



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**HIGH COURT MISC. APP. CAUSE NO. 386 OF 2014**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**KIAMBU LANDS REGISTRAR.....RESPONDENT**

**CHAIRMAN, LIMURU LAND CONTROL BOARD**

**ESTHER NJERI NJENGA**

**JOSEPHINE NDUTA KARITHI**

**SOPHIE KABURA MACHARIA**

**JUDITH NYORO**

**BANCY GATHONI MUSA**

**LUCY WANJIKU MUCHEKEHU.....INTERESTED**

**PARTIES**

**EX-PARTE ALVIN KAMANDE NJENGA**

**RULING**

1. In these proceedings the ex parte applicant, **Alvin Kamande Njenga**, sought an order of mandamus directed to the Respondent to supply him with the documents that had been used to make changes in Limuru/Ngecha Land Registration 166-1975. He also sought that the costs of the said application be provided for.
2. In the said application the applicant disclosed the existence in this Court of ELC 512 of 2008 and averred that the said documents were required in order to determine the signatories and the authority obtained by the owners of the said parcels.. In his view this was a simple matter which required very little effort and he was prepared to meet the costs thereof.
3. The said application was however opposed by the interested party on inter alia the basis that these proceedings amounted to a multiplicity of suits given the fact that there were other proceedings pending between the same parties regarding the same facts being High Court ELC No. 512 of 2008 and High Court Succession Cause No. 2777 of 2008.

4. On 23<sup>rd</sup> February, 2015, the Respondent filed and served on the Applicant a bundle of documents. At first the Applicant insisted that the documents supplied to him were not the complete bundle of documents he was seeking to be supplied with. However by a turn of events on 8<sup>th</sup> June, 2015, the Applicant informed the Court that as the Respondent had conceded his application the only pending matter was the issue of costs. Consequently these proceedings were deemed to have been compromised save for the issue of costs on which the parties were directed to submit.

5. This ruling is therefore only as regards the said issue of costs.

6. The general rule as to costs is provided for in **section 27** of the **Civil Procedure Act** which provides as follows:

***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.***

7. It is therefore clear that the costs are entirely within the discretion of the Court which in making a determination hereon is to be guided with the principle that they follow the event. Where the Court decides not to follow the general rule, the Court is expected to give reasons therefor. Therefore, the applicant's view that he was the successful party even if correct does not automatically entitle him to the costs. However, the applicant's position was incorrect as the application was compromised rather than being determined as the same was never heard on the merits.

8. This provision has been the subject of several judicial pronouncements. In the case of Supermarine Handling Services Ltd vs. Kenya Revenue Authority Civil Appeal No. 85 of 2006 the Court of Appeal expressed itself thus:

**“Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance...Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where the reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule...In the instant case the learned Judge gave no reasons whatsoever for his decision to deprive the successful plaintiff of its costs and yet it was not shown that the defendant had been guilty of some misconduct which led to litigation. In the court's view the learned Judge's order was wrong and for the foregoing reasons, the plaintiff's appeal succeeds as to the award of interest and costs on the principal sum awarded”.**

9. In **Devram Manji Daltani vs. Danda [1949] 16 EACA 35** it was held that a successful litigant can only be deprived of his costs where his conduct has led to litigation, which might have been averted.

10. The Respondent and Interested Parties were of the view that in light of the decision issued by **Mwili**,

J (as she then was) in the aforesaid ELC Case on 19<sup>th</sup> June, 2012, these proceedings were totally unnecessary. A copy of the proceedings in the said case was supplied and formed part of this record. In the said proceedings the *ex parte* applicant herein is the Plaintiff while the 2<sup>nd</sup> to 7<sup>th</sup> Interested Parties herein are Defendants. On 19<sup>th</sup> June, 2012, the learned judge ordered that witness summons do issue to the Limuru Land Registrar to appear in Court and produce the proceedings of Land Control Board in respect of Limuru/Ngecha/1966 to 1975 originally known as Limuru/Ngecha/114 and that the court was to serve the summons. It was further ordered that the Deputy Registrar avails the file in respect of Succession Cause No. 2777 of 2008 and Petition No. 159 of 2011.

11. In determining the issue of costs, the Court is entitled to look at the conduct of the parties, the subject of litigation and the circumstances which led to the institution of the legal proceedings and the events which eventually led to their termination. In other words the court may not only consider the conduct of the party in the actual litigation, but the matters which led up to litigation. See **Hussein Janmohamed & Sons vs. Twentsche Overseas Trading Co. Ltd [1967] EA 287** and **Mulla (12<sup>th</sup> Edn) P. 150.**

12. In this case, it is acknowledged that there exist a civil suit between the applicant and the interested parties herein. Under the ***Civil Procedure Rules*** there are sufficient provisions for seeking reliefs in the nature of what is sought herein whether they are in possession of the adverse parties or from the government either by way of discovery or by way of witness summons. The Court in ELC case was alive to this and made appropriate orders for production of proceedings before the relevant Land Control Board. Whereas the court did not order the production of the exact documents being sought by the application these proceedings I do not see what would have prevented the applicant from seeking the order sought in these proceedings in the said case. By instituting these proceedings, it is my view that the applicant has not only wasted the time which would have been spent on prosecuting his case in the ELC but has also wasted this Court's time. I, in the circumstances agree with the 2<sup>nd</sup> to 7<sup>th</sup> interested parties that these proceedings amounted to abuse of the Court process and were it not for what I am about to state I would have had no difficulty in penalising the applicant in costs.

13. From the submissions made by the interested parties, it is clear that the dispute herein revolves around a family. It seems to be a tug of war between the applicant on one side and his mother and siblings on the other. This Court has a duty pursuant to Article 159(2)(c) of the Constitution to make orders geared towards the promotion of reconciliation in such circumstances rather than make orders which are divisive of the family unit. As Article 45(1) of the Constitution provides:

***The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.***

14. Accordingly the order which commends itself to me and which I hereby make is that each party will bear own costs of these proceedings.

**Dated at Nairobi this 10<sup>th</sup> day of July, 2015**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Applicant in person**

**Mr Gatheru for the 2<sup>nd</sup> to 7<sup>th</sup> Interested Parties and holding brief for Mr Keter for the Respondent**