



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO 219 OF 2018**

**BENSON MWANGI WANGAI .....PLAINTIFF**

**VERSUS**

**SAMUEL MAINA KABIRU**

**(As the Legal Administrator of the estate of AMOS KABIRU KIMEMIA).....DEFENDANT**

**R U L I N G**

1. On 11<sup>th</sup> March 2019 the parties herein entered into a consent order in the following terms:-

- 1. That the plaintiff's special damage claim in the sum of Kshs234,008/= be set off against the rent payable by the plaintiff to the deceased estate.***
- 2. That the plaintiff do give vacant possession and hand over the suit premises to the administrators of the deceased's estate within 3 months from today .***
- 3. The parties to agree on who is to pay the costs of the suit.***
- 4. That parties to take accounts on the rent paid and payable .***

2. On 4<sup>th</sup> July 2019 when the matter was listed for mention the parties reported that the parties had virtually agreed on everything save for who was to bear the costs of the suit. Mr. Mbiyu advocate for the defendant, however stated that although consent order had been made for the rent deposit of Kshs.840,000/= placed in Court to be released to the defendant that had not happened because the plaintiff had not availed the original deposit receipt which is a prerequisite before the deposit can be released by the Court. The Court after submissions by counsel for the respective parties directed the parties to settle the outstanding issues relating to accounts within 30 days; the parties were granted liberty to execute the order relating to the release of the rent deposited in Court and further the plaintiff was directed to file an affidavit setting out reasons why he should be awarded costs and the defendant was equally granted liberty to respond.

3. The plaintiff filed an affidavit on 15<sup>th</sup> July 2019 and the defendant filed a reply thereto on 16<sup>th</sup> October 2019. The plaintiff asserts that as per the consent order recorded on 11<sup>th</sup> March 2019 where the defendant agreed to pay to him the special damages of Kshs.234,008/= as claimed, it was an admission that the deceased actions that caused the damage were wrongful and were responsible for the institution of the suit. The plaintiff argued that was the reason why the defendant agreed to have the special damages as pleaded offset from the rent due by the plaintiff to the deceased estate. The plaintiff further argued the counter claim by the defendant against the plaintiff was not subject of the consent reached by the parties on 11<sup>th</sup> March 2019. Besides, the plaintiff argued that the counterclaim was seeking a rescission of the lease agreement pursuant to which the plaintiff was put into occupation of the suit premises whereof he constructed the structures that the deceased caused damage to, and which by the consent order the deceased estate agreed to compensate the damage occasioned.

4. The defendant in the replying affidavit sworn by the Legal Administrator of the deceased estate acknowledged that the counter claim sought rescission of the lease with the plaintiff on account of developments carried out by the plaintiff without permission. The defendant stated that in order to get back the premises leased to the plaintiff, the defendant agreed to pay the plaintiff the money claimed in the suit. The defendant further averred that inspite of the recording of a consent for the release of the sum of Kshs.840, 000/= deposited in Court to the defendant the plaintiff has refused to surrender the original Court receipt for the same to facilitate release. The defendant's position was that the counterclaim against the plaintiff was well founded and that the defendant willingly chose not to pursue the same in order to have the dispute between the parties resolved. The defendant further opined that since the plaintiff still owed the defendant unpaid rent aggregating Kshs.1,435,000/= it would be unfair for the plaintiff to seek costs from the defendant when he was in default of rent payment.

5. Section 27(1) of the Civil Procedure Act, Cap 21 Laws of Kenya makes provision for award of costs. It is clear that the costs are awarded at the discretion of the Court having regard to the attendant circumstances in each case. However the general rule is that the costs follow the event unless for reasons to be recorded, the judge directs otherwise.

Section 27 (1) of the Act 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.***

6. In the present matter it is apparent the consent order entered by the parties on 11<sup>th</sup> March 2019 virtually compromised the suit and the only issue that was left outstanding was by who the costs of the suit were payable. The consent order suggests the defendant's counterclaim against the plaintiff was abandoned. It was not made subject of the consent. Even in the subsequent mention on 4<sup>th</sup> July 2019 the issue of the counterclaim was never raised.

7. The plaintiff by the plaint had sought a permanent injunction restraining the defendant from in any manner interfering with the premises that he had leased from the defendant; general damages for trespass; special damages in the sum of Kshs.234,008/=; and cost and interest. Arising from the consent order the plaintiff's claim for special damages was awarded. The lease of 5 years and 3 months entered into between the parties had ran its full course at the time the consent order was entered. No general damages for trespass were awarded to the plaintiff.

8. The defendant by its counterclaim had sought rescission of the lease agreement that he had entered with the plaintiff. No such order was entered as per the consent. The defendant infact stated in his affidavit that he willingly chose not to pursue the counter claim in order to have the matter resolved between the parties. The defendant cannot therefore be said to have been successful on the counterclaim.

9. In the circumstances my view is that the plaintiff was partially successful in the suit. The defendant has suggested that since the plaintiff still owes the defendant arrears of rent he would not be entitled to any costs. I do not consider the fact that the plaintiff may owe the defendant rent arrears would be a relevant factor in determining whether the plaintiff should be awarded costs in the suit. The accrual of rent arrears would constitute a separate cause of action which could be pursued in a different action.

10. Respecting the release of the sum of Ksh.840,000/= deposited in Court on account of rent for the defendant, there is an express order of the Court authorizing release of the same to the defendant and therefore the plaintiff cannot have any legitimate reason to withhold the original deposit receipt which is necessary to facilitate the processing of the release of the deposit as ordered. The plaintiff should forthwith surrender the original receipt to the Court to enable the release of the deposit to the defendant to be processed.

11. Having regard to all the circumstances, I would in exercise of my discretion award the plaintiff 50% of the costs of his suit as against the defendant, he having only been partially successful. I make no order for costs on the counter claim considering the plaintiff's lease with the defendant ran its full course and the claim having been abandoned by the defendant.

12. Orders accordingly.

**RULING DATED SIGNED AND DELIVERED AT NAKURU THIS 21<sup>st</sup> DAY OF NOVEMBER 2019.**

**J M MUTUNGI**

**JUDGE**