



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC 346 OF 2016**

**1. JUMA ABDALLA MUNYAO KATHENGE**

**2. ASMAA NDUKU JUMA.....PLAINTIFFS**

**-VS-**

**1. JAMES KIBET CHICHIR**

**2. EQUITY BANK KENYA LTD.....DEFENDANTS**

**RULING**

1. The only issue for determination is the question of costs, the parties having settled the other issues in the Suit. The Plaintiffs, who had entered into a Sale Agreement with the 1<sup>st</sup> Defendant for purchase of the Suit Property, have submitted through their Advocates M/s Chala & Co. Advocates that they were forced to file this Suit to protect their interest when the 1<sup>st</sup> Defendant tried selling the same property to a third party while the 2<sup>nd</sup> Defendant who had charged the Suit Property failed to release the title documents despite having been paid outstanding loan amounts. It is therefore the Plaintiffs' submissions that both Defendants should pay them costs.

2. The Plaintiffs' Counsel relied on the case of **Nahson Maingi Muguna –v- Joseph Njiru M'Arucha (2014)eKLR** where at paragraph 14 the Court made reference of the case of **East African Standard Limited –v- Guardian Limited (1934) 16 (1)KLR 23** in which the Court of Appeal held:

***“The Court must exercise the discretion judicially and should not deprive a Plaintiff of his costs unless it can be shown that he acted unreasonably. The principle to be applied is whether the action is one which ought to have been brought.”***

The Plaintiffs submitted that they acted reasonably and did what a reasonable and prudent man would have done and that the filing of the Suit was inevitable. In the circumstances, the Plaintiffs submit that they deserve to be paid costs by the Defendants who prompted the filing of the Suit and which has caused the Plaintiffs to incur costs.

3. M/s Muriu, Mwangi & Co Advocates for the 2<sup>nd</sup> Defendant submitted that both the Plaintiffs and the 1<sup>st</sup> Defendant should bear the costs. It is their submission that the 1<sup>st</sup> Defendant should bear the costs because he is the one that threatened to fail to complete the transaction between him and the Plaintiffs after money was paid to him. It is also the 2<sup>nd</sup> Defendant submission that the Plaintiffs should pay costs because they are the ones who brought the Suit against the 2<sup>nd</sup> Defendant without appreciating that the 2<sup>nd</sup> Defendant was only holding the title as a chargee and could not release it to any other person other than the chargor or on the chargor's instructions. The 2<sup>nd</sup> Defendant's Advocates relied on the cases of **Jasbir Singh Rai & 3 others – v- Tarcholan Singh Rai & 4 others (2014)eKLR** where essence of awarding costs were stated as follows:

***“The object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case... costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action. ”***

4. They also cited the case of **Cecilia Karuru Ngayu –v- Barclays Bank of Kenya & Another (2016)eKLR** in which it was stated that:

***“It matters not that the case was withdrawn or compromised or intended to be compromised as in this case, what matters is whether the second Defendants are entitled to costs for the trouble undertaken by them in defending these proceedings”***

The court in Cecilia Karuru (Supra) went on:

*“Thus the expression “the costs shall follow the event” means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the cost of any particular issue go to the party who succeeds upon it. An issue in this sense need not go to the whole cause of action, but includes any issues which has a direct and definite claim to judgment in the whole or in part.”*

5. The 2<sup>nd</sup> Defendant’s counsel also relied on the case of **Kay Construction Company Limited –V- Eco Bank Kenya Ltd & 6 Others** (2015)eKLR where it was held that:

*“... the inter pleader bank was put to costs by the Suit for which recompense is in order. It is entitled to costs upon the withdrawal of the Suit for having been through this litigation.”*

6. I have considered the submissions made as well as the authorities cited. Section 27 of the Civil Procedure Act provided 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 Suit 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.**

7. It is clear that the issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event. However, it is to be recognized that the principle that costs 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.

In determining the issue of costs, Mativo J in the case of **Cecilia Karuru Ngayu (supra)** stated that the court is entitled to look 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 stage at which the proceedings were terminated, **(vi)** the manner in which they 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.

8. In this case, the Plaintiffs and the 1<sup>st</sup> Defendant entered into Sale Agreement in which the 1<sup>st</sup> Defendant sold to the Plaintiffs the property known as **SUBDIVISION NO.6234 (ORIGINAL NO.5220/4)SECTION 1 MN** at a consideration of Kshs.12,000,000 whereupon the Plaintiffs paid agreed deposit of Kshs.5,000,000.00 out of which the sum of Kshs.3,506,832.00 was paid to the 2<sup>nd</sup> Defendant to redeem the title which was charged to the 2<sup>nd</sup> Defendant. The balance of the purchase price was to be paid within 7 days of successful registration of the Discharge of Charge in favour of the 2<sup>nd</sup> Defendant and the transfer in favour of the Plaintiffs. The pleadings herein show that the 1<sup>st</sup> Defendants failed to deliver the completion documents as agreed and instead entered into a sale agreement with a third party over the same property. This prompted the Plaintiffs to file this Suit.

9. By consent dated 1<sup>st</sup> February 2017 between all the parties in this Suit, it was agreed that the 2<sup>nd</sup> Defendant was to release to the Plaintiffs the Original title documents of the Suit Property together with a discharge of charge duly executed by the 2<sup>nd</sup> Defendant whereupon the Suit between the Plaintiff and the 2<sup>nd</sup> Defendant would be deemed as settled. Similarly, the 1<sup>st</sup> Defendant was to release the completion documents to the Plaintiffs who were to pay the balance of the purchase price where after upon successful transfer of the Suit Property in favour of the Plaintiffs the Suit between the Plaintiff and the 1<sup>st</sup> Defendant would also be marked as fully settled. The issue of cost was then left for determination by the Court.

10. In the case of **Jasbir Singh Rai and Others (supra)**, the supreme court held:

*“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 Defendants or respondent will bear the costs.”*

11. There is no doubt that the Suit herein was compromised in favour of the Plaintiffs. The issue that arises is whether the Plaintiffs were justified in instituting the Suit. In my view, the Plaintiffs were justified. There is no doubt that the Plaintiffs were prompted to take action when the 1<sup>st</sup> Defendant failed to comply with the terms of the agreement for sale between him and the Plaintiffs. Indeed there is evidence that the 1<sup>st</sup> Defendant had even purported to resell the Suit property to a third party. This is despite having received payment from the Plaintiffs. The Plaintiffs were within their rights to rush to Court to protect their interests. Face with the circumstances and facts of this case, I find that the Plaintiffs acted reasonably and did what a reasonable and prudent man would have done. I find that filing this Suit was inevitable. In my view, the 1<sup>st</sup> Defendant was to blame. It is the 1<sup>st</sup> Defendant’s actions that made the Plaintiffs and the 2<sup>nd</sup> Defendant incur expenses in this case. Both the Plaintiffs and 2<sup>nd</sup> Defendant are entitled to costs for the trouble undertaken by them in prosecuting and defending these proceedings.

12. In the result, I order that the 1<sup>st</sup> Defendant do pay both the Plaintiffs and the Defendant the costs of this case to be agreed or taxed by the

Taxing Master of this Court.

Orders accordingly.

**Ruling dated, signed and delivered at Mombasa this 19<sup>th</sup> day of July 2018.**

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**C. YANO**

**JUDGE**