



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT BUSIA**

**ELC CIVIL CASE NO. 68 OF 2018**

**DOUGLAS WABWIRE WABIDONGE.....PLAINTIFF/RESPONDENT**

**= VERSUS =**

**JOHN OCHIENO WANJALA.....1<sup>ST</sup> DEFENDANT**

**MAXISON ODUORI.....2<sup>ND</sup> DEFENDANT**

**LUCAS BARASA.....3<sup>RD</sup> DEFENDANT**

**GEOFFREY OTIENO ODUOR.....4<sup>TH</sup> DEFENDANT**

**AND**

**COOPERATIVE BANK OF KENYA.....INTERESTED PARTY/APPLICANT**

**RULING**

1. The plaintiffs' suit against the defendant was withdrawn on 21<sup>st</sup> January 2019. The trial judge directed parties to file submissions on the issue of costs. At the time of withdrawal, the pre-trial directions had not been undertaken. This necessitated the filing of the motion dated 13/7/2019 seeking orders;

**(i) That the Honourable Court be pleased to enter judgment on costs of the suit in favour of the Interested Party.**

**(ii) That upon the grant of prayer 1 of the Draft Interested Party's Bill attached herewith be taxed by the taxing master forthwith upon payment of requisite court fees.**

**(iii) That the costs of this application be borne by the plaintiff.**

2. The plaintiff in his submission stated that he had joined the Interested Party to his pleadings because the green card for the suit title Bukhayo/Mundika/10238 showed it was charged to the Interested Party. That by virtue of the charge, the inference drawn is that the Interested Party had a stake in the title. The plaintiff stated that he did a demand letter. He submitted that this was good reason not to award costs and referred this Court to the decision of *Cecilia Karuru Ngayu Vs Barclays Bank of Kenya & Ano (2016) eKLR*.

3. The Interested Party/Applicant argues that she is entitled to costs because they entered appearance and substantially participated in the suit thus incurring expenses before the suit was withdrawn. The Interested Party did not file any submissions.

4. In the green card for title No. Bukhayo/Mundika/10238 annexed to the replying affidavit, entry No. 1 on part C of the encumbrance section does show the registration of the charge in favour of the Interested Party. The plaintiff also annexed as 'DWW-2'; the demand letter dated 22<sup>nd</sup> June 2018 addressed to Co-operative Bank Busia Branch inquiring the interest of the bank over the suit property. The plaintiff stated that they received no response to their demand. The Interested Party made no mention whether the letter was received by them or not.

5. The plaintiff stated that when they received no response, they decided to include the Interested Party's name to the suit. In the defence filed by the Interested Party, it is pleaded that title No. Bukhayo/Mundika/2932 did not exist and that even if it existed, this suit is devoid of merit as the matters directly connected with the plaintiffs' claim have been the subject of Busia ELC Case No. 5 of 2014 which has been conclusively determined.

6. I have considered the facts presented by both parties. The plaintiff wishes to be excused from paying for costs because he did a demand letter to the Interested Party before filing this suit. The Interested Party on his part argued that the plaintiff was aware of her interests in the suit titles if any for two reasons:

1) *That parcel No. Bukhayo/Mundika/10238 was not curved from parcel No. Bukhayo/Mundika/2932.*

2) *The plaintiff was a party to case No. 5 of 2014 in which the matters in issue were directly in issue and which case was already determined.*

7. This Court is in agreement with the principles to be considered before costs is awarded as enumerated by Mativo J. in the case of ***Cecilia Karuru Ngayu Vs Barclays Bank of Kenya & Ano supra***. However, these principles are not available to a party who brings a subsequent suit after being made aware of the history of the subject matter. The plaintiff in his replying affidavit made no mention of Busia ELC Case No. 5 of 2014. If he was a party to the previous suit where the interest of the Applicant was already determined then he cannot have the protection of the provisions of order 1 rule 7 of the Civil Procedure Rules which states that ***“where the plaintiff is in doubt as to the persons from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties”***.

8. In light of the plaintiff having been a party to the previous suit (ELC Case No. 5 of 2014), I find that he knew and or ought to have known the interests of the applicant before joining him to the present proceedings. Consequently the suit having been withdrawn after appearance and defence made by the Interested Party, Section 27 of the Civil Procedure is called into play. Accordingly I find that the Interested Party is entitled to costs. The costs shall be agreed upon or taxed.

**Dated, signed and delivered at BUSIA this 21<sup>st</sup> day of November, 2019.**

**A. OMOLLO**

**JUDGE**