



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**MILIMANI LAW COURTS**

**ELC LC CASE NO E037 OF 2025**

**NYONG'O OMONDI LUTHULI.....PLAINTIFF/APPLICANT**

**VERSUS**

**CANAAN DEVELOPERS LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**CANAAN ESCADA LIMITED.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. On the dates of 1<sup>st</sup> of March 2021 and 19<sup>th</sup> March 2022, the parties herein executed an agreement for Sale relating to the sale and purchase of Apartment 1402 and 1403 respectively, erected on property Land Reference Number 1870/X/134.
2. The Completion Date was 24 months from the Commencement Date or within 30 days after the Vendor obtains the Certificate of Occupation from the Nairobi City County.
3. In line with the terms of the agreement, the Applicant discharged his contractual obligations for the apartment units, whereupon the Respondents were required to immediately release the titles.
4. Upon carrying out a search on the mother title, NAIROBI/BLOCK/347, formerly conversion, Nairobi Land Reference No. 1870/X/134 (Original Number 1870/X/69/1), the Applicant discovered that the Respondents had registered a charge in favour of Prime Bank in the sum of Ksh

400,000,000/= on or about 14th January 2021, way before the parties entered into the sale agreement, information that the Applicant avers was not made known to him.

5. After issuing several demand notices and a Declaration of Dispute, the Applicant filed the present application dated 3<sup>rd</sup> February 2025 seeking a temporary injunction restraining the Respondents from charging, transferring, or otherwise dealing with the mother title NAIROBI/BLOCK4/347 formerly Land Reference No.1870/X/134 (Original Number 1870/X/69/1), pending arbitration. The Respondents filed a replying affidavit to the same dated 17<sup>th</sup> March 2025.
6. Before the application could be heard the Respondents surrendered the title to the Applicant on the 25<sup>th</sup> April 2025. This prompted the Applicant to withdraw the suit by filing a notice of withdrawal on the 9th May 2025 which was allowed by the court on the 13<sup>th</sup> May 2025. The parties agreed that the court would determine the issue of costs.
7. The sole issue for the determination is whether the Respondents are entitled to costs.

*Order 25 of the Civil Procedure Rules makes provision for withdrawal of suits under rules 1 and 2 thereof. It provides that: -*

*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.*

*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 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.*

8. The Supreme Court of Kenya in **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others SC.APP. No.16 of 2014** had this to say on withdrawal of a suit”-

*“A party’s right to withdraw a matter before the court cannot be taken away. A court cannot bar a party from withdrawing his matter. All that the court can do is to make an order as to costs where it is deemed appropriate.”*

9. Section 27(1) of the Civil Procedure Act provides that:

*“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...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.”*

10. The general rule, as stated above, is that costs follow the event unless there is good reason to depart from that principle. In [Party of Independent Candidates of Kenya v Mutula Kilonzo & 2 others \[2013\] eKLR](#) the court held;

*Costs are not awarded as a matter of right. They are awarded at the discretion of the Court. At the risk of monotony, the discretion must be exercised judicially upon defined legal principles. Therefore, the law in designing the legal phrase that ‘‘Cost follow the event’’ recognized the fact that there could be no one size*

*fit-all'' prescription on the matter.*

11. In ***Wanjiku & others versus Del monte Kenya Ltd & another ;National Environment Authority &6 others ( interested parties) Environment and Land Petition E 001 of 2024(2024) KEELC 13818 (KLR)*** the court set out factors that should guide a court in awarding costs

12. These factors are;

- The conduct of the parties
- The subject of litigation
- The circumstances which led to the institution of the proceedings
- The events which led to the termination
- The stage at which the proceedings were terminated
- The manner in which they were terminated
- The relationship between the parties
- The need to promote reconciliation

13. The court has discretion on whether to award costs or not. As always, discretion must be exercised judiciously and in accordance to the law and established principles taking into account the circumstances of each individual case.

14. In the instant case, the Applicant filed the application to obtain injunctive reliefs while pending Arbitration. Prior to filing the application, the Applicant had written several demand letters and made a Declaration of Dispute all of which elicited no response. The Respondent only availed the title documents after the application was filed in court. The matter came up for two virtual mentions which the Respondents participated in, before the matter was withdrawn.

15. Having considered the circumstances which led to institution of the proceedings and the fact that immediately the Applicant obtained the documents they withdrew the application, I find that this is a fit case to exercise discretion in favour of the Applicant. As such each party will bear their own costs for the suit.

**Ruling Signed dated and delivered via Microsoft teams this 11<sup>th</sup> day of December 2025**

**JUDY OMANGE**

**JUDGE**

***In the presence of***

*Court Assistant Catherine  
Mr. Mutanda for Applicant  
Mr. Kaula for Respondent*