

Thirdly, in the Plaintiff, the plaintiff did not say how much was lawfully due to the Defendant and the amount over and above that sum that was being demanded from her.

For the above reasons, the Plaintiff cannot be heard to say that she is the successful litigant. It is clearly the Defendant who is.

On the second issue, I find that no reason has been given to disentitle the successful party, costs which are by law its entitlement.

The provision to **Section 27(1)** of the **Civil Procedure Act** only gives discretion to the Court or Judge to disentitle the successful party costs for good reason.

Since no good reason has been shown or demonstrated in this case, I find that the Defendant is the party entitled to costs.

Order accordingly.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 14TH DAY OF DECEMBER, 2021

M.N. GICHERU

JUDGE