



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC CASE NO. 571 OF 2017**

**CHARLES KARUE**

**DAVID NYAGA**

**GILBERT MUTHONYI suing as officials of**

**WA KIGWE AMANI WELFARE GROUP.....PLAINTIFF/APPLICANT**

**VERSUS**

**MICHAEL GAITHUMA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**NATIONAL CONSTRUCTION AUTHORITY.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**COUNTY GOVERNMENT OF KIAMBU.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

The Plaintiff herein had on **31<sup>st</sup> May 2017**, filed this suit as an **Originating Summons** and sought for determination of three questions. The said suit was accompanied by a **Notice of Motion Application** even dated, wherein the Plaintiff had sought for injunctive orders against the Defendants herein.

The suit came to Court on **2<sup>nd</sup> June 2017**, at the first instance and interim orders were granted in terms of **prayer No. (f)** of the **Notice of Motion Application** dated **31<sup>st</sup> May 2017**. The said orders were as follows:-

*“A temporary injunction be issued restraining the 1<sup>st</sup> Defendant/Respondent, his employees, Servants, agents or any other person claiming through him from engaging in any further or other building works, construction, delivery of construction material or in any way further development whatsoever on the property known as Juja Kalimoni Block 8/478, pending the hearing and determination of this application.”*

The matter was set for hearing on **19<sup>th</sup> June 2017**. However, on **19<sup>th</sup> June 2017** the Plaintiff/Applicant and his advocate were absent, but 1<sup>st</sup> Defendant/Respondent was present. The matter was adjourned and referred back to the Registry for taking of another hearing date.

The matter again came to court on **9<sup>th</sup> October 2017**, wherein the Plaintiff/Applicant was absent and so was its advocates. The said Notice of Motion Application dated **31<sup>st</sup> May 2017**, was dismissed entirely for want of prosecution.

However, the 2<sup>nd</sup> Defendant filed a Notice of **Preliminary Objection**, and the same was fixed for hearing on **12<sup>th</sup> November 2018**. On this particular date **12<sup>th</sup> November 2018**, the Plaintiff Advocate was absent but had instructed one **Mr. Kangiri Advocate**, to hold his brief. He applied to have the **Preliminary Objection** canvassed by way of written submissions. The Court directed that the said **Preliminary Objection** dated **7<sup>th</sup> June 2018**, be canvassed by way of written submissions. The objector, who was the 2<sup>nd</sup> Defendant was granted **21 days** to file and serve its written submissions. The Plaintiff was also granted **21 days** to file their written submissions.

From the Court record, the 2<sup>nd</sup> Defendant filed its written submissions on **15<sup>th</sup> May 2019**. The matter came for mention in Court on **20<sup>th</sup>**

**May 2019**, wherein the Plaintiff applied for time to file the written submissions. The Court granted the Plaintiff **14 days** to file and serve the said written submissions and matter was to be mentioned on **2<sup>nd</sup> July 2019**, for a ruling date.

When the matter came to court for mention on **2<sup>nd</sup> July 2019**, **Mr. Muturi Njoro** for the Plaintiff had not filed the written submissions as earlier directed by the court. The matter was given a further mention date for **29<sup>th</sup> October 2019**, which date the Plaintiff who had not complied with the Court's directions of filing the written submissions sought to have the suit **withdrawn entirely with no orders as to costs**.

However, the Court directed the parties to reach **a consent** on the issue of costs as the 2<sup>nd</sup> Defendant/Respondent had no objection to the withdrawal of the suit, but the same be withdrawn with costs to the 2<sup>nd</sup> Respondent. When the matter came back to Court on **2<sup>nd</sup> March 2020**, parties had not agreed on the issue of costs and Court directed the parties to submit on the said issue of costs. The matter was to be mentioned on **25<sup>th</sup> May 2020**. From the Court record, the 2<sup>nd</sup> Defendant filed its written submissions on **25<sup>th</sup> May 2020**.

However, the Plaintiff failed to submit on the issue of costs but the Court set down the matter for Ruling.

Having taken into account the chronology of events in this suits and the submissions by the 2<sup>nd</sup> Defendant, the Court finds that the guiding law on the issue of costs is **Section 27(1)** of the **Civil Procedure Act** which states:-

*“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.”*

It is clear from the above provisions of law that the issue of costs is left to the discretion of the Court. However, it is also very clear that costs of the suit do follow the event. See the case of *R...Vs...Rosemary Wairimu Munene, Exparte Applicant ... Vs ... Ihururu Diary Farmers Cooperative Society Ltd, JR Appl. No. 6 pf 2004* where the Court held that:-

*“It is well recognized that the principle “costs follow the event” is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in the prosecuting or defending the case.”*

From the chronology of the actions taken by the parties as given above, It enumerates the trouble taken by the parties herein since the suit was filed.

*Justice Kuloba (Retired) in his book Judicial Hints on Civil Procedure, 2<sup>nd</sup> Edition(Nairobi) Law Africa 2011, Page 94 stated:-*

*“Costs are awarded at the unfettered discretion of the court, subject to such conditions as may be prescribed and to the provisions of any law at the time being in force, but they must follow the event unless the Court has given reasons to order otherwise. It is therefore very clear that costs do follow the event. This means that costs should be awarded to a successful party, a rule which should not be departed from without the exercise of good grounds for doing so. (see the case of Party of Independent Candidates of Kenya vs Mutula Kilonzo and 2 others (2013) eKLR).”*

It is also very clear that **section 27** of the **Civil Procedure Act** provides the general rule which ought to be followed, unless a good reason to be recorded is given. In this matter, the Plaintiff did not submit on the issue of costs and therefore no good reasons were advanced why costs should not follow the event.

As the Court makes its determination it will be guided by the following principles

- a. **Conduct of the parties.**
- b. **The subject of litigation**
- c. **The circumstances which led to institution of the suit**
- d. **Event which eventually led to the termination**
- e. **The stage at which the proceedings were terminated.**
- f. **The manner in which they were terminated**

It is evident that the Plaintiff filed this **Originating Summons** and a **Notice of Motion Application**. After obtaining **interim Orders** at the first instance, the Plaintiff failed to prosecute the said application dated **31<sup>st</sup> May 2017**, which was eventually dismissed by the Court for want of prosecution.

The 2<sup>nd</sup> Defendant filed a **Preliminary Objection** and though granted several opportunities, the Plaintiff failed to file the written submissions. However, Plaintiff sought to withdraw the suit with **no orders as to costs**. It is evident that though the suit is withdrawn, this

is a case where costs should follow the event. The 2<sup>nd</sup> Defendant had taken trouble to file a **Preliminary Objection** and the **written submissions**. For the above reasons, the Court finds that the 2<sup>nd</sup> Defendant is entitled to costs, which **costs** should be paid by the Plaintiff. The costs should be agreed upon or taxed by the taxing master of this court.

It is ordered.

**Dated, signed and Delivered at Thika this 24<sup>th</sup> day of September 2020**

**L. GACHERU**

**JUDGE**

**24/9/2020**

**Court Assistant – Lucy**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via Video conference**

**No appearance for the Plaintiff**

**No appearance for the 1<sup>st</sup> Defendant**

**Mr. Oweya for the 2<sup>nd</sup> Defendant**

**No appearance for the 3<sup>rd</sup> Defendant**

**No appearance for the 4<sup>th</sup> Defendant**

**L. GACHERU**

**JUDGE**

**24/9/2020**