



Ethics and Anti-Corruption Commission v Kivisi & 2 others (Environment and Land Case 596 of 2014) [2025] KEELC 5593 (KLR) (29 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5593 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND CASE 596 OF 2014
DO OHUNGO, J
JULY 29, 2025**

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

EDWARD KIVISI 1ST DEFENDANT

SAMMY SILAS KOMEN MWAITA 2ND DEFENDANT

JAMES MACHARIA GITU 3RD DEFENDANT

RULING

1. When this matter came up on 12th June 2025 for mention to fix date of judgment, the parties recorded a consent through which judgment was entered against the First and Third Defendants in terms of prayers (a) to (d) of the plaint dated 27th May 2009. The said prayers read as follows:
 - a. A declaration that the alienation of Land Reference Number Kakamega Town Block III/274 by the 2nd Defendant and the subsequent registration and issuance of the Certificate of Lease to the 1st Defendant of the said parcel of land was irregular, fraudulent, and illegal and consequently null and void.
 - b. A declaration that the registration of Land Reference Number Kakamega Town Block III/274 in the name of the 1st Defendant conferred no estate, interest or right on the 1st Defendant and the same is null and void.
 - c. An order directing the Land Registrar, Kakamega to rectify the register by the cancellation of the Certificate of Lease and all entries on the land register in respect of Land Reference Number Kakamega Town Block III/274.



- d. An order of permanent injunction restraining the 1st Defendant, his agents, servants, assigns or any one of them from leasing, transferring, charging, entering or taking possession, and/or in any other manner howsoever from dealing with Land Reference Number Kakamega Town Block III/274 other than by transfer, delivery up or surrender of the same to the Government of Kenya.
2. Parties did not however agree on costs. At their request, the matter was scheduled for mention on 26th June 2025 so that parties address the Court on costs.
3. Mr Ondieki learned Counsel for the First and Third Defendants urged the Court to spare his clients costs. He submitted that by conceding to the Plaintiff's claim, the First and Third Defendants had saved both the Court's and the Plaintiff's time. He urged the Court to exercise discretion under Section 27 of the *Civil Procedure Act* and order that each party bears own costs. He added that the national government had repossessed the suit property and that a judgment in the matter would have been in futility. He relied on the case of *Robric Limited & another v Kobil Petroleum Limited & another* [2018] eKLR and argued that awarding costs to the Plaintiff would be double jeopardy to the First and Third Defendants who are tax payers.
4. In response, Ms Omari learned Counsel for the Plaintiff submitted that costs usually follow the event and that an unsuccessful party bears costs. She added that the First and Third Defendants conceded the Plaintiff's claim after trial and when the only thing pending was judgment. That in the circumstances, the First and Third Defendants' conduct warrants that they pay costs. She further argued that although the Defendants had been evicted from the suit property by the government, the First and Third Defendants remained registered proprietors hence the need for the case. That in the circumstances, costs are needed for public purposes and to compensate the Plaintiff for the trouble of prosecuting the matter. She concluded by urging the Court to award the Plaintiff costs of the case.
5. In a brief rejoinder, Mr Ondieki submitted that the First and Third Defendants are not unsuccessful parties in view of the consent. He added that there are no winners or losers in a consent judgment.
6. I have considered the First and Third Defendants' application for an order that each party bears own costs as well as the submissions. The only issue for determination is whether each party should bear own costs of this case.
7. The starting point is that costs are at the discretion of the Court and that generally, costs follow the event. Discretion must be exercised judiciously. The broad guidelines for determining liability to pay costs are found at Section 27 of the *Civil Procedure Act* which provides:

- (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.
8. The Plaintiff has contended that it is a successful party in view of the consent. On the other hand, the First and Third Defendants maintain that the consent presents a win-win situation and that there is no losing party. While there is no doubt that the Plaintiff has a decree in its favour arising from the consent, I choose to focus on what transpired just before the consent order was made: the parties freely chose to record the consent. There would be no consent if the parties had not done so.
9. The consent judgment is the result of collaborative action between the parties. Without such action, the Court would have retired to write judgment. There is no telling what the outcome of the case would have been if the Court had to resolve it through a considered judgment. None of the parties can say with certitude, at this point, that they would have emerged successful upon a considered judgment. Further, a consent judgment insulates the parties from the perils of setting aside, review or an appeal. Therein lies the win-win perspective.
10. Another aspect of the dispute merits mention. It is not contested that the national government unilaterally evicted the Defendants from the suit property and repossessed it while the case was pending in this Court. It is apparent that the said development played a significant role in the First and Third Defendants' decision to enter into a consent.
11. Taking all the above factors into consideration, I am persuaded that this is a fit and proper case in which to order that each party bears own costs of the case. It is so ordered.

DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 29TH DAY OF JULY 2025.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

No appearance for the Plaintiff

Mr Ondieki for the First and Third Defendants

No appearance for the Second Defendant

Court Assistant: K Misiko

