



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 36 OF 2018

DHANOA MANVIR SINGH.....PLAINTIFF

=VERSUS=

KILE DEVELOPMENT LIMITED.....DEFENDANT

JUDGMENT

1. The plaintiff brought this suit against the defendant on 29/1/2018 contending that he purchased an apartment from the defendant at a cost of Kshs 20,750,000 and paid to the defendant full price together with all requisite monies necessary for conveyance of the apartment into his name, including stamp duty, lease registration fees, legal fees, and management company incorporation charges. He further contended that the defendant gave him vacant possession of the apartment but had failed to complete the conveyance for a period of over three years. He sought specific performance and permanent injunctive orders against the defendant.

2. On 12/3/2018, CM Advocates LLP filed a notice of appointment on behalf of the defendant. There is, however, no record of any defence or replying affidavit filed by the defendant.

3. On 12/7/2018, parties to this suit, through their respective advocates, recorded a consent in the following terms:

1) This suit is marked as settled save for the issue of costs which requires further engagement by the parties

2) In default of amicable resolution of the issue of costs, parties shall file and exchange brief affidavits and brief written submissions on the issue of costs and the court shall render a determination

3) Mention on 29/11/2018 for directions.

4. Subsequently, on 11/7/2019, the plaintiff filed an affidavit sworn by him on 23/11/2018. The affidavit contained the background to this suit and the reasons why the plaintiff was constrained to initiate the suit. The plaintiff gave sworn evidence why he held the view that he was entitled to costs. The defendant did not file any affidavit to controvert the depositions and documentary evidence put forth by the plaintiff. Indeed, on 24/9/2019, counsel for the defendant confirmed that they had opted to file written submissions on the issue of costs without filing any affidavit. Both parties having filed written submissions, they invited the court to make a determination on the single issue of costs.

5. The plaintiff through his counsel, Mr Amalemba, submitted that the guiding law on costs in a civil suit is Section 27 of the Civil Procedure Act. He added that costs are awarded at the discretion of the court. Reliance was placed on, *inter alia*, the decision in **Cecilia Karumu Ngayu v Barclays Bank of Kenya & another (2016) eLKL** where the court emphasized that the jurisdiction to award costs is a discretionary one. Counsel for the plaintiff further submitted that when determining the issue of costs, the court looks at various factors, among them: the conduct of the parties; the subject of litigation; the circumstances which led to the institution of the suit and the events which eventually led to the termination of the legal proceedings. Reliance was placed on **R v Independent Electoral & Boundaries Commission and Another ex-parte Mohammed Ibrahim Abdi 7 others**. Counsel argued that the plaintiff made all attempts to afford the defendant an opportunity to complete the conveyance prior to institution of the suit but the defendant failed to complete the conveyance. He contended that the defendant only completed the conveyance after the suit was filed. He urged the court to award the plaintiff costs of the suit.

6. The defendant through its counsel, Ms Rono, submitted that the delay in completion of the conveyance was occasioned by the closure of Chase Bank where the disbursements paid by the plaintiff had been kept by the defendant's agent. Counsel argued that costs are awarded at the discretion of the court and whenever exercising that discretion, the court takes into account various factors such as: the length of time the suit has been in court before withdrawal; the stage of the hearing of the suit; the steps taken in the suit so far; and the need to promote access to justice by indigent suitors. The defendant argued that the plaintiff did not deserve to be awarded costs because the delay was unavoidable and there was no fault on part of either party to this suit. The defendant added that in the event that the court is inclined to award the plaintiff costs, only the sum of Ksh 150,000 should be awarded because the matter did not proceed to hearing.

7. I have considered the pleadings filed by the plaintiff, the affidavit filed by the plaintiff pursuant to the consent order recorded on 12/7/2018, and the parties' respective written submissions filed in accordance with the consent order. I have also considered the relevant legal framework and jurisprudence on the single issue in this suit. The single issue falling for determination in this judgment is the question as to whether there should be an award of costs in the suit, and if so, who should bear the costs. It is noted that the defendant elected not to file any affidavit to present to the court evidence relating to the issue of costs.

8. The court's jurisdiction on the subject of costs in a civil suit is guided by the legal framework in Section 27 of the Civil Procedure Act which provides as follows:

27 Costs

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.

2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

9. My interpretation of the above legal framework is that unless it is prescribed otherwise, jurisdiction to award costs relating to a suit is discretionary. Courts have developed clear principles which guide the exercises of this discretionary jurisdiction. In **Supermarine Handling Services Ltd v Kenya Revenue Authority [2010] eKLR** the Court of Appeal emphasized that the discretion is a judicial one; its exercise must be based on facts, and the judge exercising the discretion has an obligation to give reasons for the discretionary decision taken.

10. The Supreme Court of Kenya in **Jasbir Singh Rai & 3 Others v Tavlochan Singh Rai & 4 others (2014) eKLR** set out the following jurisprudential guidelines on the exercise of this discretionary jurisdiction:

"It emerges that the award of costs would normally be guided by the principle that costs follow the event; the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously exercised discretion of the court, accommodation of the special circumstances of the case, while being guided by the ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior to, during, and subsequent to the actual process of litigation"

11. Suffice to say that, in exercising the discretionary jurisdiction to award costs in a civil suit which has either been compromised or withdrawn without going to trial, the court looks at various factors, among them: the circumstances which led to the institution of the suit; the events which ultimately led to the termination of the suit; the manner in which the suit was terminated; the conduct of the parties; the relationship between the parties; the subject matter of the suit; and the need to promote reconciliation.

12. In the present suit, the defendant did not file any affidavit to place before court any evidential material relating to the issue of costs. The net result is that the court only has the uncontroverted evidence of the plaintiff on the issue of costs. The defendant's counsel's submission that the delay to complete the conveyance was caused by factors beyond the parties to this suit lacks evidential support because the defendant elected not to file an affidavit to demonstrate why the plaintiff should not be awarded costs.

13. On his part, the plaintiff filed a detailed affidavit and exhibited various correspondences. He deponed that the defendant was afforded ample opportunity to address the plaintiff's legitimate grievances through direct engagement and through his advocate but the defendant chose to be arrogant. Indeed, the letter dated 12/10/2017 from the defendant's advocate to the plaintiff's advocates contains the following concluding remarks:

"In light of the foregoing, we shall not comply with any of your client's demands contained in the said letter. You (sic) client is at liberty to escalate this matter by taking such legal action as he may deem appropriate"

14. It is apparent from the tone of the letter dated 12/10/2017 that the defendant did not appreciate the fact that the grievance which the plaintiff was raising was legitimate. It was the duty of the defendant to engage the plaintiff and seek indulgence. The defendant elected to be arrogant and dared the defendant to initiate any legal proceedings deemed appropriate. Left with no other option, the plaintiff initiated this suit to ventilate his legitimate grievance. In the circumstances, I am persuaded that the plaintiff is entitled to costs of this suit.

15. The defendant urged that in the event that the court is inclined to award the plaintiff costs of this suit, the same should be limited to Kshs 150,000. Assessment of costs upon termination of a suit is a jurisdiction vested in the taxing officer of the court. I will therefore not assume that jurisdiction in the manner suggested by counsel for the defendant.

Disposal Order

16. In light of the forgoing, the plaintiff is hereby awarded costs of this suit, to be agreed upon by the parties, and in default, to be taxed by the taxing officer of this court.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF NOVEMBER 2019.

B M EBOSO

JUDGE

In the presence of:-

Mr Amalemba for the plaintiff

Court Clerk - Mr Waweru