



**REPUBLIC OF KENYA**

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

**ELC NO. 251 OF 2017**

**MORRIS MBABU MWITARI.....PLAINTIFF**

**VERSUS**

**HENRY KIMANI.....1<sup>ST</sup> DEFENDANT**

**JOSEPH WANYOIKE MUCHOKI.....2<sup>ND</sup> DEFENDANT**

**COUNTY GOVERNMENT OF NAKURU.....3<sup>RD</sup> DEFENDANT**

**RULING**

***(Plaintiff filing suit but later withdrawing it; plaintiff contesting award of costs to the defendants; plaintiff having been allotted suit land but not acquiring title; plaintiff having an agreement with the 1<sup>st</sup> and 2<sup>nd</sup> defendants for them to lease the land; 1<sup>st</sup> and 2<sup>nd</sup> defendants contending in the suit that the land is of 3<sup>rd</sup> defendant who holds title; 3<sup>rd</sup> defendant being predecessor of entity that apparently allotted the land to the plaintiff; conduct of defendants not entitling them to costs; court holding that there will be no order as to costs).***

1. The plaintiff filed this suit on 16 June 2017 vide which he claimed that in the year 1996, the Municipal Council of Nakuru, allocated him the parcel of land known as Nakuru Municipality Block 10/UN. Sec 58. He averred that he paid all requisite fees and has been in occupation of the land since then. He pleaded that the 1<sup>st</sup> and 2<sup>nd</sup> defendants own the land parcels Nakuru Municipality Block 10/298 and 299 respectively, and that they have been developing the same by putting up high rise residential buildings. He pleaded that in early May 2017, the 1<sup>st</sup> and 2<sup>nd</sup> defendants encroached into his land and started constructing a sewerage system to service their respective parcels of land which he averred was an act of trespass. In the suit, the plaintiff sought orders that he be declared the owner of the land parcel Nakuru Municipality Block 10/UN. Sec 58; an order that the 1<sup>st</sup> and 2<sup>nd</sup> defendants do demolish the sewerage system therein; and a permanent injunction to restrain them from the said land. Together with the suit, the plaintiff filed an application for an interlocutory injunction to restrain the 1<sup>st</sup> and 2<sup>nd</sup> defendants from the suit land pending hearing of the case.

2. The 1<sup>st</sup> and 2<sup>nd</sup> defendants filed a replying affidavit to oppose the motion. They averred that there does not exist a land described as Nakuru Municipality Block 10/UN. Sec 58. They affirmed that they are the owners of the land parcels Nakuru Municipality Block 10/298 and 299, but averred that the parcel of land adjacent to them is the land parcel Nakuru Municipality Block 10/308, which is owned by the County Government of Nakuru. They stated that in the year 2016, a portion of this land was leased to them for a period of 15 years, to use it as a parking space for their tenants, and that is how they have been in possession of the same.

3. Probably owing to the above averments, the plaintiff moved to amend his plaint to enjoin the County Government of Nakuru as the 3<sup>rd</sup> defendant and filed an amended plaint on 6 July 2017. He pleaded inter alia that the 3<sup>rd</sup> defendant has connived with the 1<sup>st</sup> and 2<sup>nd</sup> defendants to fraudulently acquire his land, and that the property was leased while in the knowledge that the plaintiff was in occupation. He also amended his prayers to inter alia seek orders that he be declared the owner of the plot Nakuru Municipality Block 10/308 and a declaration that the lease agreement by the 3<sup>rd</sup> defendant to the 1<sup>st</sup> and 2<sup>nd</sup> defendants is null and void.

4. On 1 March 2018, the 3<sup>rd</sup> defendant filed defence vide which it asserted ownership of the land parcel Nakuru Municipality Block 10/308 and denied any dealings with the plaintiff over the same. It affirmed that it had leased out this land to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

5. On 19 April 2018, when the matter came up for the inter-partes hearing of the plaintiff's application for injunction, Mr. Omae, learned counsel for the plaintiff applied to withdraw the entire suit, and further applied that the defendants be denied costs as they are the ones who created the problem over the suit land. Mr. Gatonye, learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants had no objection to the withdrawal of the suit but sought costs. So too, Ms. Litunda, learned counsel for the 3<sup>rd</sup> defendant. I allowed the withdrawal of the suit, but given the contest on costs, I directed parties to file affidavits and submissions justifying their position on costs. I have gone through the affidavits and submissions filed.

