



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC NO. 57 OF 2008

TELESIA KAMBUA KINYILIPLAINTIFF

VERSUS

NDANGWA KINYILI MASILA 1ST DEFENDANT/RESPONDENT

ELLENA MUTANU KINYILI2ND DEFENDANT/RESPONDENT

MBITHE MUNYAO 3RD DEFENDANT / RESPONDENT

BENJAMIN MANTHI KITHEKA4TH DEFENDANT/RESPONDENT

RULING

1. What is before me for ruling is the notice of motion application expressed to be brought under section 98 of the Civil Procedure Act, Orders 51 Rules 1,3,4,5, and 7 and order 45 Rule 1 of the Civil Procedure Rules for orders:-

1. That the 3rd Defendant prays to have the Judgment dated and delivered on 24/11/2017 be reviewed and the court makes an order for the 4th Defendant to be awarded costs of the suit since the 4th Defendant is not a member of the family of the 1st, 2nd and 3rd Defendant.

2. The costs of this application be to the 4th Defendants.

2. The application is predicated on the grounds on its face and is supported by the affidavit of F.M Masika, the counsel of the Defendants and in particular the 4th Defendant. It is dated 28th November, 2017 and was filed in court on 6th December, 2017.

3. The application is opposed by the Plaintiff vide his grounds of opposition dated 5th April, 2018 and filed in court on even date. Those grounds are:-

1. The court addressed the issue of costs in its judgment and it is therefore not correct to state that the issue was not addressed.

2. The Applicant has not met the threshold for review of the judgment as contemplated under Order 45 Rule 1 of the Civil Procedure Rules.

3. Costs are awarded in exercise of the discretionary powers of the court as provided under section 27 of the Civil Procedure Act and the Applicant has not demonstrated how that discretion was exercised either unfairly or extra judiciously. He indeed has not set out any ground for the disturbance or upsetting of this courts discretion.

4. The court directed that the application be disposed off by way of written submissions. Only the 4th Defendant had filed his by the time of writing this ruling.

5. The counsel for the 4th Defendant submitted that in its judgement made on the 24th November, 2017, the court denied the 1st, 2nd and 3rd Defendants costs of the suits in order to promote harmony among their family since the three Defendants and the Plaintiff are mother and children. The counsel pointed out the court did not consider costs in respect of the 4th Defendant who was not a member of the family of the other Defendants and the Plaintiff.

6. The counsel further submitted that the 4th Defendant is praying to be awarded costs for the following reasons:-

1. **The 4th Defendant was dragged into this suit for no reason whatsoever by the Plaintiff.**
2. **The issue should have been raised and dealt with by the Plaintiff and her mother and two (2) sisters.**
3. **The Plaintiff was aware that the family land had to be shared among her mother and the other sisters whether under Kamba Customary Law or the Law of Succession Act.**
4. **The 4th Defendant had to engage a lawyer and he had to pay his fees.**
5. **The 4th Defendant had to travel to court in all occasions the matter used to be in court.**
6. **The 4th Defendant had to bring his witnesses to court whom he would pay their transport and food.**
7. **The 4th Defendant had to leave his work and come to court.**
8. **The 4th Defendant was a bona fide purchaser of the land since the land was registered in the name of the 1st Defendant.**
9. **The 4th Defendant had paid the 1st defendant the purchase price of the portion he bought.**
10. **The 4th Defendant had been in court for 10 years.**
11. **The 4th Defendant did not misconduct himself.**

7. The counsel was of the view that there is an error or omission that is apparent on the face of the record and as such the 4th Defendant requires to be awarded costs to compensate him for the trouble he undertook in defending the suit.

8. The counsel cited the case of *Cecilia KaruruNgayo V Credit Reference Bureau Africa Ltd[2016] eKLR* where Mativo, J stated as follows:-

“ to my mind, in determining the issues of costs, the court is entitled to look at 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. [11] in other words the court may not only consider the conduct of the party in the actual litigation, but the matters which led to the litigation, the eventual termination thereof and the likely consequences of the order for costs [12]”

9. I fully associate myself with the judgement of Mativo, J. Having read the application together with the grounds of opposition, it seems to me that the court did not take into consideration the fact that the 4th Defendant is unrelated to his co-defendants and the Plaintiff. That in my view is an error on record. In the circumstances, the judgement dated 24th November, 2017 is hereby reviewed and order for costs of the suit is made in favour of the 4th Defendant. Suffice it to say the application is allowed as prayed.

SIGNED, DATED and DELIVERED at MAKUENI this 29TH day of NOVEMBER, 2018.

MBOGO C.G

JUDGE

IN THE PRESENCE OF ;

1. Ms Kyalo for the Plaintiff
2. Mr. Nthiwa holding brief for Mr. Masika for the 4th Defendants.
3. Mr. Kwemboi Court Assistant

MBOGO C.G, JUDGE

29/11/2018