



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 131 OF 2017

JULIUS SILVESTOR MWAURA.....PLAINTIFF

VERSUS

JOHN MWAURA KABURU.....DEFENDANT

JUDGMENT

1. The Plaintiff sued the Defendant seeking the following reliefs;
 - a. An order directing the Defendant to transfer to the Plaintiff the aforesaid land parcels numbers LOC 1/KIUNYU/1463 AND LOC.1/KIUNYU/1466 and in default thereof the Deputy Registrar of this Honourable Court to effect the said transfer on behalf of the Defendant.
 - b. In the alternative judgment be entered for the Plaintiff against the Defendant for the sum of Kshs. 487,775/- as per paragraph 6 and 7 of the plaint above.c. Interest on b and c above.
2. The Plaintiff's claim is that he purchased the suit parcels of land from the Defendant through an agreement dated 6/01/1998. That before the said purchase, the Plaintiff and Defendant who are first cousins were beneficiaries to the estate of Mwaura Thinwa vide succession Cause No. 433 of 2000 before the Chief Magistrate's Court at Thika in respect to the parcels of land number LOC 1/KIUNYU/560 AND LOC 1 /KIUNYU/1143 then registered in the names of the deceased.
3. That the Plaintiff purchased the Defendant's share of the estate for the price of Ksh. 429,817/-. That after the conclusion of the succession proceedings the Plaintiff's interest on the estate was thus determined to constitute the suit parcels of land.
4. The Plaintiff avers that thereafter the Defendant declined to transfer to him his share of the estate in clear breach of the sale agreement aforementioned.
5. The Plaintiff also claims that the beneficiaries to the estate were to share the expenses incurred in filing the succession cause as the same were to be paid by the Plaintiff to be refunded thereafter. That the Defendant's share of the expenses was Kshs. 157,918/- to which he refunded a sum of Kshs. 100,000/- leaving a balance of Kshs. 57,918/- unpaid to the Plaintiff.
6. The Defendant in his statement of defence admits the sale agreement but claims that the purchase price was to be determined after the succession cause was completed and assessed at the current market rate. That after the conclusion of the succession proceeding the Plaintiff offered to pay Ksh. 625,000/- whilst the Defendant insisted the prevailing market rate at the time was Ksh. 1,200,000/- per acre. That they both failed to reach a consensus on the price to be paid the Defendant therefore offered to refund the monies paid to the Plaintiff which he allegedly declined after the initial deposit for Kshs. 100,000/- in the pretext of the account the amount was deposited to was no longer functional.
7. The Defendant also disputed the amount of money paid to him by the Plaintiff and maintains that the total amount paid to him totaled to Ksh. 425,000/- out of which he claims to have refunded the sum of kshs. 100,000/- leaving a balance of ksh. 325,000/- which the Defendant declined to accept. The Defendant contends that the refund of Kshs. 100,000/- was not in relation to the succession cause as it had been long concluded.
8. The matter did not proceed for hearing as parties opted to record a consent in the following terms;
 - a. Judgment to be entered against the Defendant in the sum of Kshs. 325,000/-.

b. The issue of costs be canvassed by way of written submissions.

c. Both parties to file and serve written submissions.

9. The Court adopted the said consent as the judgement in the suit with the exception of who pays the costs of the suit which is a subject of this judgement.

10. The Plaintiff submitted that his action of moving to Court was necessitated by the Defendant's failure to transfer the suit parcels of land to him upon conclusion of the succession proceedings. That after parties entered a consent of the amount of the purchase price to be refunded the Defendant, adamantly refused to pay costs to the Plaintiff. The Plaintiff thus believes that the Defendant is duty bound to bear the consequences of his actions and maintains that the Defendant must be condemned to pay costs. The Plaintiff further submits that the law expressly provides for costs to follow the events.

11. The Defendant emphatically submitted on who should bear the costs in this case after the entry of the consent. That he is alive to the provisions of Section 27 of the Civil Procedure Act but maintained that the section itself leaves the issue to the discretion of the parties and went ahead to demonstrate through various case law that the award or decline to costs is discretionary. From the precedents relied upon by the Defendant some of the factors the Courts would consider in the award or decline to costs was the substance of the pleadings, the trouble taken in prosecuting the case, the relationship of the parties and the conduct of the parties before during and after filing the suit.

12. The Defendant in conclusion was convinced that he had satisfactorily demonstrated that the award of costs is to be made on case to case basis and opined that the instant suit was fit for parties to bear their own costs.