6. In his affidavit, the plaintiff has averred that he was allotted the plot by the Municipal Council of Nakuru and has annexed what he has termed to be an allotment letter dated 17 May 1996. He also annexed a letter dated 1 July 1996, directing The Provincial Physical Planner, Rift Valley Province, to draw a part development plan for the plot. He has also annexed minutes of 2 October 1996, of the Nakuru District Plot Allocation Committee, which approved the allocation of the plot to him. He has averred that he even had an agreement with the 1<sup>st</sup> and 2<sup>nd</sup> defendants allowing them to use the plot and that they paid him some money for the same. He has averred that it is only after the institution of this suit that he learnt that the 3<sup>rd</sup> defendant never submitted records of the allocation of land to him so that the allocation can be formalized. He has deposed that if it was not for the conduct of the defendants he would not have filed the suit.

7. On his part, the 1<sup>st</sup> defendant deposed inter alia that he and the 2<sup>nd</sup> defendant are entitled to costs. He has deposed that the plaintiff is withdrawing the suit after realizing the weakness of his case. He has reiterated that the owner of the land is the 3<sup>rd</sup> defendant and that they hold a lease from the 3<sup>rd</sup> defendant.

8. No affidavit was filed by the 3<sup>rd</sup> defendant.

9. The starting point must be Section 27 of the Civil Procedure Act, Cap 21, Laws of Kenya, which provides as follows :-

*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 an 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 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.*

10. It will be discerned from the above, that in as much as the court has wide discretion with regard to orders on costs, the general rule is that costs follow the event, unless for good reason, the court orders otherwise.

11. In the case of **Council of Governors vs Senate & Another (2014) eKLR**, the supreme court cited the following dictum on costs, made in the case of **Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others**, Supreme Court, Petition No. 4 of 2012 :-

*18. 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, accommodating the special circumstances of the case, while being guided by 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.”*

12. It will be seen therefore that it is not in all cases that costs must follow the event. One of the factors that the court may consider in order to decline awarding costs to the successful party include the conduct of that party.

13. In our case, the plaintiff has demonstrated that indeed he had all persuasion and reasons to believe that the suit plot was allocated to him by the predecessor of the 3<sup>rd</sup> defendant. The averment that the 1<sup>st</sup> and 2<sup>nd</sup> defendant entered into an agreement with the plaintiff to use the suit premises and that they even paid rent to the plaintiff is not denied by the 1<sup>st</sup> and 2<sup>nd</sup> defendants. I already stated that the 3<sup>rd</sup> defendant did not file any affidavit and has therefore not repulsed the averments of the plaintiff that the 3<sup>rd</sup> defendant's predecessor led the plaintiff to believe that he had been allocated the subject plot. I have no evidence that the plaintiff was ever aware, before filing this suit, that the subject plot was retained by the 3<sup>rd</sup> defendant or that there was a lease that it had granted to the 1<sup>st</sup> and 2<sup>nd</sup> defendants. In my view, the plaintiff had legitimate grounds to believe that the allocation of the subject plot to him was intact. The conduct of all defendants, indeed led him to have this belief. I do not think that it would be fair in the circumstances of this case, to award the defendants the costs of this suit, given their conduct.

14. I believe that justice will be served if I make the order, that there will be no order as to costs of this suit, save for the costs that I may have awarded in the course of hearing the application for injunction, to any of the parties. Thus I now make the order that this suit is marked as withdrawn with no orders as to costs.

15. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 26<sup>th</sup> day of September 2018.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of: -**

Mr. Gatonye for the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

No appearance on the part of M/s S.M Omae & Co. for the plaintiff.

No appearance on the part of Ms. Litunda for the 3<sup>rd</sup> defendant.

Court Assistant: Nelima Janepher.

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**