



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 143 OF 2011

DOREEN OUKO.....PLAINTIFF

VERSUS

PRIMEROSE COURT.....DEFENDANT

RULING

1. On 28th January, 2013, the parties informed the court that this suit had been settled save for the issue of costs. The court thereupon, ordered the parties to file a written consent to be adopted by the Court and take a mention date at the registry for the endorsement of the consent. The written consent was never filed. However, by a Notice of Motion dated 7th August, 2013, the Plaintiff sought an order for the costs of this suit to be paid by the Defendant. The said application was supported by the affidavit of Robert Paul Onyango, learned counsel to the Plaintiff, sworn on 7th August, 2013. On 14th November, 2013 ordered that submissions on that application be filed. Counsels for the parties filed their written submissions on 20th November, 2013.
2. The background to the suit is that the Plaintiff and Defendant entered into a sale agreement dated 1st September, 2005 for the sale and purchase of LR. Number 3734/284 House Number 7, Primrose Court (“the suit Property”). After the execution of the agreement, the Plaintiff paid the purchase price of Kshs. 10,000,000/= and other incidental expenses by February, 2007. However, it was contended that thereafter the Defendant delayed in the registration of the title documents to the suit property necessitating the filing of the instant suit on 15th April, 2011.
3. It was submitted by the Plaintiff's counsel that the Plaintiff was entitled to costs as she had proved her claim against the Defendant. That the suit was filed by the Plaintiff due to the fact that the Defendant had failed to perform its contractual obligations and was lax in completing the transaction to the detriment of the Plaintiff. It was further submitted that the Plaintiff incurred unwarranted legal expenses in filing this suit. That filing of the suit was the only avenue open to the Plaintiff to receive the original ownership documents of the suit property. It was further submitted that it was trite law that costs follow the suit as provided for in Section 27 (1) of the Civil Procedure Act.
4. In reply, the Defendant submitted that it should not be condemned to pay any costs in the matter for the reason that the Plaintiff was informed of the progress in the registration of the lease for the suit property. That any impediment in the registration process of the lease was not intentional but was beyond the control of the Defendant. It was further submitted that the application and suit was pre-emptive as the Plaintiff had been informed by the Defendant on the cause of the delay of the registration of the lease. The Defendant relied on the case of **Devram Manji Daltani Vs**

Danda (1949) EACA 35.

5. The issue for determination is who between the parties should pay the costs of this suit which has been settled by consent of the parties. Section 27 (1) of the Civil Procedure Act provides:-

“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.”

From the foregoing, it is clear that Costs are in the discretion of the court, save for the fact that they will normally follow the event, unless the court shall otherwise order. See the case of **Independent Candidate of Kenya & Another Vs Mutula Kilonzo & 2 Others (2013) eKLR**

6. In interpreting Section 27 (1) of the Civil Procedure Act, the event is the result of the proceedings and it is the successful party in this result who is normally to be awarded costs of the suit. Though the written consent is yet to be filed in court, the parties have not disputed that the matter has been settled by consent save for the issue of costs. The question then that arises is, who then is the successful party in this case?
7. It has been argued by the Plaintiff, that despite the suit being settled by the consent of the parties it was the wrongful acts of the Defendant that led to the dispute. That the Plaintiff incurred costs of Kshs. 72,455/= in respect to the court filing fees. The Defendant on the other hand argues that the suit was instituted prematurely as the Plaintiff had all along known about the impediments with regard to the registration of the lease.
8. Having considered the opposing arguments, I am in agreement with the holding in the case of **Thomas Gitau Njogu & 4 others Vs Patrick Waruinge Muhindi & 2 others [2013] eKLR** where **Nyamweya J** held that:-

“..... the only material event under section 27 of the Civil Procedure Act is the success or otherwise of a suit. Fault is only material when it comes to exercise of the courts discretion whether or not to award costs due to a successful party on account of their conduct. It is also my view that it is not always given that in a consent there will be a successful and unsuccessful party. To determine the successful party in a consent order the court will need to examine the content and nature of the said consent in relation to the pleadings by the parties.” (Emphasis mine)

9. It is therefore imperative for the court to examine the content and the nature of the consent between the parties. In this instance however, there is no consent order for the court to examine. Nevertheless, I have perused the Plaintiff dated 15th April, 2011 that is on record. Amongst the reliefs sought by the Plaintiff was an order for specific performance for the Defendant to surrender the original title document to the suit property. In the alternative, the Plaintiff sought an for the Chief Land Registrar to facilitate the transfer of the suit property to the Plaintiff with or without the Defendant’s original title by use of a certified copy thereof in possession of the Chief Land Registrar.
10. From this, it is clear that the Plaintiff wanted the process of registration of the title documents for the suit property in her name to be completed. I note from the record that on 26th June 2012, the Defendant’s Counsel informed the court that the Original Title for the suit property had been availed to the Chief Land Registrar for the registration of the lease in the Plaintiff’s name. An adjournment was therefore sought for the parties to record a consent. In the circumstances, it would appear that the Plaintiff largely succeeded in securing the orders sought in her Plaintiff with the registration of the Title document. Further, I agree with the Plaintiff that the transaction was delayed to her detriment as the same took close to four years to complete. She incurred court fees

and legal fees in instituting the suit in order to seek redress for the delay in the transaction.
11. Consequently, I allow the application dated 7th August, 2013 as prayed.

DATED and **SIGNED** at **BUNGOMA** this 21st day of February, 2014.

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A. MABEYA

JUDGE

DELIVERED and **SIGNED** at **NAIROBI** this 5th day of March 2014.

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J.B. HAVELOCK

JUDGE