



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 318 OF 2015

DELTA PLAINS MANAGEMENT CO. LTD.....1 ST PLAINTIFF

- VERSUS -

ST. BAKHITTA DAY CARE & KINDERGATEN....1ST DEFENDANT

FESLISTA MUTHOKI2ND DEFENDANT

JUDGMENT

1. The plaintiffs initiated this suit through a plaint dated 22/4/2015. They alleged that the defendants were undertaking unapproved developments on **Land Reference Number 28529/156** which neighboured their properties. Consequently, they sought the following verbatim orders against the defendants:

a. A declaration that the alteration on the commercial centre to a kindergarten/nursery school on Land Reference Number 28529/156 by the defendants is illegal

b. A permanent injunction do issue to restraining (sic) the defendants from changing the user the commercial (sic) centre constructed on L R No 28529 with the intention of converting it to a kindergarten/nursery school or carrying out the business of a kindergarten/nursery school

c. A permanent injunction do issue to restraining (sic) the defendants from making alterations to the commercial centre constructed on L R No 28529 with the intention of converting it to a kindergarten/nursery school or carrying out the business of a kindergarten/nursery school.

d. Costs of the suit

e. Any other relief that this honourable court may deem fit and just to grant.

2. Together with the plaint, they brought a notice of motion dated 22/4/2015 and amended on 19/5/2015, seeking interlocutory injunctive orders against the defendants. Mutungi J disposed the said application through a ruling dated 10/9/2015. He found the application to be devoid of merit and dismissed it. On their part, the defendants entered appearance on 1/7/2015 through the firm of Lubulellah & Associates.

3. When the matter came up for trial directions on 18/7/2019 and 11/12/2019, Mr Onyango, counsel for the plaintiffs, orally conveyed the plaintiffs' decision to have the matter marked as withdrawn with no order as to costs. On his part, Mr Eugene Lubulellah, counsel for the defendants, indicated that the defendants had no objection to the withdrawal provided they were awarded costs of the suit.

4. Subsequently, on 3/3/2020, parties to this suit recorded the following consent which was adopted by the court on the same day:

“BY CONSENT:

1. Parties to file and exchange affidavits relating to the issue of costs

2. Parties to file and exchange written submissions on the issue of costs

3. Court to render a judgment on the issue of costs.”

5. This judgment therefore relates to the single issue as to whether the defendants should be awarded costs upon the suit being marked withdrawn.

6. In tandem with the above consent, the court directed parties to file and exchange affidavits and written submissions on the single issue relating to costs of the suit. Regrettably, none of the parties filed an affidavit. They elected to only file written submissions, which I have carefully considered.

7. In my view, the legal import of the parties' decisions not to present affidavit evidence relating to costs is that the court has no evidential materials upon which to rely. Secondly, in the circumstances, the court can only rely on the parties' pleadings and submissions, without focusing on the evidential aspects of the issue at hand.

8. The substantive legal framework on costs is **Section 27** of the **Civil Procedure Act** which provides as follows:

27 (1) 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.

2. The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

9. My interpretation of the above legal framework is that, generally, costs follow the event, meaning that the successful party is to be awarded costs of the suit and the unsuccessful party is to bear costs of the suit. Secondly, the jurisdiction to award costs is a discretionary one and is to be exercised judiciously. Thirdly, where the court exercises discretion and departs from the general principle that costs follow the event, it is obligated to outline the reason(s) for the departure.

10. The above principle upon which this discretionary jurisdiction is exercised was affirmed by the **Supreme Court of Kenya** both in (i) **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai 4 others** and in (ii) **Council of Governments v Senate & Ano [2014] eKLR** in the following words:

“It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails: but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.”

11. In the present suit, no evidential materials have been placed before the court to lay a factual basis upon which the court would exercise discretion in a manner that departs from the general principle that costs follow the event. Secondly, the plaintiffs have not demonstrated any special circumstances that would justify a departure from the general rule. The plaintiffs purported to outline factual background of the suit through their written submissions. In my view, the plaintiffs squandered the opportunity to lay their factual background of the suit when they elected not to file and serve an affidavit on the issue of costs as agreed in the consent and as directed by the court upon adoption of the consent. They cannot purport to present evidence through submissions.

12. I will in the circumstances apply the general principle that costs follow the event and award the defendants costs of the suit. Consequently, I make the following final disposal orders in this suit:

a. The plaintiffs' request to withdraw this suit is granted and the suit is hereby marked withdrawn.

b. The plaintiffs shall jointly and severally bear the defendants' costs of the withdrawn suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 1ST DAY OF DECEMBER 2020.

B M EBOSO

JUDGE

In the Presence of: -

Mr Eugene Lubelellah for the Defendants

Court Clerk - June Nafula