



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC 277 OF 2018

(FORMERLY NAIROBI ELC CASE NO.1105 OF 2015)

GARUN INVESTMENT LIMITED.....1ST PLAINTIFF/RESPONDENT

BACKSHAM INVESTMENT LIMITED.....2ND PLAINTIFF/RESPONDENT

VERSUS

AGUTHI ENTERPRISES LIMITED.....DEFENDANT/APPLICANT

AND

HUSSEIN IBRAHIM NUNI.....INTERESTED PARTY

RULING

The matter for determination is the **Notice of Motion** Application dated **16TH June 2016**, by the Defendant/Applicant seeking for orders that;

- 1. THAT this Honourable Court be pleased to review the order made by Honourable Lady Justice Gacheru on 26th day of May 2016, in specific the order denying costs of this suit to the Defendant by awarding the costs of this suit to the Defendant forthwith.**
- 2. THAT this Honourable Court be pleased to grant any other such orders it deems fit in the circumstances.**
- 3. THAT costs be in the cause.**

The Application is premised on the grounds that on the **20th of May 2016**, the Plaintiffs/Respondent's Advocates served the Defendant's/Applicant's Advocates with a draft consent letter seeking to withdraw this suit with no orders as to costs. Upon seeking instructions from their clients, the Applicants' advocates were informed that the Defendant

insisted on payment of costs and therefore the Advocates declined to execute the Draft consent letter and the same has not been used by any of the Parties. That on the **14th May 2016**, the Applicant was served with a **Notice of Withdrawal** and the Applicant was of the opinion that it would automatically be entitled to costs. However, when the matter came up for hearing, in marking the suit as withdrawn as per the Plaintiff's formal request, the Court ordered that there be no order as to costs to the Defendant and interested party and that there was therefore an error/ mistake apparent on the face of the record as the Court overlooked and or failed to take into account the express provisions set out under **Order 25 of the Civil Procedure Rules**. Further that since the Application has been brought without unreasonable delay, it is in the interest of justice that the prayers sought are granted.

In his **Supporting Affidavit**, **Stanley Kamuyu Githaiga**, a Director of the Defendant/Applicant reiterated the contents of the grounds on the face of the Application and averred that the Application has been brought on good basis and that there was no **inordinate delay** and urged the Court to allow the Application.

The Application is opposed and the Plaintiffs/Respondents filed **Grounds of Opposition** dated **30th July 2018**, and opposed the Application on the grounds that he Application is **bad in law**, **unmaintainable** and **an abuse** of the **court process** and that it ought to be dismissed with costs.

The Application was canvassed by way of written submissions and the Defendant/Applicant through the **Law Firm of Lawrence Mbabu & Associates**, filed its written submissions on the **10th June 2019**, which the Court has now carefully read and considered.

The Court has also carefully considered the Application, the annexures thereto and the written submissions and it is the Court's holding that the issue for determination is ***whether the Applicant is entitled to the orders of review.***

The guiding provisions of law with regards to review of a Court's order or decree are to be found in **Section 80** of the **Civil Procedure Act** and **Order 45** of the **Civil Procedure Rules**. **Section 80** gives the power of review while **Order 45** sets out the rules by giving the grounds of review and therefore lays down the jurisdiction and scope of review as;

- (a) Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;*
- (b) On account of some mistake or error apparent on the face of the record, or*
- (c) For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.*

Further the Supreme Court laid down the guiding principles for Applications of review in the case of **Parliamentary Service Commission ...Vs... Martin Nyaga Wambora & Others [2018] eKLR** and held that;

“Consequently, drawing from the case law above, particularly Mbogo and Another v Shah, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:

- (i) A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a Limited Bench of this Court.*
- (ii) Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;*
- (iii) An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.*
- (iv) In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.*
- (v) During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.*
- (vi) The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:
 - (a) as a result a wrong decision was arrived at; or*
 - (b) it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.**

With the above principles in mind, it is therefore this Court's considered view that the Applicant has to establish that the ***Court erred in the exercise of its discretion or exercised it whimsically, misdirected itself and as such a wrong decision was arrived at.*** It is Applicants' contention that the Court erred in declining to order the withdrawal of the suit with costs even though the Defendants were entitled to be given cost. In deciding whether or not to grant costs to a party, the Court is guided by **Section 27(1)** of the **Civil Procedure Act** that provides;

“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.”

It is therefore clear that the guiding factor on whether or not to grant costs is that costs will always follow the events and unless there is a sufficient reason to depart from the same then the Court should exercise its discretion and grant the said costs. Was the Applicant therefore in this case entitled to costs of the suit by virtue of the fact that the Plaintiffs/ Respondents had withdrawn the suit?

The Court finds that there are various factors that would guide a court while deciding whether a party should be granted costs when the suit has been withdrawn or discontinued and the Court should consider the matters that led to the litigation, the conduct of the parties and the manner in which the suit was terminated and therefore appreciating the trouble that had been taken by the parties. See the case of **Cecilia Karuru Ngayu ...Vs... Barclays Bank of Kenya & Another [2016]eKLR**, where the Court held that;

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.¹¹¹ 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.”

This Court has gone through the Court proceedings and it is important to note the various steps taken by the parties in order for the Court to appreciate the troubles that had been taken since the suit was filed.

Having gone through the proceedings, this Court notes that the Defendant had entered appearance and taken steps to defend the suit and in filing the suit papers in Court together with the Advocates attendance in Court. Further the Court notes that costs were incurred by the Defendant/Applicant in carrying out the above exercises. From the proceedings, while the interested party had no objection the suit being withdrawn with no orders to costs the record reveal that the Defendant had sought for the costs of the suit. Bearing in mind that the Defendant/ Applicant had taken steps from the date the suit was filed in **2015** to defend the suit and had incurred costs, it is this Court’s considered view that the Defendant is entitled to costs as there was no good reason to decline the costs to the Defendant/Applicant as required. Further, the Plaintiff/Respondents in defending the instant Application have also not given any reason to warrant the Defendant not being granted costs as per **Order 25, Rule 3** of the **Civil Procedure Rules** which provides;

“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.”

Going by the above provisions of law, this Court finds and holds that the Defendant is entitled to costs of the suit if the suit has been withdrawn. **Order 25** as read together with **Section 27** of the **Civil Procedure Act** gives the Court the discretion to grant cost unless there is a sufficient reason not to grant the costs. As already discussed above by this Court the circumstances of this case are that the Defendant having gone through various steps to defend this suit is therefore entitled to the costs of the suit.

Consequently, the Court finds that this is a case that warrants review as the Defendant has established that the Court erred in exercise of its discretion and a wrong decision was arrived at. Therefore this Court finds and holds that the Application dated **16th June 2016**, is merited and further the said Application was not brought without any inordinate delay.

The end result is that the instant Application is allowed entirely with costs.

It is so ordered.

Dated, Signed and Delivered at **Thika** this **27th** day of **February 2020**.

L. GACHERU

JUDGE

27/2/2020

In the presence of

No appearance for 1st Plaintiff/Respondent

No appearance for 2nd Plaintiff/Respondent

M/S Ganzansure holding brief for Mr. Mbaabu for Defendant/Applicant

No appearance for Interested party

Lucy - Court Assistant

L. GACHERU

JUDGE

27/2/2020