



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. NO. 204 OF 2015

1. STEPHEN NDEGWA MUNGA

2. MUNGA NDEGWA KADZANGO

3. ANDERSON NZAKA MUTA

4. CEPHUS KASSIM FONDO.....PLAINTIFFS

VERSUS

GIDEON NGAOH GUNDU.....DEFENDANT

RULING

1. By consent recorded by the court on 23rd January, 2018, the parties settled the case in the terms recorded. The parties also agreed that the only outstanding issue was the issue of costs. The parties attempted to agree on the issue of costs but it appears they did not reach any agreement.

2. By a notice of motion dated 8th June, 2018, the defendant seeks an order that he be awarded costs of the suit. The application is brought under Section 3A and 27 of the Civil Procedure Act and is premised on the grounds on the face of the motion and supported by the affidavit of the defendant sworn on 8th June, 2018. It is the defendant's contention that the Plaintiffs' suit was premature as the issue would have been resolved without coming to court as the defendant had not refused to transfer the suit property to other families. The defendant further contends that he was not served with any notice prior to the filing of this suit. The plaintiffs did not file any response to the application and therefore the application is not opposed.

3. I have considered the application. The court takes the view that awarding costs is a matter of the court. It is not a matter of course. The exercise of the discretion, however, depends on the circumstances of each case. The law on costs of a suit and interest thereon is in Section 27 (1) of the Civil Procedure Act which gives courts unfettered discretion to determine by whom and out of what property and to what extent costs are to be paid, and to give all necessary directions for the purpose aforesaid. However, the proviso thereof states 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.”

4. In Judicial Hints of Civil Procedure, Justice Kuloba stated that:

“The giving or absence of notice to sue, before a suit is instituted is a relevant consideration in awarding costs. This is a circumstance in which quite apart from misconduct, costs can be refused to a successful party.”

5. In the case of **Morgan Air Cargo Limited –v- Everest Enterprises Limited (2014)eKLR**, Gikonyo, J while considering the issue of costs where the matter was settled by consent stated that:

“But, it does not necessarily mean that, where parties have entered a consent to settle a proceeding, no costs should be awarded, or there is no successful party in the matter. The incidence of settlement by consent of the parties, to my mind, is just but a vital factor the court should consider, within the circumstances of each case, in deciding whether costs are payable or not. A consent recorded in settlement of a proceeding is not an automatic disentitlement of costs and, I would therefore, hesitate profoundly to make any generalized propositions on the law that consent is an automatic disentitlement of costs without reference to the context of the particular case.

.....the nature of settlement in the consent may determine the course of the event, and thus, the place of costs in the suit.....”

6. What are the circumstances of this case? Although the defendant has deponed that he was not served with any notice prior to filing of this suit, I note that among the plaintiffs’ list of documents filed on 3rd September, 2015, there is a demand notice dated 26th June, 2015 issued by the 2nd Plaintiff to the defendant to produce the Title deed of the suit property failure to which the plaintiffs would institute legal proceedings. It is, therefore, not correct to state that this suit was premature or was unnecessary.

7. Looking at the nature of the consent recorded herein and the entire circumstances of the case as well as the relationship of the parties, who are family members, in my view the most appropriate order on costs is that each party bear their own costs. I accordingly dismiss the notice of motion dated 8th June 2018 with no order as to costs.

DATED, SIGNED and DELIVERED at MOMBASA this 16th day of May 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Mwazighe holding for Ms. Okumu for Defendants

Mkhan for Plaintiff

Yumna Court Assistant

C.K. YANO

JUDGE