



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 353 OF 2017

HOTEL CATHAY LIMITED.....PLAINTIFF

VERSUS

NAKURU PLAYERS THREATRE (Being sued through its Registered Trustees 1. Prof James Tuitoek, 2. Dr. Joseph Walunywa 3. Sam Munagwe).....1ST DEFENDANT

SOUTHERN EMPIRE TRADERS LIMITED.....2ND DEFENDANT

COUNTY GOVERNMENT OF NAKURU.....3RD DEFENDANT

RULING

(Costs; plaintiff filing suit complaining of nuisance by the defendants; in the course of the proceedings defendants sorting out the nuisance; suit overtaken by events; plaintiff now seeking costs; costs in the discretion of the court; parties being neighbours; good policy for neighbours to first try and settle such issues before coming to court and also good policy to encourage such persons to settle their matters out of court; in the circumstances of the case, each party to bear his/her own costs)

1. This ruling is in respect of who should pay the costs of this suit which was on 18 September 2018 confirmed as having been settled and/or overtaken by events.

2. To put the matters into perspective, this suit was commenced by way of a plaint which was filed on 19 September 2017. In the plaint, the plaintiff pleaded that it carries out a hotel business on the land parcel LR No. 4/134 which adjoins the 1st defendant's land parcel LR No. 451/12/3 in Nakuru Town. It averred that in the year 2016, the 1st defendant allowed the 2nd defendant to operate a bar christened "talk of town" within its premises. The plaintiff complained that in his operation of the bar, the 2nd defendant played loud music throughout the night to the detriment of the plaintiff, its clients and the other surrounding residents. The plaintiff pleaded that their plea to have the defendants tone down the high volume of music had been blatantly ignored. The plaintiff further pleaded that the 1st and 2nd defendants have allowed the keeping of cattle within their premises which result in a pungent smell and lots of flies that cross over to the premises of the plaintiff. The plaintiff pleaded of having made complaints to the 3rd defendant (the County Government of Nakuru) to no avail. In the case, the plaintiff sought a permanent injunction to stop the nuisance complained of, a declaration that the 3rd defendant had abdicated its duties; general damages for nuisance; special damages and costs.'

3. The defendants appointed different counsel to act for them in the matter. The 1st defendant pleaded in its defence that the loud music is played by the 2nd defendant. On the part of the 2nd defendant, it was pleaded that the 2nd defendant entered into an agreement to rent part of the premises of the 1st defendant to operate a bar. It averred that all requisite licences were taken. The 2nd defendant pleaded that the livestock on the premises is owned by the caretaker of the 1st defendant and is not responsible for any nuisance as a result of the livestock. The 2nd defendant did not agree that it plays loud music. The 3rd defendant entered appearance through its County Attorney but I have not seen any defence filed.

4. At the outset, I encouraged the parties to pursue negotiations and try to agree on the issues and the parties did meet. At some point, I was told that the parties had agreed on the issues raised by the plaintiff but did not wish to commit themselves into any consent because they had not agreed on costs. No consent was forthcoming and I directed the parties to prepare their witness statements and documents in readiness for trial. On 18 September 2018, when the case came up for pre-trial directions, I was informed by Mr. Langat for the plaintiff that the noise pollution was sorted by the removal of the 2nd defendant from the 1st defendant's premises and that the cows complained of have also been removed. The only issue was costs. This was confirmed by all counsel for the defendants. Clearly, the suit had either been settled or overtaken by events and there was nothing to proceed for trial. The parties could not however agree on costs and they asked me to make a

determination on the same. I thus directed parties to file their respective affidavits and the same was done.

5. On its part, the plaintiff was of opinion that it deserves costs. It was deposed by Mr. Toroitich its director, that on 3 July 2017 they wrote to the 1st and 2nd defendants complaining that the noise was disturbing their business. On 27 July 2017, they again wrote to the County Director of Environment, Nakuru County complaining of the noise and the flies brought about by the presence of the cows on the 1st defendant's premises. This was ignored. It is averred that on 16 October 2017, the County Government wrote to the 1st defendant. He has deposed that after this court directed parties to negotiate, they wrote to their advocate on 16 November 2017, that they were reluctant to pursue negotiations as the noise had only gotten louder. He has acknowledged that at the moment, the noise has toned down and the cows removed. He is however of the view that they deserve costs and that they would not have sued if the defendants had complied with their demand letters.

6. The 1st defendant filed an affidavit sworn by Silas Temba, the Chairman of the 1st defendant. He has deposed that the 1st defendant received from the 3rd defendant a letter dated 16 October 2017, asking the 1st defendant to relocate the cows. Immediately they received the letter they asked their caretaker to remove the cows, and they were removed. He is of the view that each party should bear its own costs.

7. The 2nd defendant filed an affidavit sworn by Mr. Gerald Mwaniki Ngunjiri, its business manager. He has deposed inter alia that the 2nd defendant has never conceded to creating excessive noise. He has deposed that they were never served with a letter before this suit was instituted. He has deposed that throughout their negotiations they were of the view that each party should bear its own costs which was rejected by the plaintiff. The 2nd defendant now wishes to have costs.

