



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI

JR CASE NO 15 OF 2017

POSTEL HOUSING CO-OPERATIVE SOCIETY LIMITED....1ST PETITIONER
EXCLUSIVE ESTATES LIMITED.....2ND PETITIONER

VERSUS

TELCOM KENYA LIMITED.....1 ST RESPONDENT
AFTRACO LIMITED.....2 ND RESPONDENT
HON ATTORNEY GENERAL.....INTERESTED PARTY

JUDGMENT

1. On 12/11/2019, the petitioners in this petition through their Advocates, M/s Prof Tom Ojienda and Associates, filed a notice of withdrawal of suit reading as follows:

“NOTICE OF WITHDRAWAL”

Take NOTICE that the petition herein by the petitioner POSTEL HOUSING CO-OPERATIVE SOCIETY LIMITED CO-OPERATIVE SOCIETY LIMITED AND EXCLUSIVE ESTATES LIMITED, is hereby wholly withdrawn against the respondents.

DATED at Nairobi this 7th day of November 2019

PROF TOM OJIENDA AND ASSOCIATES ADVOCATES FOR THE ”

2. When the petition was placed before the court in plenary on 21/11/2019, Mr Makokha counsel for the petitioners, asked the court to adopt the notice of withdrawal without making an award in relation to costs. Mr Tugee, counsel for the 1st respondent, conceded to the withdrawal but insisted on the 1st respondent being awarded costs of the petition. Subsequently, on 4/3/2020, parties to the petition recorded a consent in the following terms:

BY CONSENT

1. Parties agree that the issue of costs be determined by the court based on written submissions already filed by the parties

2. The court be at liberty to give a date for judgment on the issue of costs.”

3. Consequently, the single issue falling for determination in this suit is whether the petitioners should bear costs of this suit.

4. The 1st respondent submitted that under Rule 26 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, the award of costs is at the discretion of the court. It was the 1st respondent's view that the discretion must be exercised in a way to ensure that: (i) litigants are not unduly kept from accessing the courts to determine their rights and fundamental freedoms; and (ii) parties do not file petitions that are without merit, vexatious or otherwise an abuse of court process

5. Counsel for the 1st respondent submitted that the two questions to guide the court when exercising its discretion in the present suit are: (i) whether the petition was wholly frivolous, an abuse of the constitutional process or that the petition did not raise purely constitutional issues; and (ii) whether the petition was a matter in the domain of public interest litigation.

6. The 1st respondent argued that the petitioners brought this petition to impede justice because the petitioners were aware that there were two previous suits relating to the same issue and the dispute in the two previous suits had been referred to arbitration for the purpose of resolving the issue of ownership of the suit property. It was further argued that the petition herein was not in any way brought to advance a legitimate public interest or to contribute to a proper understanding of the law in question; it was filed for private gain to assert ownership over private property. Reliance was placed on the decisions in: (i) *Rodgers Mwema Nzioka v The Attorney General & 8 others (2006) eKLR*; (ii) *John Wekesa Khaoya v Attorney General [2013] eKLR*; (iii) *Tom Mboya Odege v Edick Peter Omondi Anyonga & 2 Others [2018]eKLR*; and (iv) *Trusted Society of Human Rights Alliance v Mohammed Hussein Mulla Nanji & 2 Others [2017]eKLR*. The 1st respondent urged the court to award it costs of the petition.

7. Counsel for the 2nd respondent submitted that two issues fell for determination: (i) whether the court had discretion to award costs where a suit has been withdrawn; and (ii) whether the 1st interested party (sic) should be awarded costs following the plaintiff's (sic) withdrawal of the suit. It was argued that Section 27(1) of the Civil Procedure Act granted this court discretion to award costs in a suit regardless of whether the suit is withdrawn, struck out for want of jurisdiction or fully determined on merits. Relying on the decision in **Little Africa Kenya Limited v Andrew Miriti Jason [2014] eKLR**, counsel for the 2nd respondent argued that no party in a suit should claim entitlement to costs in a "course", contending that it is only the court which has authority to determine who should and who should not be awarded costs. Counsel added that the court's power to award costs must be flexed judiciously and within legally defined principles.

8. Counsel for the 2nd respondent further submitted that the court was enjoined to be guided by the provisions of Section 27 of the Civil Procedure Act and the dictum that costs follow the event. Counsel for the 2nd respondent added that were the court to deviate from the general rule that costs follow the event, the court would be required to give reasons for the deviation. Further reliance was placed on the decisions in (i) **Nyeri HCCC No 173 of 2008; Stephen Chege Waweru v Ehphantus Mwangi & Others**, and (ii) **Cecilia Karuru Ngayu v Barclays Bank of Kenya & Antother [2016]eKLR**. Counsel argued that the petitioners' conduct of seeking to have this court determine matters which were pending before the arbitrators was a gross abuse of the judicial process and amounted to improper legal practice and forum-shopping. Counsel urged the court to award the respondents costs of the suit.

