



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC JR MISC. APP. NO. 44 OF 2017**

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY OF JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF: NOTIFICATION APPROVAL OF DEVELOPMENT PERMISSION OF CHANGE OF USER ON LR NO NAIROBI/BLOCK 139/114 ISSUED TO ERIC K MUMBI BY THE NAIROBI CITY COUNTY ON 8<sup>TH</sup> MAY 2017.**

**AND**

**IN THE MATTER OF: ARTICLES 22, 23, 42, 69, 70, 232(1) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: LAND ACT NO. 6 OF 2012 PHYSICAL PLANNING ACT (NO. 6 OF 1996) ENVIRONMENT AND LAND COURT NO. 19 OF 2011**

**BETWEEN**

**JOHN TONY GECAGA.....1<sup>ST</sup> APPLICANT**

**THOMAS GITAU NJOGU.....2<sup>ND</sup> APPLICANT**

**DAVID KABAGE KURIA.....3<sup>RD</sup> APPLICANT**

**SAMUEL GATHECA MURIUKI.....4<sup>TH</sup> APPLICANT**

**VERSUS**

**DOROTHY WANJIKU GUCHU.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PHYSICAL PLANNING NAIROBI**

**CITY COUNTY.....2<sup>ND</sup> RESPONDENT**

**RULING**

**1.** The Ex parte Applicants herein own parcels of land neighbouring that of the 1<sup>st</sup> respondent in Marurui, Nairobi. The special condition in all their leases provides that; “the land and buildings herein shall only be used for one private dwelling house (excluding guest houses) and that the building shall not cover more than fifty per centum of the land or such lease area as may be laid down by the local authority in its by

law”.

2. The 1<sup>st</sup> respondent applied for change of user for a single dwelling unit to a multi dwelling unit. The applicants through their residents association known as Marurui Estate Residents Welfare Association (MERWA) filed an objection to notice of change of user. The 2<sup>nd</sup> respondent however approved the change of user and subsequently the 1<sup>st</sup> respondent commenced construction of multi dwelling units on her land.
3. The four applicants herein sought judicial review orders of certiorari to quash the administrative action of the 2<sup>nd</sup> respondent of 20<sup>th</sup> April 2017 approving the change of user on LR No. Nairobi/Block 139/114 from a single dwelling unit into a multi dwelling unit and prohibition as against the 2<sup>nd</sup> respondent prohibiting it from approving the building plans on the above mentioned parcel of land.
4. The 1<sup>st</sup> respondent filed a preliminary objection dated 29<sup>th</sup> November 2017 challenging the jurisdiction of this court on the ground that the Ex parte applicants’ application for leave was filed outside the six months period prescribed under order 53 rule 2 of the Civil Procedure Rules 2010.
5. Later on the parties decided to explore on out of court settlement wherein the 1<sup>st</sup> respondent agreed to stick to the approved building plans and not go beyond the first floor. Since the 1<sup>st</sup> respondent honoured the undertaking, the Ex parte applicants felt no need to prosecute their application. However they made it clear that they did not intend to withdraw their notice of motion. That instead it is the compromise that led to the applicants’ notice of motion and the 1<sup>st</sup> respondent’s preliminary objection becoming moot.
6. The court directed parties to file written submissions on their issue of costs.