8. The 3rd defendant filed a Replying Affidavit sworn by Mr. James Kamau, the County Environment Officer in charge of Nakuru East. He has acknowledged that through a letter dated 27 July 2017, the plaintiff wrote to the County Director of Environment raising concerns over noise and environmental pollution. They followed up on the complaint and visited the site on 28 July 2017. A report was made and on 1 August 2017 a notice was issued to the 1st and 2nd defendants advising them to adhere to permitted noise levels. On 16 October 2017, they also wrote to them to address the issue of pollution by cows and littering from maize roasting. In a bid to comply, the 1st defendant wrote to the owner of the cows, one Edward Odoyo, asking him to remove the cows and the cows were removed. He has deposed that the 3rd defendant acted reasonably and in good time and they should not be condemned to costs.

9. All counsel filed submissions which I have considered alongside the authorities that they referred me to.

10. The issue of costs is addressed in Section 27 of the Civil Procedure Act, which provides as follows :-

27. Costs

(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.

11. It will be seen from the above that costs are at the discretion of the court or judge, but generally costs will follow the event unless the judge for good reason orders otherwise. In simple terms, the party who succeeds in litigation ought generally to be awarded costs to be paid by the losing party. But as will be noted, the court has discretion, and at times, in utilizing its discretion, the court may not necessarily award costs to the winning party against the losing party. Sometimes it is because of the conduct of the parties and sometimes because of the relationship of the parties. It may also be because of other factors not necessarily tied to these two that I have mentioned.

12. The issues in this case were overtaken by events. The 2nd defendant who was operating the bar that was alleged to be the source of loud music was removed from the 1st defendant's premises. The cows which were alleged to have been causing the emission of foul smell and attracting flies that would wander into the plaintiff's premises were also removed. I did not have occasion to try any of the issues raised by the plaintiff for it appears as if they were settled by the above events. I cannot tell, at this stage, whether or not I would have entered judgment for the plaintiff. I however think that it was significant that all defendants were ready to consider the complaints of the plaintiff. They tried to sit down and accommodate the plaintiff. In as much as they did not agree to any consent that was recorded, the 1st defendant certainly did write to its caretaker to remove his cows which was done. I am not sure if the 2nd defendant was removed from the premises of the 1st defendant because of the noise, but he was certainly removed or went away voluntarily. It may be that the plaintiff had a good case, but I think the gesture of the defendants, in attempting to accommodate the plaintiff and remove whatever was irritating the plaintiff, needs to be commended.

13. I have not seen very concerted efforts made by the plaintiff to reach out to the defendants before coming to court, and it could be that if the plaintiff had tried to reach out to the 1st and 2nd defendants earlier, and tried to discuss the matter, this litigation would have been avoided. The plaintiff of course stated that it wrote a letter dated 3 July 2017 to the 1st defendant but the 1st defendant has not acknowledged receipt of it. I appreciate that it is not the law, as submitted by counsel for the plaintiff and as held in the case of **Stanley Kaunga Nkaricha vs Meru Teachers College & Another (2016)eKLR**, that solely because a successful party did not issue a notice before action, then he does

not deserve costs. As well stated in that case, this is only one consideration which the court will take into account in making a decision on who should bear the costs of the case.

14. In our instance, I am of the strong view that the plaintiff needed to do a little more before coming to court with this litigation. It is good practice for people to try and reach out to their neighbours to settle matters such as these amicably before coming to court. I think the plaintiff was in a good position to reach out to the 1st and 2nd defendants but did not do too much. The plaintiff operates a hotel open to the public. It is not a private home; it would have been a good venue for a meeting, but the plaintiff never called the 1st and 2nd defendants to any. There was of course no duty to call them into a meeting, and nothing wrong in coming to court, but as I am saying, for issues such as these, relating to neighbours, it is important that first the parties try to iron out their differences amicably with the use of the resources that they have at hand. You wouldn't want a situation where it is the practice that neighbours sue each other as a first recourse when some issues arise between them. You would want to encourage them to first exhaust all avenues before coming to court and come to court as a last recourse. Neighbours should not be aloof and should in fact be encouraged to always come together in search of homegrown solutions. But even this aside, I think all defendants proceeded to act in good faith to resolve the issues once this case was filed. Where such issues have been resolved, in good faith, and given the fact that the parties are neighbours and will continue being neighbours, it would probably be in good stead to let each party bear its own costs.

15. That is exactly my view in this case. Having taken into consideration all factors, I order each party to bear his/her own costs.

16. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 9th day of April 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. R.K . Langat present for plaintiff.

Ms. Rahab Muthoni present for 2nd defendant

No appearance for 1st defendant.

No appearance for 3rd defendant.

Court Assistant :Nelima Janepher /Kemboi

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU