



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

E.L.C CASE NO. 284 OF 2014

PETER OMANI OBIRIA.....PLAINTIFF/RESPONDENT

VERSUS

HUDSON OKWEMA.....1ST DEFENDANT

JOHN NYANGERI.....2ND DEFENDANT

AGRICULTURAL SOCIETY OF KENYA.....3RD DEFENDANT

GUSII MWALIMU ACHWA ASSOCIATION.....4TH DEFENDANT

RULING

INTRODUCTION

1. What is before me is the 3rd Defendant's Notice of Motion dated 8th March 2019 in which the Applicant prays that this honourable court be pleased to enter judgment on costs in favour of the 3rd Defendant herein. The application is supported by the affidavit of Batram Muthoka sworn on the 8th March, 2019.

2. The application is opposed by the Plaintiff through the statement of Grounds of Opposition dated 27th May, 2019.

3. In order to put the matter into perspective it is necessary to give a brief background. The Plaintiff instituted this suit against the Defendants on 22nd July 2014. Upon being served with the plaint and summons to enter appearance, the 3rd Defendant entered appearance on 12th August 2014 and subsequently filed a defence dated 2nd September 2014. On 7th May 2015, the 3rd Defendant filed a Notice of Preliminary Objection stating inter alia that the suit herein was not maintainable against it in the manner canvassed and the orders sought were not available to the Plaintiff in law. The Preliminary Objection was argued and the court ordered the Plaintiff to amend its plaint within 21 days to replace the 3rd Defendant as currently constituted failing which the suit against the 3rd Defendant would be struck out. The Plaintiff failed to amend its Plaint as ordered with the result that the suit against the 3rd Defendant was struck out on account of lack of capacity. A subsequent application filed by the Plaintiff on 18th May, 2016 seeking to review the said order was dismissed on 24th February 2017.

4. Since the court did not make any order regarding costs following the striking out of the suit against the 3rd Defendant, the 3rd Defendant now wants the court to award it costs as it contends that it incurred costs in terms of advocates instruction fees, court attendance and other disbursements. In his grounds of opposition, the Plaintiff argues that the application is misconceived and legally untenable as the court is functus officio. He contends that the application has been mounted by a stranger as the 3rd Defendant is no longer a party to the suit and it therefore lacks the locus standi to file the application.

ISSUES FOR DETERMINATION

5. Having considered the Notice of Motion, affidavit and Grounds of Opposition the following issues fall for determination:

- i. Whether the Applicant lacks the locus standi to bring this application.
- ii. Whether the matter is res judicata.
- iii. Whether the 3rd Defendant is entitled to the costs.

ANALYSIS AND DETERMINATION

6. The first issue for determination is whether the 3rd Defendant lacks the locus standi to bring this application.

Learned counsel for the Plaintiff has submitted that the 3rd Defendant, that is, Agricultural Society of Kenya having been struck off the suit has no locus standi to bring this application and therefore the firm of Milimo, Muthomi & Company Advocates could not have been instructed to file the instant application by a party who is no longer participating in these proceedings. Learned counsel for Applicant mistook this submission to mean that they were not properly on record as they had not complied with order 9 Rule 9 of the Civil Procedure Rules. As I understand it, counsel for the Respondent are of the view that the 3rd Respondent cannot come back to court to ask for costs since they are no longer parties to the proceedings. I do not agree with the position taken by the Respondent's counsel as the costs alluded to relate to the suit that was filed against the 3rd Defendant and which according to the 3rd Defendant, ought to have been awarded to them when the suit against them was struck out. It is therefore my finding that the issue of the 3rd Defendant's locus standi does not arise.

7. I now turn to the second issue which is whether the matter is res judicata

It has been submitted by counsel for the Plaintiff that the Notice of Motion dated 8th March 2019 is res judicata as the question of costs was determined by the court in its ruling dated 8th April 2016 and the Applicant cannot revisit the same issue. He has submitted that if the 3rd Defendant was not happy with the costs that were awarded, they ought to have filed a reference and not filed the instant application asking the court to enter judgment on costs.

