



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 135 OF 2011**

**FREDRICK NZIOKI KAMUNZYU.....1<sup>ST</sup> PLAINTIFF**

**LYDIA WANJIRU WARUGURU.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MARK MBUVI MAUNDU.....1<sup>ST</sup> DEFENDANT**

**FRANCISCA SYOMBUA MAUNDU.....2<sup>ND</sup> DEFENDANT**

**ISAAC MUTHAMA KIMILU.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. This suit was withdrawn by the Plaintiffs on 9<sup>th</sup> April, 2018. This Ruling is in respect to the question of whether the Defendants should be paid costs for the withdrawn suit. The parties' advocates have filed submissions in that respect.
2. The Plaintiffs' advocate submitted that while this suit was pending, the management of the Malili Ranch Limited managed to procure the formal title documents for their members and the other allottees and that in the process, the Plaintiffs were issued with the title documents for their respective parcels of land.
3. With the issuance of the title documents to the Plaintiffs, the Plaintiffs' advocate submitted that the suit was overtaken by events; that the Defendants are seeking to recover costs out of a fraudulent and illegal transaction of which they are not remorseful and that while exercising its discretion on the issue of costs, the court should be guided by: the conduct of the parties before and during the proceedings; whether a party has succeeded in its claim; any admission or offer to settle the matter and whether the successful claimant exaggerated its claim.
4. Counsel submitted that the Defendants conduct was fraudulent and that they should not be allowed to benefit from such an illegality. Counsel relied on numerous authorities which I have considered.
5. The Defendants' advocate submitted that where a Defendant has been wrongly sued, the court ought to award him costs; that the Defendants are not guilty of misconduct and that the Defendants are entitled to costs for the withdrawn suit.
6. In their Plaint dated 10<sup>th</sup> June, 2011, the Plaintiffs described the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as the administrators of the Estate of the late Josiah Maundu Munuka, who, before his death, was a member of the Aimi Ma Kilungu Limited Farm. It was the Plaintiffs' case that before the death of the deceased, he sold to them the suit properties.
7. However, upon his death, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants sold the suit land to the 3<sup>rd</sup> Defendant. In their prayers, the Plaintiffs sought for a declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants lacked capacity to enter into any Agreement of Sale of parcel number 932 Aimi Ma Kilungu Limited Farm and for a declaration that the sale of the land to the 3<sup>rd</sup> Defendant was fraudulent and illegal.
8. In their Defence, the Defendants averred that they were not aware of the sale of the land between the Plaintiff and the deceased. The Defendants however admitted having sold the suit land to the 3<sup>rd</sup> Defendant and offered to refund the purchase price by the Plaintiffs.
9. Although the Plaintiffs made an oral Application to withdraw the suit, the terms of the said withdrawal were not recorded. Indeed, this court is unable to ascertain the grounds that informed the said withdrawal. Considering that the withdrawal of the suit came up seven (7) years after the suit was filed, and in the absence of evidence to show that the Defendants conceded to the allegations in the Plaint, the

Defendants are entitled to the costs of the suit.

10. I say so because the Defendants did incur costs while defending the suit. If indeed the Plaintiffs believed that the Defendants were engaged in fraudulent dealings, then they should have fixed the matter for hearing to prove their allegations.

11. Having not set out the terms under which the withdrawal of the suit was arrived at, and in the absence of evidence showing that the Defendants atoned for the allegations that the Plaintiffs had raised in the Plaint, the Plaintiffs should pay the costs for the withdrawn suit. Indeed, it is only in the clearest of cases that the court will allow a party who sues another one to walk away without paying costs in the event he withdraws his suit.

12. Unless a misconduct on the part of the Defendant is established, either in a consent or otherwise, a party who withdraws a suit ought to pay costs to the person he sues.

13. For those reasons, I direct that the Plaintiffs pay to the Defendants the costs of the suit, which should include incidental costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 26<sup>TH</sup> DAY OF JULY, 2019.**

**O.A. ANGOTE**

**JUDGE**