



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE 560 OF 2011

KOMBO HASSAN KOMBO (Suing as the administrator of the Estate of

MWISHAHALI KOMBO MWINYIHAJI-deceased).....PLANTIFF

VERSUS

OMAR SAID ABDALLA.....1ST DEFENDANT

MENASIRI MWINYIHAJI NASSIR.....2ND DEFENDANT

RULING

1. The issue for my determination here is whether to award costs of this suit to the Plaintiff since the claim was settled through a compromise. The brief background of this case is that the Plaintiff sued the 1st Defendant vide a plaint dated 6th October 2011 and filed in Court on 11th October 2011. The Defendant did not enter appearance within the prescribed time upon which the Plaintiff requested for and obtained interlocutory judgment on 19th January 2012.

2. The Plaintiff proceeded to prove his case by formal proof on 24th June 2013 and a Judgment delivered on 18th October 2013. Thereafter the Plaintiff took out notice to show cause which was fixed for hearing on 14th November 2014. On being served with the Notice to Show Cause, the Defendant filed an application to set aside the ex-parte judgment. The application was heard and determined on its merit on 20th February 2015 and dismissed. Subsequently two other applications were filed by the Defendant and an interested party. The application for the interested party was also heard and a ruling delivered on 30th June 2015. The effect of the ruling joined the interested party as a 2nd Defendant to the proceedings. It also determined the application dated 27th February 2015 filed by the original Defendant (now 1st Defendant).

3. The Plaintiff later complied with order 11 and asked the Court to certify the suit as ready for hearing. He proceeded to fix the case for hearing on 27th April 2016. On the hearing date, the parties informed Court that the offending structures had been removed and a survey report was filed to confirm. The removal of the offending structures resolved the dispute leaving the issue of who should now pay the costs of the suit.

4. Both advocates filed written submissions on the issue of payment of costs. The matter of costs is provided for under Section 27 of the Civil Procedure Act which the parties have quoted verbatim basically that awarding of costs is left to the discretion of the Court. The discretion of the Court usually must be exercised judiciously taking into account the circumstances of each case. The Plaintiff cited the case of **CECILIA KARURU NGANYU VS- BARCLAYS BANK OF KENYA AND ANOTHER (2016)EKL** where Mativo, J. set out the following issues to be determined while considering whether or not to award costs:

- i) The conduct of the parties.**
- ii) The subject of litigation.**
- iii) Circumstances which led to the instructions of the proceedings.**
- iv) Events which led to the termination of the case.**
- v) Stage at which the proceedings were terminated and**

vi) The manner in which they were terminated.

5. These considerations have also been captured by case law cited in support of the respondent's case. For instance, the Defendant referred to excerpts from Kuloba J's (retired) book titled *Judicial Hints on Civil Procedure, 2nd Edition (Nbi) Law Africa* 2011 page 94 that costs follow the event unless the court had good reason to order otherwise. Similarly, in the case of **P.I.C.K VS- MUTUAL KILONZO & 2 OTHERS**, the Court held that awarding of costs is a discretionary duty and award of costs to the successful party should not be departed from without the exercise of good grounds for doing so. In concluding, the Defendants argued that the Plaintiff is entitled to costs from the 2nd Defendant while the 1st Defendant who was wrongly sued is entitled to claim costs from the Plaintiff. They urged the Court to so find.

6. From this background, it is clear that the Plaintiff was indeed offended by encroachment on his plot. He sued the 1st Defendant for the encroachment and the offending structures were removed before the suit proceeded to hearing inter-parties. The Court was not told who between the two defendants removed the offending structures. Before the structures were removed; the plaintiff had testified and three applications were also filed, heard and determined. This implied the Plaintiff was forced to incur costs.

7. Both Defendants filed statements of defence denying the Plaintiff's claim. For the compromise settlement to be reached, the Plaintiff was put through a process. It was not admission of the claim immediately on being made aware of the existence of this suit. Taking all the processes undertaken in line with the decision of Mativo, J in the case of **CECILIA KARURU NGAYU supra**, I am satisfied that the Plaintiff is entitled to be awarded costs of the suit.

8. The 1st Defendant submitted that the Plaintiff's costs should be paid by the 2nd Defendant. At the same time, the 1st Defendant should be paid costs by the Plaintiff. Since it is admitted by the Defendants that the offending structures were placed by the 2nd Defendant, I do order that he pays the Plaintiff's costs of this suit. However on the issue of costs incurred by the 1st Defendant, the Plaintiff did sue him under the belief that he was the one responsible for putting up the structures. When the suit was compromised, it was not told to this Court who of the Defendants had placed the structures. Secondly since the suit was not heard on merits, this Court cannot determine from the submissions as to whether the 1st Defendant was wrongly sued.

9. In any event while determining the issue of costs where a suit is compromised, a Court should not investigate to find out who is the guilty party as to do so would amount to condemning a party unheard. Consequently, I find that the 1st Defendant is not entitled to any costs from the Plaintiff. In conclusion the cost of this suit is awarded to the Plaintiff only which costs are to be paid by the 2nd Defendant.

Dated, signed & delivered at Mombasa this 31st day of July 2019.

A. OMOLLO

JUDGE