



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. APPEAL NO. 214B OF 2012**

**BENJAMIN NZYOKI MBINDYO.....1<sup>ST</sup> APPELLANT**

**ARON MUTUNGA MBINDYO.....2<sup>ND</sup> APPELLANT**

**JOHN MAWEU MUTISO.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**JAMES NZEKI KILONZO.....RESPONDENT**

**RULING**

1. This Appeal was withdrawn by the Appellants on 18<sup>th</sup> February, 2020. The Ruling relates to the issue of costs that was canvassed by way of written submissions as directed by the court.

2. The Appellants filed an Application to file an Appeal arising out of the decision of the Eastern Province Land Disputes Appeals Committee in Appeal No. 41 of 2005, out of time dated 31<sup>st</sup> July, 2008. The Application was allowed by the court on 7<sup>th</sup> December, 2012.

3. The Appellants then filed the Memorandum of Appeal on 24<sup>th</sup> December, 2012. On 2<sup>nd</sup> July, 2019, the parties took directions on the hearing of the Appeal. They agreed to canvass the Appeal by way of written submissions. The matter was listed for mention on 26<sup>th</sup> September, 2019 for compliance on filing of submissions.

4. On 26<sup>th</sup> September, 2019, counsel for the Appellants informed the court that the disputed suit land in Musalala sub-location had been declared to be an adjudication section pursuant to the provision of section 5 of the Land Adjudication Act. A copy of the letter dated 9<sup>th</sup> June 2016 declaring the suit land as an adjudication section was furnished to the court.

5. Counsel informed the court that as a result of the information regarding the establishment of an adjudication section, the Appellants had not filed submissions in respect to the Appeal because the jurisdiction of the court had been ousted by operation of the law.

6. The Respondent's counsel submitted that the Respondent is entitled to costs. Counsel placed reliance on the provisions of Section 27 of The Civil Procedure Act that 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. Reliance was also placed on Order 25 Rule 1 & 2 of the Civil Procedure Rules which provides as follows:

*“1) At any time before the setting down of the suit for hearing the Plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the Defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.*

*2) Discontinuance (Order 25 Rule 2)*

*(1) Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn, upon the filing of*

a written consent signed by all of the parties.

(2) Where a suit has been set down for hearing the Court may grant the Plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just.

(3) The provisions of this rule and rule 1 shall apply to counterclaims.”

8. The Respondent’s counsel cited the case of **Peter Muriuki Ngure v Equity Bank (K) Ltd [2018] eKLR** where the court stated as follows:

“7. It is quite clear therefore that the key word in this Section is “event”. As stated in the submissions by the Respondent, this word has been addressed in the Judicial hints on Civil Procedure by Justice (Rtd) Kuloba as follows;

“The words “the event” mean the result of all the proceedings to the litigation. The event is the result of entire litigation. It is clear however, that the word “event” is to be regarded as a collective noun and is to be read distinctively so that in fact it may mean the “events” of separate issues in an action. Thus the expression “the costs shall follow the event” means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it. An issue in this sense need not go to the whole cause of action, but includes any issue which has a direct and definite even in defeating the claim to judgment in the whole or in part”.

9. It was submitted by counsel that the discretion to award costs lies with the court; that the said discretion should be exercised judiciously and that the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied the costs or the successful issue was not attracting costs and that none of those deviant factors are present in this case. Counsel cited the case of *Peter Muriuki Ngure v Equity Bank (K) Ltd [2018] eKLR* where the court at paragraph 8-12 stated as follows:

“8. The other issue that arises and is settled in law, is that the Court has unfettered discretion to award costs, (see *Republic vs Rosemary Wairimu Munene, Exparte Applicant vs Ihururu Dairy Farmers Co-operative Society (2014) eKLR, JR Application NO. 6 of 2014 and Halsbury’s Laws of England 4<sup>th</sup> Edition (Re-issue), (2010), Vol. 10.*)

9. In the exercise of this discretion though the Court must always have regard to the fact that costs awards are all about indemnification, the purpose of costs should always be to indemnify fully or partially the successful party for the expenses incurred in hiring a Counsel to defend or enforce their legal rights. (see *Harold vs Smith 1860, 5H. & N. 381.*)

12. Be that as it may, the fixing of costs is to be governed by an overarching principle of reasonableness. In the case of; *Zesta Engineering Ltd vs Cloutier (2002) O.J.No. 4495(C.A.)* (QL it was stated that:

“In our view the costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant.”

10. The Respondent’s counsel submitted that no evidence in the form of a gazette notice declaring the area an adjudication section had been adduced and that the Appellants should shoulder the costs of the Respondent for defending the Appeal. Reliance was placed on the case of *Fredrick Nzioki Kamunzyu & Another v Mark Mbvi Maundu & 2 Others [2019] eKLR* where the court held:

“9. Although the Plaintiffs made an oral Application to withdraw the suit, the terms of the said withdrawal were not recorded. Indeed, this court is unable to ascertain the grounds that informed the said withdrawal. Considering that the withdrawal of the suit came up seven (7) years after the suit was filed, and in the absence of evidence to show that the Defendants conceded to the allegations in the Plaint, the Defendants are entitled to the costs of the suit.

