



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 100 OF 2017

GEORGE OGWENO WANGA.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD.....DEFENDANT

R U L I N G

1. The Plaintiff – **GEORGE OGWENO WANGA** – instituted this suit vide a Plaint dated 16th May 2017 against the Defendant – **NATIONAL BANK OF KENYA** – seeking orders compelling the Defendant to discharge his property **L.R. BUKHAYO/BUGENGI/2421** and that in default the Deputy Registrar of the Court be authorized to sign the discharge of charge on behalf of the Defendant.
2. The Plaintiff pleaded that he had fully repaid a loan of Kshs.100,000 as well as accrued interest which was secured by a charge over the aforementioned suit property. The Defendant then filed suit against the Plaintiff, namely **BUSIA HCC NO. 39 of 1997** claiming Kshs.982,211.25 which was struck out. He pleaded further that if at all the loan and interest thereon was not fully repaid, it could not be recovered as it was time-barred as per the Limitations of Actions Act.
3. The Defendant entered appearance on 29/5/2017 and filed Defence on 16/6/2017. The Defendant admitted that the Plaintiff took out a loan facility of Kshs.100,000 secured by a legal charge over the suit property. However, the Plaintiff did not repay the loan amount. The Defendant attempted to sell the charged property on several occasions by public auction but was barred from doing so as the Plaintiff obtained court injunctions preventing the sale. The Defendant pleaded further that it would apply to have the current suit struck out for being *res judicata* by virtue of **BUSIA CMCC NO. 387 of 2009** and **BUSIA HCCC No. 39 OF 1997**.
4. The matter was fixed for hearing on 7/5/2018. However on the said date the Plaintiff sought to withdraw the case against the Defendant. The Defendant did not object to the same subject to payment of its costs. The Plaintiff refused to concede on costs giving rise to this ruling. Parties elected to proceed by way of written submissions. The Plaintiff's submissions were filed on 20/7/2018 and the Defendant's on 8/6/2018.
5. I have read the parties' submissions for and against payment of costs. The Plaintiff submitted that he opted to withdraw the suit as the Land Registrar vacated the charge pursuant to Section 85 2(a), (b) and (c) of the Land Act hence the cause of action was dispensed with or overtaken by events. It therefore ceased to exist. The Plaintiff contends that in as much as costs follow the event, the circumstances of this particular case should be considered namely *inter alia*, that there was indeed a cause of action when the case was instituted, the Defendant had declined to discharge the charge despite several requests by the Plaintiff and notice from the Land Registrar and ultimately the charge was discharged. The Plaintiff relied on the case of **Little Africa Kenya Ltd Vs Andrew Mwaiti Jason Nairobi HCCC No. 149 of 2011** to buttress his position that costs should be awarded in consideration of the conduct of the parties.
6. The Defendant on the other hand contended that it was entitled to costs incurred in defending the suit. The Defendant's counsel relied on the cases of **John Ochanda Versus Telkom Kenya Limited Sc App. No. 25 of 2014** and **Nicholas Kiptoo Arap Korir Salat Versus IEBC & 7 Others, Sc. App. No. 16 of 2014** quoted by the Court of Appeal in the case of **Beijing Industrial Designing and Research Institute Vs Lagoon Development Limited (2015) eKLR**. It is important to note that these cases dealt primarily with a Party's right to withdraw his/her case. In this case the matter was marked as withdrawn with no objection from the parties have for the aspect of costs.
7. Ideally, the norm is that costs follow the event. The statutory underpinning of this practice is the proviso to section 27(1) of the Civil Procedure Act that states as follows:

(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.”

However, the award of costs remain discretionary. It is not automatic that they shall be awarded to the successful party by right.

8. The rule in English law generally, and Kenyan law in particular, is that a party may be deprived of costs if his conduct or action in relation to the issue at hand has been unreasonable, oppressive or vexatious. As laid down in our Civil Procedure at Section 27 (supra) the court has a wide discretion in awarding costs.

9. It appears to me that a defendant who is successful in litigation can justifiably be deprived of his costs when it is shown that his conduct either prior to or during the course of the suit has led to litigation which, but for his own conduct, might have been averted. I think the proper question to ask is: Was the defendant's conduct in relation to the issue at hand such that it could induce the plaintiff to feel or believe he has a good cause of action? If the answer to this question is in the affirmative, then it is proper to deny costs to the defendant.

10. It appears to me that there has been previous litigations – specifically **CMCC No. 387/09** and **BUSIA HCC No. 39/1997** – relating generally to the same issue. In both instances, the Defendant came out the loser. Despite this however, and notwithstanding requests by the Plaintiff to discharge the charge, the Defendant refused to oblige. It would appear that this left the Plaintiff with no option but to file this case.

11. The Plaintiff filed an Affidavit erroneously termed “Supporting affidavit” on 20/7/2018 filed contemporaneously with his submissions. He stated that it came to his knowledge that the Land Registrar had exercised his powers under the Land Registration Act and discharged the charge based on the aforementioned Busia High Court Case. The letter from the Registrar confirming this position and addressed to the Defendant is dated 20/2/2018. The resultant title deed free from encumbrances was issued on 12/3/2018. The Plaintiff did not err in bringing fresh developments to the Court's attention.

12. It is clear that the cause of action no longer exists as it has been overtaken by pertinent events. What baffles me is the conduct of the Defence. At the time of filing suit the Plaintiff still had a valid case. The Defendant in response to the Plaintiff filed a Defence alleging that the Plaintiff was still indebted to it and that the case was *res judicata* the same cause of action having been determined in two cases, **BUSIA CMCC No. 387 of 2009** and **BUSIA HCCC No. 39 OF 1997**. Those two averments are diametrically opposed. It is quite clear that the Defendant was willing to defend its case sending the Court on a wild goose chase regardless of the fact that it had been unsuccessful twice before and did not prefer an appeal. Consequently, the Defendant was obligated to discharge the charge upon the suit property. There also seems to have been laches on the part of the Plaintiff who should also have followed up on the discharge once the aforesaid cases were decided in his favour decades ago. But laches notwithstanding, it is clear the Plaintiff had no option but to file the suit, the Defendant having completely refused to discharge the charge.

13. The Defendant in this matter is guilty of blameworthy conduct. It should have discharged the charge when it lost the other cases it had with the Plaintiff. It was requested to do so but it declined. I do not think it merits costs in this case. Let each side bear its own costs.

Dated, signed and delivered at Busia this 6th day of February, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff: Absent

Defendant: Absent

Counsel for Plaintiff: Absent

Counsel for Defendant: Present

Court Assistant: Nelson Odame