9. Counsel for the submitted that the principal law on costs was Section 27 of the Civil Procedure Act and that the jurisdiction to award costs is discretionary. He added that one of the factors to consider when exercising that jurisdiction is whether the suit in question is a public interest litigation. Relying on the Supreme Court decision in **Jasbir Singh Rai & 3 Others v Terlochan Singh Rai & 4 others [2014] eKLR**, counsel submitted that the petition herein was a public interest litigation, firstly, because it was brought as a Constitutional Petition under the Bill of Rights; and secondly, because it focused on Legal Notice No 154 of 2009 and Legislative Supplement No 11 of 2011. Thirdly, counsel argued that this petition was a public interest litigation because the suit property was the subject of acquisition by the Government of Kenya. Counsel added that the overwhelming public interest was the reason why the Attorney General applied through an application dated 8/12/2017 to be joined as an interested party and was subsequently joined. Counsel further argued that the respondent's contention that this petition was subjudice was misguided because their attempt to have the petition struck out on that ground had been rejected by the court. Counsel urged the court to decline to award costs to the respondents.

10. I have considered the parties' pleadings, respective submissions, and the relevant legal frameworks and jurisprudence. As indicated in paragraph 3 of this judgment, the single issue falling for determination in this petition is whether the petitioner should bear costs of the petition.

11. The general legal framework on the courts' exercise of jurisdiction to award costs in civil cases is Section 27 of the Civil Procedure Act which provides as follows:

7. 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.

12. Additionally, where the civil suit in question relates to the enforcement of a right within the Bill of Rights in the Constitution, Rule 26 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms (Practice and Procedure Rules 2013) applies. It provides thus:

26. Costs

(1) The award of costs is at the discretion of the court.

(2) In exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms.

13. What is clear from the above legal frameworks and what is now settled law is that the courts' jurisdiction to award costs is discretionary. The general principle which guides our courts when exercising this jurisdiction is that costs follow the event. The dictum "*costs follow the event*" means that the costs incurred by the successful party are to be borne by the unsuccessful party at the conclusion of the case. Secondly, departure from this general principle should be based on good reasons. Put differently, the court's discretionary jurisdiction to award or decline to award costs is to be exercised judiciously.

14. Articulating the above position, the Supreme Court of Kenya stated as follows at paragraph 15 in **Jasbir Singh Rai & Others v**

Jarlachan Singh Rai & 4 others [2014] eKLR.

“It is clear that there is no prescribed definition of any set of “good reasons” that will justify a court’s departure, in awarding costs, from the general rule, costs follow the event. In the classic common law style, the courts have proceeded on a case by case basis, to identify “good reasons” for such a departure”

15. The present petition was withdrawn before trial. The merits of the parties’ respective cases were therefore not tested through the usual rigours of trial. The petitioners did not therefore succeed in their prayers in the petitions. The petitioners are consequently the unsuccessful parties.

16. Subsequent to withdrawing the petition, parties executed a consent inviting the court to render a judgment on the outstanding issue of costs, based on the parties’ filed written submissions. The parties did not tender any form of evidence on the issue of costs. In my view, in the absence of tested evidence focusing on the issue of costs, the court has no basis for departing from the general principle that costs follow the event.

17. Counsel for the petitioners urged the court to find that the petition herein was a necessary public interest litigation. I do not agree with that view because at the time of filing the notice of withdrawal, this suit had been stayed pursuant to a ruling rendered by this court on 21/1/2019. The court made a finding in the said ruling to the effect that the petition herein was directed at the respondents and through it, the petitioner had asserted their proprietary rights in relation to the suit property. The court had also found that the issues in this suit were the same as the issues in other preceding suits. The court had further found that the parties to this petition had consensually referred those issues to arbitration. The court stated thus:

“If the present petition is allowed to proceed in its present form, there is a real danger of the court and the arbitral tribunals arriving at contradictory findings in relation to the same issues. This has the potential of throwing the administration of justice into disrepute”

18. What emerges from the above prior findings is that this petition was not necessary in so far as it sought the court’s resolution of issues which the parties were already litigating on and were resolving through the preceding suits and through arbitration. This petition was, in my view, not a necessary public interest litigation.

19. In light of the foregoing, the court is not satisfied that the petitioners have laid a basis upon which the court can judiciously depart from the general principle that costs follow the event. The net result is that the court has come to the finding that the petitioners having abandoned their petition, they should bear costs of the abandoned petition in tandem with the general principle that costs follow the event.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF MAY 2020.

B M EBOSO

JUDGE

In the presence of:-

Ms Songok for the 1st Respondent and holding brief for Ms Gachamba for the 2nd Respondent

Ms Omire holding brief for Prof Tom Ojienda for the

Mr Allan Kamau for the Interested Parties

Court Clerk - June Nafula