



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 306 OF 2016

- 1. KIMEU MATIVO
- 2. CHRISTINE MATIVO
- 3. TIMOTY MATIVO
- 4. PHILEMON MATIVO CHARLES
- 5. SAMSON MWANGINGI
- 6. MIRIUM SYOMBUA CHARLES
- 7. MARGARET KIMEU
- 8. DANIEL SILA MATIVO.....PLAINTIFFS

-VERSUS-

- 1. RAFIKI MICRO FINANCE LTD
- 2. MWANGANGI MATIVO
- 3. JOSEPH MWANGINGI T/A PWANI HOMECARE.....DEFENDANTS

RULING

1. The only issue for determination is the question of costs, the parties having settled the other issues in the suit. Section 27 of the Civil Procedure Act provides 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 to give all necessary directions for the purposes of 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 of issue shall follow the event unless the court or judge shall for good reason otherwise order.”

2. It is clear that 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. However, it is to be recognized that the principle that 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.

3. In determining the issue of costs, Mativo J in the case of **Cecilia Karuru Ngayu –v – Barclays Bank of Kenya & Another (2016) eKLR** stated that the court is entitled to look inter alia,

- (i) the conduct of the parties, (ii) the subject of litigation, (iii) the circumstances which led to the institution of the proceedings, (iv) the events which eventually led to their termination, (v) the stage at which they were terminated, (vii) the relationship between the parties, and (viii) the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2)(c) of the constitution.

4. In this case, the dispute is over the property known as KWALE/SHIMBA HILLS/99. The plaintiffs' case was that the suit property is family land which was just registered in the 2nd defendant's name to hold in trust for the family who include the plaintiffs and the 2nd and 3rd defendants. The suit property was used as security for a loan advanced by the 1st defendant to the 3rd defendant who had defaulted in repaying the loan, prompting the 1st defendant to exercise its statutory power of sale. It is the plaintiffs' contention that they live on the suit property but were not consulted and did not consent to the charge. This prompted the filing of the suit by the plaintiffs which has now been settled. The 2nd and 3rd defendants apparently do not deny and indeed support the plaintiffs' contention that the suit land is family property.

5. There is no doubt that the suit herein was compromised in favour of both the plaintiffs and the 1st defendant. The issue that arises is whether the plaintiffs were justified in instituting the suit. In my view, the plaintiffs were justified. There is no doubt that the plaintiffs were prompted to take action when the 1st defendant threatened to auction their land. The plaintiffs were within their rights to rush to court to protect their interests. Faced with the circumstances and facts of this case, I find that the plaintiffs acted reasonably and did what a reasonable and prudent man would have done. I find that filing this suit was inevitable.

6. On the other hand, the 1st defendant was within its right to initiate the process of recovery of the loan advanced to the 2nd defendant when the 2nd defendant defaulted in repayment by instructing auctioneers to auction the suit land after due notices had been issued. In my view, the 1st defendant was not to blame for the institution of the suit by the plaintiffs. It is the 2nd and 3rd defendants' actions that made the plaintiffs and the 1st defendant to incur expenses in this case. Both the plaintiffs and the 1st defendant are entitled to costs for the trouble undertaken by them in instituting and defending these proceedings. However considering the relationship between the plaintiffs and 2nd and 3rd defendants and the need to promote reconciliation amongst them, I order that they each bear their own costs.

7. In the result I order that the 2nd and 3rd defendants do pay the 1st defendant the costs of this case to be agreed or taxed by the taxing master of this court.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF JANUARY 2020.

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C.K. YANO

JUDGE

IN THE PRESENCE OF:

Adede holding brief for Nyabena for applicant

Mwawasa for Lumatete for respondents

Yumna Court Assistant

C.K. YANO

JUDGE