### **The 1<sup>st</sup> Respondent’s submissions**

7. The 1<sup>st</sup> respondent’s submissions are dated 1<sup>st</sup> November 2018. She referred to section 27 of the Civil Procedure Act which provides that costs of and incidental to all suits shall be in the discretion of the court or Judge and that costs of any action follow the event. She relied on the case of **Cecilia Karuru Ngayu vs Barclays Bank of Kenya & Another [2016] Eklr and Republic vs Rosemary Wairimu Munene, Ex parte Applicant vs Ihururu Dairy Farmers Cooperative Society Ltd JR No. 6 of 2014** where it was held that, the principle of costs to follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.
8. As to the question as to whether or not the act of recording a consent to withdraw a suit is an event within the phrase “costs follow the event; the 1<sup>st</sup> respondent relied on the case of **Cecilia Karuru Ngayu vs Barclays Bank of Kenya and Another**. The 1<sup>st</sup> respondent further submitted that the applicants filed their application for leave out of time as required by the Law Reform Act and as such the leave granted was a nullity and the substantive motion was incurably defective. Furthermore, that the 1<sup>st</sup> respondent applied for the development permission from the Nairobi City County, posted in a notice of change of user on the property and advertised this in the Standard Newspaper of 27<sup>th</sup> January 2017 and that no objection was received by the 2<sup>nd</sup> respondent.
9. The 1<sup>st</sup> respondent further submitted that had the Ex parte applicants been diligent, the proceedings herein would not have been necessary. The 1<sup>st</sup> respondent has incurred costs towards defending the motion and it would only be just if those costs are refunded. She prays that the court exercises its discretion on the issue of costs in her favour.

### **The Ex parte Applicants’ submissions**

10. The Ex parte applicants’ submissions are dated 21<sup>st</sup> November 2018. They reiterate the facts of their case and that their objection was received by the officer of the County Secretary, Nairobi on 10<sup>th</sup> February 2017 and forwarded to the Planning and Housing Department on 15<sup>th</sup> February 2017 but there was no response. The letter is attached to their submissions along with a follow up letter on the issue and their intention to sue.
11. The Ex parte applicants further submitted that upon seeing the extent of the approvals after the 1<sup>st</sup> respondent filed her bundle of documents they were advised to find a middle ground since by the time the preliminary objection and the application would be dispensed with, the 1<sup>st</sup> respondent would have completed construction anyway. That after negotiations, the 1<sup>st</sup> respondent undertook to ensure that construction would not go beyond the first floor as per the approvals. This was repeated before court on 27<sup>th</sup> September 2018. The 1<sup>st</sup> respondent having honoured her undertaking, the Ex parte applicants felt that there was goodwill on her part and, dissatisfied as they were with the alleged illegal approvals, they decided to cede some ground and engage on the issue of costs instead of prosecuting their application. The Ex parte applicants stressed the fact that at no given instance was there an intention to withdraw their notice of motion and that it was the compromise that rendered the said motion and the 1<sup>st</sup> respondent’s preliminary objection moot.
12. The Ex parte applicants outlined two issues for determination. One, whether they duly served the respondents, to which they submit that vide a letter dated 3<sup>rd</sup> November 2017, they notified the respondent to desist from proceeding with the construction to which they did not receive a response. That they lodged their application eleven (11) days after notice was served on the respondents. That had the respondent responded to their letter and attached all their approvals and plans, maybe there would have been no need to file this suit. They relied on order 3 rule 2 of the Civil Procedure Rules 2010.
13. The second issue they outlined is whether the applicants are entitled to costs. They submit that they brought this suit as a matter of public interest and that their fundamental rights enshrined in the constitution, namely the right to privacy, right to a clean and healthy

environment and right to own property were being infringed. That the commitment made by the 1<sup>st</sup> respondent to strictly stick to the approvals was critical in the sense that other developers in the area had obtained approvals to carry out limited construction but on connivance with the City Hall officials, had gone beyond such approvals. That the residents have filed several cases before this court due to such circumstances with some having been resolved in their favour. One is Nairobi ELC No. 272 of 2011 which they had annexed on their verifying affidavit. The Ex parte applicants feel that their only recourse in light of the foregoing was to go to court.

14. In support of their case they cited Section 27 of the Civil Procedure Act and the case of **Cecilia Karuru Ngayu vs Barclays Bank of Kenya & Another e KLR [2016]**. They further submit that they filed this application to protect both private and public interest and that their constitutional rights had been infringed upon by a member of the public in conjunction with an administrative body. That the judicial review was the only mechanism to grant the prayers sought and that the application was not withdrawn but rather compromised and that if at all costs should be awarded then they ought to be given to the applicants.

