



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 34 OF 2016

NANCY WAKATHARE NGURI.....1ST PLAINTIFF

JANE NJERI NGURI.....2ND PLAINTIFF

CHARITY MUTHONI NGURI.....3RD PLAINTIFF

VERSUS

EDITH WAGATU NGURI.....1ST DEFENDANT

JAMES MBUTHIA NGURI.....2ND DEFENDANT

KELVIN WAWERU NGURI.....3RD DEFENDANT

RULING

The plaintiffs filed this suit vide a plaint dated 7th March 2016 seeking a raft of orders plus costs. The plaintiff also filed a Notice of Motion under certificate of urgency contemporaneously with the plaint seeking temporary injunction orders under **Order 40 Rule 1 (a) and (b) CPR**. After the case was confirmed for hearing and before the same was heard, the plaintiffs through the firm of Ndegwa & Ndegwa Advocate filed a Notice of withdrawal pursuant to **Order 25 Rule 1 CPR** dated 18th July 2019. On 18th October 2019, the suit came up for mention when the said Notice of withdrawal was adopted as an order of this Honourable Court. However, the issue of costs was agreed to be negotiated failing which the same to be canvassed by way of written submissions. When this matter came up next for mention on 21st November 2019, the Court was informed that no agreement had been reached and the parties were given timelines within which to file and serve their respective submissions. When the matter came up for mention next on 13th December 2019, only the defendants counsel had filed their submissions.

PLAINTIFFS SUBMISSIONS

The plaintiffs did not file any written submissions within the stipulated period.

DEFENDANTS SUBMISSIONS

The defendants through the firm of Magee Law LLP filed their submissions on 11th December 2019 and cited **Section 27 of the CPA**. The learned counsel also cited the following cases:

1. **Ethics and Anti-corruption Commission Vs Nderitu Wachira & 2 others – Misc. Civil Appl. No. 19 of 2015.**
2. **Kombo Hassan Kombo (Suing as the administrator of the Estate of Mwishahali Kombo Mwingi Haji) Vs Omar Said Abdalla & Another ELC Case No. 560 of 2011.**
3. **Hotel Cathay Limited Vs Nakuru Players Theatre (Being sued through its Registered Trustees 1. Prof. James Tuitoek 2. Dr. Joseph Walunywa 3. Sam Munagwe) & 2 Others ELC No. 353 of 2017 (Nakuru) (un-reported).**
4. **Republic Vs Independent Electoral and Boundaries Commission & 3 others - Misc. Application No. 344 of 2017.**

5. Devram Manji Daltani Vs Danda (1949) 16 E.A.C.A 35.
6. Impresa Ing Fortunato Federice Vs Nabwire (2001) 2 E.A. 383.
7. Re Ebuneiri Waisswa Kafuko (Deceased) Kampala H.C.M.A No. 81 of 1993.
8. Party of Independent Candidate of Kenya Vs Mutula Kilonzo & 2 Others H.C E.P. No. 6 of 2013.

DISPOSITION

I have considered the submissions by counsel for the defendants and the applicable law. The principle guiding the award of costs in a suit was set out by the Supreme Court of Uganda in the case of *IMPRESSA ING FORTUNATO FEDERICE VS NABWIRE (2001) 2 E.A 383* where it was held:

‘The effect of Section 27 of the Civil Procedure Act is that the Judge or Court dealing with the issue of costs in any suit, action, or matter has absolute discretion to determine by whom and to what extent such costs are to be paid; of course like all judicial discretions, the discretion on costs must be exercised judiciously and how a Court or a Judge exercises such discretion depends on the facts of each case. If there were mathematical formula, it would no longer be discretion - while it is true that ordinarily, costs should follow the event unless for some good reason the Court orders otherwise, the principles to be followed are;

1. Under Section 27 (1) of the Civil Procedure Act (Chapter 65), costs should follow the event unless the Court orders otherwise. This provision gives the Judge discretion in awarding costs but that discretion has to be exercised judicially.

2. A successful party can be denied costs if it is proved that but for his conduct the action would not have been brought. The costs should follow the event even when the party succeeds only in the main purpose of the suit It is trite law that where judgment is given on the basis of consent of parties, a Court may not inquire into what motivated the parties to consent or to admit liability since admission of liability implied acceptance of the participants of injuries enumerated in the plaint and the evidence in favour of the Respondent, including loss of hearing and speech”.

I find the above decision which has been applied in numerous other decisions in this country persuasive. The plaintiffs had instituted this suit against the defendants jointly and severally who filed their joint statement of defence denying the plaintiffs claim and sought to have the suit dismissed with costs. The defendants had also filed a Notice of Preliminary Objection. Where a party institutes a suit which is highly contested such as before Court and subsequent withdraws the same, the Court has no facts upon which to exercise its discretion. If this Court had heard the parties and the circumstance under which the dispute arose, the Court would then exercise its discretion based on such facts otherwise the appropriate order to issue in this case is that costs should follow the event. Having said that, I hereby order that the plaintiff should bear the costs of this suit plus interest at Court rates.

It is so ordered.

READ, DELIVERED and SIGNED in open Court at Kerugoya this **21st day of February, 2020.**

.....

E.C. CHERONO

ELC JUDGE, KERUGOYA

21ST FEBRUARY, 2020

In the presence of:

1. Mr. Asimwe holding brief for Magee
2. Plaintiff/Advocate – absent
3. Okatch – Court clerk