13. Section 27 of the Civil Procedure Act which provides as follows:-

“27 (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 give all the necessary directions for the purposes aforesaid; and the fact that the Court 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 direct.”

14. In the case of **Morgan Air Cargo Limited v Everest Enterprises Limited [2014] Eklr**, the Court takes the view that awarding costs is a matter of the discretion of the Court. It is not a matter of course. The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the Civil Procedure Act is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case. With regard to the circumstances of this case, my grounding is in the work of Justice Kuloba in **Judicial Hints of Civil Procedure** that;

“Furthermore a successful party cannot be deprived of his costs merely because the suit proceeded ex parte or uncontested. This is to say, the fact that the unsuccessful party did not contest the case is not in itself a ground for refusal of costs but it is a factor that can be taken into account if other good reason exists.

The giving or absence of notice to sue, before a suit is instituted is a relevant consideration in awarding costs. This is a circumstance in which quite apart from misconduct, costs can be refused to a successful party.

[12] I need to discuss one important issue: the law on compromise, and the work of David Foskett, Q.C of Gray's Inn at page 77 of his book **In the Law and Practice of Compromise** is relevant that;

“An unimpeached compromise represents the end of the dispute or disputes from which it arose. Such issues of fact or law as may have formed the subject-matter of the original disputation are buried beneath the surface of the compromise. The Court will not permit them to be raised afresh in the context of new action.”

But, it does not necessarily mean that, where parties have entered into consent to settle a proceeding, no costs should be awarded, or there is no successful party in the matter. The incidence of settlement by consent of the parties, to my mind, is just but a vital factor the Court should consider, within the circumstances of each case, in deciding whether costs are payable or not. A consent recorded in settlement of a proceeding is not an automatic disentitlement of costs and I, would, therefore, hesitate profoundly to make any generalized propositions on the law that consent is an automatic disentitlement of costs without reference to the context of the particular case. There are obvious reasons I say so; the nature of settlement in the consent may determine the course of the event and, thus, the place of costs in the suit; parties may as well in the consent indicate that costs shall be borne by a particular party and I do not think that can be defeated on the argument that a settlement by consent of the parties means no party pays costs unless it is expressly stated or by implication inferred in the case. These are real legal as well as practical issues which abound in this subject. Even the **Rufus Njuguna Miringu Case (Supra)** which is most cited on this subject was decided...**in the circumstances...**of the case. The Court should, therefore, look at the event within the circumstances of the case. And that exercise will inform the exercise of discretion by the Court. It should also be understood well; that a successful party does not refer to a person who has been taken through rigorous and convoluted motions of litigation by the other party. Similarly, a party does not cease to be a successful party merely because he met little or no contest in his claim against the Defendant. He is a successful party because he is declared so by the Court after looking at the result of the entire litigation, which includes; negotiations or steps which culminates to, and

the recording of a consent thereto, conduct of the Plaintiff etc. On that basis I believe settlement of a case by consent of the parties should be one of the factors the Court should consider in deciding whether or not costs should be awarded to the successful party.

15. In the absence of a consent on payment of costs between the parties, this Court falls back to its discretion which, it has been said time and again should be exercised in accordance with established legal principles; not whimsically; not capriciously. The circumstances of each case play a major role here.

16. What are the circumstances of this case? Although the parties were negotiating, the correspondences on record show that the Plaintiff expressly indicated that it had rejected the offer by the Defendant and filed suit. He then instructed his Advocates to start the legal process and notice of institution of suit was issued. It is, therefore, not correct to state that this suit was premature or was unnecessary.

17. Of note is the fact that the Defendant admitted the claim in his defence. On the 9/5 /17 he proposed through his counsel on record that he was willing to repay the sum of Kshs 425,000/- in 17 years, a proposal that was found unreasonable by the Plaintiff. Nevertheless, a consent was recorded shortly thereafter on the 9/7/19 in terms stated in the preceding para.

18. It is trite that it is not the province of the Court to investigate the circumstances in which the parties arrived at a consent. What is important is that the parties agreed to resolve their dispute. In this case the dispute was resolved in favour of the Plaintiff in terms of his alternate prayer b in the plaint.

19. I see no reason to depart from the law as set out in section 27 of the Civil Procedure Act. I exercise my discretion and award costs to the Plaintiff against the Defendant.

20. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 14TH DAY OF NOVEMBER 2019

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Mr Chege HB for Kirubi for the Plaintiff

Defendant's Advocate – Absent

Defendant is Present in person

Ms Irene and Ms Njeri, Court Assistants