



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 210 OF 2010

IN THE MATTER OF THE ESTATE OF KENNETH MPUTHIA

Alias KENNETH MPUTHIA GEORGE (DECEASED)

FRIDAH KAARI.....1<sup>ST</sup> PETITIONER

GRACE KANJIRU PATRICK.....2<sup>ND</sup> PETITIONER

-VERSUS-

BRIDGET MUTHONI.....1<sup>ST</sup> INTERESTED PARTY

PETER GITONGA.....2<sup>ND</sup> INTERESTED PARTY

JOY KAGENDO.....3<sup>RD</sup> INTERESTED PARTY

#### RULING

1. On 21/5/2019 this court ordered that issues of trust herein be determined by the Environment and Land Court.
2. On 29/10/2019, Mr. **Gikonyo, counsel for the interested parties** informed this court that they had filed **Elc Case No. 90 of 2019** to determine the claim of trust in respect of L.R. Abogeta/L-Kithangari /1465. On that basis, he withdrew the application for revocation of grant dated 30/1/2015, but prayed that the court to award no costs on the application.
3. Mr. **Ndubi, Counsel for the petitioner**, although he did not object to the withdrawal, insisted on being paid costs on the withdrawn application.
4. The court directed the parties to canvass the issue of costs through written submissions. The petitioners submitted that the withdrawal of the application dated 30/1/2015 ought to have been made at the earliest opportunity. It was submitted that no direct relation which existed between the petitioner and the interested parties. He stressed that the interested party forcefully occupied the suit premises and left the petitioners to live in a destitution. Counsel was worried that the application has been in court for the last four years and the applicant has had to engage an advocate. For these reasons Mr. Ndubi claimed for costs. The interested parties on the other hand, urged this court to order each party to bear own costs as this is a family matter.

#### **Analysis and Determination**

5. The main and only issue for determination is whether or not the interested parties should pay costs of the withdrawn application.
6. Section 27 of the Civil Procedure Act provides as follows;

#### **27. Costs**

**(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 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.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

7. Order 25 Rule 3 of the Civil Procedure Rules also provides as follows;

Upon request in writing by any defendant the registrar shall sign judgment for the costs of a suit which has been wholly discontinued, and any defendant may apply at the hearing for the costs of any part of the claim against him which has been withdrawn.

8. In *Ethics and Anti-Corruption Commission v Nderitu Wachira Nderitu Wachira & 2 others* [2016] eKLR the Court relied on the citation made by Kuloba j in *Richard Kuloba, Judicial Hints on Civil Procedure, 2nd Edition, page 99 & 101* where he opined;

“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.....and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course.”

9. In *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another* [2016] eKLR the Court outlined the conditions a court should adhere to in determining an award of Costs when it held as follows;

“To my mind, in determining the issue of costs, the court is entitled to look at 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 the proceedings were terminated, (vi) the manner in 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.[11] In other words the court may not only consider the conduct of the party in the actual litigation, but the matters which led to the litigation, the eventual termination thereof and the likely consequences of the order for costs.”

10. The history of this case show a tumultuous turn when the interested party filed for revocation of grant. The said application has been pending for a considerable amount of time in litigation; although the transfer of the initial trial judge may have contributed to the delay herein. There have been claims that the Interested party forcefully occupied the estate property leaving the petitioners to live in destitution. These are disturbing events. That notwithstanding, I note that the withdrawal of the application was as a result of a court order referring the determination of trust and ownership of the land to ELC. Thereafter, the interested party filed suit in **ELC case No. 90 of 2019**.

11. I am aware 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. Is this a case where the judge should order otherwise?

12. The fact that the withdrawal of the application was inevitable after ELC became seized of the matter, the fact that this is a family matter and the need to promote amicable resolution or reconciliation of the parties, the order that commends itself to me that, and I order each party shall bear their own costs of the application. It is so ordered.

Dated, signed and delivered at Milimani Nairobi this 21<sup>ST</sup> day of APRIL, 2020

F. GIKONYO

JUDGE

Representation:

1. Ndubi Ondubi & Co. Advocates for the Petitioners.

2. J. Gitonga and Co. Advocates for the Interested Parties.

[jgitongalawyer@yahoo.com](mailto:jgitongalawyer@yahoo.com)