



Trustees (Registered) Eldoret Churches Urban Project Trust Fund v National Land Commission & 3 others (Environment & Land Case 63 of 2015) [2024] KEELC 401 (KLR) (24 January 2024) (Ruling)

Neutral citation: [2024] KEELC 401 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 63 OF 2015**

**JM ONYANGO, J
JANUARY 24, 2024**

BETWEEN

TRUSTEES (REGISTERED) ELDORET CHURCHES URBAN PROJECT TRUST FUND PLAINTIFF

AND

**NATIONAL LAND COMMISSION 1ST DEFENDANT
COUNTY GOVERNMENT OF UASIN GISHU 2ND DEFENDANT
LAND REGISTRAR UASIN GISHU COUNTY 3RD DEFENDANT
EUNICE WAMBUI NDUNGU & JARED AKONGA OWASHIKA (ON BEHALF OF OTHERS) ON BEHALF OF OTHERS 4TH DEFENDANT**

RULING

1. The Plaintiff/Applicant filed a Notice of Motion dated 3rd October, 2022 Section 1, 1A, 3, 3A, 27 and 63 of the [Civil Procedure Act](#) and Order 51 of the Civil Procedure Rules seeking the following orders:
 - a. Spent
 - b. Spent
 - c. That this Honourable court be pleased to order a stay of taxation of costs by the 2nd Defendant/ Respondent pending the hearing and determination of the this application inter partes.
 - d. That this Honourable court be pleased to determine whether the 2nd Defendant is entitled to costs under Section 27 of the Civil Act where the suit was withdrawn before hearing.
 - e. That the Honourable court be pleased to determine whether a County Government can claim costs as a party in a suit.



- f. That the Plaintiffs are only trustees who run the Health Centre which receives donations from World Vision and the 2nd Defendant/Respondent to serve the local communities and is therefore a Non-profit making Health Centre, a fact which is known to the 2nd Defendant/Respondent.
 - g. The costs of this Application be provided for.
2. The Application is based on the grounds set out on the face of the Notice of Motion and the Supporting Affidavit of Bishop Thomas Kogo sworn on 3rd October, 2022. In the said Affidavit he deposes that the suit was withdrawn vide a Notice of Withdrawal dated 13th December, 2018 and the Court allowed the withdrawal with costs but the court did not direct by whom and out of what property and to what extent such costs are to be paid as provided under Section 27 of the [Civil Procedure Act](#).
 3. It is his further deposition that the 2nd Defendant/Respondent subsequently taxed its Bill Costs. That he is of the view that the 2nd Respondent being a County Government cannot claim costs. He avers that costs normally follow the event and in this case the event was the outcome of the suit but the suit did not proceed.
 4. He deposes that the Plaintiffs are trustees who run a non-profit making health center which receives donations from World Vision and the 2nd Defendant/Respondent and they can therefore not pay costs.
 5. He avers that when the 2nd Defendant/Respondent filed a Counterclaim, the Plaintiff/Applicant filed a Preliminary Objection and the court struck out the Counterclaim with an Order that each party bears their own costs because the judge considered that the Plaintiff was a trust.
 6. He further avers that under Section 27 of the [Civil Procedure Act](#), costs follow the event, which is the outcome of the case, but in this case, there was no event as the case did not proceed for hearing hence each party should bear their own costs.
 7. In opposing the Application Mr. Gad Kipkurui Chemoyai filed a Replying Affidavit sworn on 28th October, 2022.
 8. He deposed that the Plaintiff withdrew this suit on 13th December, 2018 vide a Notice of Withdrawal of suit. The court subsequently allowed the Notice of Withdrawal with costs to all the Defendants and fixed the matter for hearing of the Defendant's Counterclaim, however the 2nd Defendant's Counterclaim was struck out.
 9. He further avers that on 4th March, 2022 he filed the Party and Party Bill of Costs and the Deputy Registrar directed that the parties file their submissions. The Deputy Registrar subsequently delivered his ruling on 21st January, 2022 in which he taxed the 2nd Defendant's costs at Kshs.399.260 and a Certificate of Costs was duly issued.
 10. It was his deposition that the Order for stay of taxation had been overtaken by events as the Bill of Costs had already been taxed, and the court could therefore not issue orders in vain.
 11. He deposed that the 2nd Defendant is entitled to costs in the same way it would pay costs in a Civil matter if ordered to do so.
 12. The Application was disposed of by way of written submissions. The Plaintiff filed its List of Authorities accompanied by brief submissions dated 12th June, 2023 while the 2nd Defendant filed their submissions dated 20th June, 2023.