15. The 2<sup>nd</sup> respondent has not filed any papers save for a notice of appointment of their advocates despite having been served with all the notices by the Ex parte applicants. The 2<sup>nd</sup> respondent never gave them an opportunity to participate in the approval process hence the need to file this application. The 2<sup>nd</sup> respondent was responsible for the illegal approvals and as such it should be condemned to pay the costs incurred by the Ex parte Applicants. They also relied on the averments in the verifying affidavit sworn by Samuel Gatheca Muriuki on 12<sup>th</sup> November 2018. The Ex parte applicants pray for costs and/or the alternative that the parties do bear their own costs.

#### **The 2<sup>nd</sup> Respondent's submissions.**

16. The 2<sup>nd</sup> respondent is of the view that the question of costs should take a non- adversarial approach. It cited Section 27 of the Civil Procedure Act. They put forward the case of **Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others [2014] eKLR and Republic vs IEBC Ex parte Mohamed Ibrahim Abdi & Others [2017] eKLR; Amoni Thomas Amfry & Another vs The Minister for Lands & Another**, Nairobi HC Petition No 6 of 2013. The respondent submits that since the resolution of the matter emanated largely from the parties and since the matter has ended in a reconciliatory tone, it calls for an exercise of discretion that is not punitive to the parties.

17. I have carefully considered the rival submissions of counsel made on behalf of the parties herein. The issue for determination is, who should be awarded costs?

18. Section 27 (i) of the Civil Procedure Act proves 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, and to give all necessary directions for the purposes of 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”.*

19. It is not in dispute that parties decided to explore an out of court settlement wherein the 1<sup>st</sup> respondent agreed to stick to the approved building plans and not go beyond the first floor. The Ex parte applicants saw no need to prosecute their application since clearly the 1<sup>st</sup> respondent preliminary objection was compromised.

20. The Ex parte Applicant's position is that they objected to the change of user. The said objection was received by the office of the County Secretary Nairobi on 10<sup>th</sup> February 2017 who forwarded the same to the department of Urban Planning and Housing on 15<sup>th</sup> February 2017. As they received no response they filed this application. In my view they were entitled to institute these proceedings. Had the respondents responded to the notice of objection, then maybe there would have been no need to institute these proceedings.

21. In the case of **Cecelia Karuru Ngayu vs Barclays Bank of Kenya Limited and Another [2016] eKLR J Mativo** stated:-

*“To my mind, in determining the issue of costs, the court is entitled to look at inter alia*

*(i) the conduct of the parties,*

*(ii) the subject of litigation,*

*(iii) the circumstances which led to the institution of the proceedings,*

*(iv) the events which eventually led to their termination,*

*(v) the manner in which they were terminated,*

*(vi) the stage at which the proceedings were terminated,*

*(vii) the relationship between the parties and*

*(viii) the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of the Constitution.*

*In other words the court may not only consider the conduct of the party in the actual litigation but their actions which led to the litigation, the eventual termination thereof and the likely consequences of the order for costs.”*

I am guided by the above authority. As stated earlier, the parties agreed to resolve the dispute.

22. I agree with the 2<sup>nd</sup> respondent’s submission that since the resolution of this matter emanated from the parties and since the matter has ended in a reconciliatory line it calls for exercise of discretion that is not punitive to the parties.

23. In the case of **Party of Independent Candidate of Kenya vs Mutula Kilonzo & 2 Others HC Election Petition No 6 of 2013** the court held that:-

*“It is clear from the authorities that the fundamental principles underlying the award of costs is two folds. In the first place the award of costs is a matter in which the trial judge is given discretion....But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so”.*

24. I find that the fact that parties agreed to resolve the dispute at the stage that they did thereby preventing further expense and time that would have been spent on litigation is good ground to depart from the general rule under Section 27 of the Civil procedure Act.

25. In conclusion, I order each party to bear own costs.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 3<sup>rd</sup> day of October 2019.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

.....Advocate for the Applicants

.....Advocate for the 1<sup>st</sup> Respondent

.....Advocate for the 2<sup>nd</sup> Respondent

.....Court Assistant