

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Appli. 149 of 2002

MILKA MUTHONI RITHO.....APPLICANT

Versus

JACINTA M. GITAU MWANGI & OTHERS.....RESPONDENTS

RULING

By a Notice of Motion dated 1st February 2006 the Interested Party, James Kiniya Gachira moved this court seeking orders that the Application be marked as compromised and/or withdrawn; that the court be pleased to enter judgment for costs in favour of the Interested Party with interest at court rates until payment in full and lastly, costs of the application be provided for. The application is expressed to be brought pursuant to Order XXIV and Order 53 R. 6 of the Civil Procedure Rules and S. 3 A of the Civil Procedure Act. The grounds upon which the Application is premised are that the Applicant filed a notice of withdrawal of the application without consulting the Interested Party and the application for withdrawal does not provide any orders as to costs. That the Interested Party has incurred substantial costs in this matter in which he was dragged by the ex parte Applicant and that the Interested Party has no objection to withdrawal of the application with costs being provided to the Interested Party. The application was also supported by the Interested Party's affidavit dated 1st February 2006 to which he has annexed the notice to withdraw as JKG1. The notice contains a consent entered between the Applicant and the Attorney General's representative to withdraw the Applicant's Notice of Motion in HCC Misc Application 149/02 dated 3rd June 2005.

The ex parte Applicant opposed the Motion by the Interested Party and a replying affidavit was filed by Thuita Ritho who deponed that he has a power of attorney from the Applicant. He deposed that he has advise from his advocates that the Respondents and Interested Party are not entitled to any costs because at the time the Notice of Motion was filed both the Respondent and Interested Party were guilty of fraud, illegal and unconstitutional acts aimed at depriving the Applicant of LR NRB/Block 178/874 and that upon the Respondent being served with the application, the Respondent moved quickly to rectify the irregularities and issued the necessary legal documents to the ex parte Applicant which he had failed to do between 1985 to 15th February 2002. That the ex parte Applicant was the original registered owner of the said land and the Interested Party went and encroached on it claiming to be the owner and filed a suit for amalgamation of the plot with another. That once this suit was filed, the Commissioner of Lands conceded and issued the Applicant with a lease and that is why the Applicant decided to withdraw the application.

I have considered the application in which the Interested Party seeks the costs of the Notice of Motion dated 1st February 2006 which was withdrawn and the affidavits and skeleton arguments on record. It is not in dispute that the ex parte Applicant's Notice of Motion was not heard on merit because the Respondent is said to have conceded and issued a lease to the Applicant. Proceeding to hear the motion would have been an academic exercise.

I wish first of all to point out that this having been a Judicial Review application the court cannot be moved under Order 24 Civil Procedure Rules and S. 3 A Civil Procedure Act because the Civil Procedure Act & Rules do not apply to Judicial Review save for Order 53 Civil Procedure rules. The orders could only be sought pursuant to Order 53 Civil Procedure Rules.

Costs will normally follow the event. In the instant case, the Notice of Motion was not determined on

merit. But this court has considered the background to this case and the alleged conduct of the Interested Party in contravening the court's orders of 15th February 2002 in which the Interested Party continued with flagrant breach of the court's order by constructing on the disputed plot forcing the Applicant to file these proceedings.

In exercise of this court's discretion, I am persuaded to order and hereby direct that each party bears their own costs in this matter.

Dated and delivered this 3rd day of October 2008.

R.P.V. WENDOH

JUDGE

Present

Mr. Ogoti holding brief for Kirui for Applicant

Mr. Kariuki for Interested Party

Daniel: Court Clerk