In its ruling dated 8th April 2016 the court made the following orders:

“I will accordingly grant liberty to the Plaintiff within the next 21 days from the date of this ruling to replace the 3rd Defendant as presently constituted with the proper 3rd Defendant giving the names of the trustees /officials to represent the “Agricultural Society of Kenya” as the 3rd Defendant in the suit failing which the suit will stand struck out on account of being defective. The 3rd Defendant is awarded costs of Kshs. 5000 for the application to be paid within 21 days of the date hereof”

8. It is clear that the court awarded costs for the application but not for the suit. This is not surprising because at that point the court did not anticipate that the Plaintiff would fail to abide by the conditions that had been laid down. It is therefore not true that the issue raised in the application is res judicata.

9. I will now consider whether the Applicant is entitled to costs. Section 27 (1) of the Civil Procedure Act provides that:

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being the cost 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 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 shall follow the event unless the court or judge shall for good reason otherwise order”.

10. It is clear that under Section 27 of the Civil Procedure Act costs are entirely at the discretion of the court. However, the proviso to this section states that costs shall follow the event unless the judge for good reasons shall otherwise order. In this matter the costs of the suit only arose after the suit against the 3rd Defendant was struck out. The judge could not express himself on the reasons for not awarding costs of the suit in his ruling since it was premature at the time. It has been submitted that this court is now *functus officio* and that the Applicant is seeking to appeal to a court of concurrent jurisdiction.

11. I am of the view that the court is not *functus officio* as the issue of the costs of the suit against the Applicant is still outstanding. It is equally not true that the Applicant is seeking appeal to a court of concurrent jurisdiction.

12. In the case of **Cecilia Karuru Nagayu v Barclays Bank of Kenya & Another (2016) eKLR** the court quoted Kuloba J in his book Judicial Hints on Civil Procedure at para101 where he states as follows:

“The law of costs as it is understood by courts in Kenya is this, that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part- no omission or neglect, and no vexatious or oppressive conduct is attributable to him, which would induce the court to deprive him of his costs, the court has no discretion and cannot take away the plaintiff's rights to costs. If the defendant, however innocently, has infringed on a legal right of the plaintiff, the plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course”

13. The court then observed as follows:

*“In my view the above paragraph applies equally where a Defendant has been wrongfully sued or in the circumstances of the present case. To my mind the second Defendant's actions enumerated above show that they are not guilty of any misconduct. It matters not that the case was withdrawn or compromised or intended to be compromised as in this case, what matters is whether the second defendants are entitled to costs for the trouble undertaken by them in defending these proceedings. In this connection, I am guided by the decision in the case of **Orix (K) Limited vs Paul Kabau & 2 Others** where it was held inter alia:-“.... the court should have been guided by the law that costs follow the event, and the Plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied costs or the successful issue was not attracting costs. None of the deviant*

factors are present in this case and the court would still have awarded costs to the Plaintiff, which I do”

14. The court further held that“*Considering the entire chain of events from filing this suit up to the time the parties left the issues to the court to determine, the numerous court attendances cited above, I find no reason to deny the second Defendant costs and in exercise of my discretion in a manner that meets the interests of justice for both parties in the circumstances of this case, and guided by the law and the relevant authorities, I hereby make the following orders:-*

1. That the second Defendant be and is hereby struck off from these proceedings.

2. That the Plaintiff do pay the second Defendant the costs of this case to be agreed or taxed by the taxing master of this court”

15. Similarly, in the instant suit there are no deviant factors and the 3rd Defendant has diligently defended the suit against it by filing a Memorandum of Appearance, Defence, List of documents and witnesses statements. The 3rd Defendant has also been active in prosecuting and defending several applications as well as the preliminary objection herein. I therefore have no reason to deny the 3rd Defendant its costs.

16. In view of the foregoing and in line with the principle in section 27 of the Civil Procedure Act, as well as the authorities cited to me, it is my finding that the Applicant is entitled to the costs of this suit.

The upshot is that the application has merit and it is granted as prayed.

The costs of this application shall be borne by the Respondent.

Dated, signed and delivered at Kisii via Zoom this 28th day of May, 2020.

J.M ONYANGO

JUDGE