10. I say so because the Defendants did incur costs while defending the suit. If indeed the Plaintiffs believed that the Defendants were engaged in fraudulent dealings, then they should have fixed the matter for hearing to prove their allegations.

11. Having not set out the terms under which the withdrawal of the suit was arrived at, and in the absence of evidence showing that the Defendants atoned for the allegations that the Plaintiffs had raised in the Plaint, the Plaintiffs should pay the costs for the withdrawn suit. Indeed, it is only in the clearest of cases that the court will allow a party who sues another one to walk away without paying costs in the event he withdraws his suit.

12. Unless misconduct on the part of the Defendant is established, either in consent or otherwise, a party who withdraws a suit ought to pay costs to the person he sues.

13. For those reasons, I direct that the Plaintiffs pay to the Defendants the costs of the suit, which should include incidental costs.”

11. In response, counsel for the Appellant submitted that as a result of the suit property being declared to be under an adjudication section, all rights and interests accruing from the suit property were to be ascertained and recorded within the provisions of the Land Adjudication Act. Counsel placed reliance on the provisions of section 30 (2) of the Land Adjudication Act which states as follows:

“Where any such proceedings were begun before the publication of the notice under [Section 5](#) of this Act, they shall be

*discontinued, unless the adjudication officer, having regard to the stage which the proceedings have reached, otherwise directs.”*

12. The court was also invited to consider the case of *Kitisu Julius Sile & 60 Others vs. Chairperson Oloirien Adjudication Section B Committee & 3 others (2016) eKLR* where the court held as follows:

*“12. From the above judicial pronouncements, I have referred to, it is patently clear that the courts have held that they have no jurisdiction to deal with a dispute where the process of adjudication is ongoing unless the adjudication officer has under section 30(1) of the Act given his consent for the party to institute court proceedings. No such consent was granted by the Adjudication officer to the petitioners to enable these proceedings to be brought. In the present matter there is no doubt that the process of adjudication is ongoing and the adjudication register has not been closed and/or published. The Court in the premises cannot properly get seized of this matter. It lacks the jurisdiction to deal with the matter.”*

13. Counsel submitted that the jurisdiction of the court was ousted when the suit property was declared to be under an adjudication section; that the adjudication officer is properly seized with the jurisdiction to hear and determine the dispute between the parties herein and that the matter ought to be discontinued by operation of law as opposed to withdrawal under Order 25 rule 1& 2 as submitted by the Respondents' counsel.

14. This Appeal was withdrawn by the Appellants on 18<sup>th</sup> February, 2020 on the ground that the Appeal offends the provisions of section 30 (1) and (2) of the Land Adjudication Act which provides as follows:

*“(1) Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under [Section 29](#) (3) of this Act.*

*(1) Where any such proceedings were begun before the publication of the notice under [Section 5](#) of this Act, they shall be discontinued, unless the adjudication officer, having regard to the stage which the proceedings have reached, otherwise directs.*

15. A perusal of the court record indicates that there is a letter dated 9<sup>th</sup> June, 2016 issued under Section 5 of the Land Adjudication Act by the Land Adjudication Officer, Makuani Adjudication, which declared certain parts of Musalala Sub-location, Kilungu Location as an Adjudication Section. The submissions by the Appellant are that the suit property falls within the said area.

16. Indeed, there is no evidence before me to suggest that the said letter is a forgery, or that the suit property does not fall within the Musalala Adjudication Section.

17. The mandatory provisions of section 30 of the Land Adjudication Act dictates that the Appeal that was filed in this court before the area in which the suit property is situated was declared an adjudication area must be discontinued.

18. While filing the current Appeal, the Appellants did not contemplate that they will be caught up by the provisions of section 30 of the Act, and the declaration of the Musalala Adjudication section on 9<sup>th</sup> June, 2016 was not of their making.

19. Considering that under the provisions of section 27 of the Civil Procedure Act the award of costs is at the discretion of the court, which discretion must be exercised judiciously and the fact that the costs of any action, cause or other matter or issue shall follow the event unless the court for good reason otherwise order, it is my finding that in the circumstances of this case, the Appellants cannot be penalized for the withdrawal of the Appeal.

20. I say so because this court was divested of jurisdiction the moment the suit property was declared to be an area under adjudication, which action the Appellants would not have foreseen as at the time they were filing the Appeal.

21. The Appeal having been withdrawn on the basis of the letter of the Land Adjudication Officer dated 9<sup>th</sup> June, 2016, and considering that the dispute between the parties herein will be resolved under the provisions of the Land Adjudication Act, it is my finding that the Appeal should be withdrawn with no order as to costs.

22. In the circumstances, and for the reasons I have given above, the Appeal herein be and is hereby marked as withdrawn with no order as to costs.

**DATED, SIGNED AND DELIVERED IN MACHAKOS THIS 23<sup>RD</sup> DAY OF OCTOBER, 2020.**

**O.A. ANGOTE**

**JUDGE**