Background

13. Before delving into the issues raised in the Application, it is necessary to give a brief background of this case. The Plaintiff filed suit against the Defendants on 5th March, 2015 seeking a permanent injunction to restrain the 1st and 2nd Defendants from interfering with the operations of the health project, selling, mortgaging or doing any other thing in any other manner affecting all that parcel of land known as Eldoret Municipality/Block 14/1653 pending the hearing and determination of the suit. They also prayed that 3rd Defendant be ordered to issue the Plaintiff with a Certificate of lease over the suit property and they be awarded the costs of the suit.
14. The 2nd Defendant filed a Statement of Defense dated 23rd March, 2015 which was subsequently amended on 6th December, 2017 and 13th November, 2019 denying the Plaintiff's claim. In the latter amendment they include a Counterclaim praying that the title issued to Plaintiff be revoked and that the 3rd Defendant do register the suit property in the joint names of the 2nd and the 4th Defendants. They further prayed that the Plaintiff's suit be dismissed with costs.
15. The suit was set down for hearing on 30th October, 2018 when the Plaintiff's first witness testified and the suit was fixed for further hearing on 13th and 14th December, 2018. On 13th December, 2018 the Plaintiff filed a Notice of Withdrawal of suit and the court marked the suit as withdrawn with costs to the Defendants. The court then fixed the Counterclaim for hearing on 21st December, 2018. On 20th December, 2018 the Plaintiff filed a Notice of Preliminary Objection challenging the legality of the 2nd Defendant's Counterclaim. The Preliminary Objection was canvassed by way of written submissions and by his Ruling delivered 16th February, 2022 the court upheld the Preliminary Objection and struck out the 2nd Defendant's Counterclaim.
16. Following the dismissal of its Counterclaim, the 2nd Defendant filed its Party and Party Bill of Costs dated 28th February, 2022 in the sum of Kshs.1,281,140. Upon being served with the Bill of Costs, learned counsel for the Plaintiff wrote to the counsel for the 2nd Defendant on 13th April, 2022 requesting him to withdraw the Bill of Costs as the 2nd Defendant's Counterclaim had been dismissed but the 2nd Defendant's counsel responded by his letter dated 14th April, 2022 that the costs were awarded to the Defendants upon the withdrawal of the Plaintiff's case. He then proceeded to serve the Plaintiff's counsel with a Taxation Notice dated 27th June, 2022 for taxation on 24th August, 2022.
17. When the matter came up for taxation on the said date, the Deputy Registrar directed the parties to file their submissions. From the record, it would appear that only the 2nd Respondent filed its submissions and the Deputy Registrar taxed the Bill at Kshs.399.260 vide his ruling delivered on 21st October, 2022.
18. In the meantime, the Plaintiff had filed the instant Application dated 3rd October, 2022 and the same was fixed for hearing on 1st November, 2022. When the Application came up for hearing on 1st November, 2022 the counsel for the 2nd Defendant informed the court that the Application had been overtaken by events as the Bill had already been taxed. Since counsel for the 2nd Defendant was absent the Application was dismissed.
19. The 2nd Respondent subsequently applied to set aside the order of dismissal and being satisfied with the explanation offered by counsel for the 2nd Respondent, for failing to attend the virtual session, the court set aside the order of dismissal and reinstated the Application which is the subject of this ruling.
20. I note that the Plaintiff does not seek a review or setting aside of the order for costs but instead it merely wants the court to determine whether the 2nd Defendant is entitled to costs.



Analysis and Determination

21. The general rule with regard to costs is found in Section 27 of the [Civil Procedure Act](#) which provides as follows:
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:
 2. 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.
22. There is ample jurisprudence on the question of costs. In the case of *Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 Others* (2014) eKLR, the Supreme Court cited with approval the decision of *Joseph Oduor Anode v. Kenya Red Cross Society*, Nairobi High Court Civil Suit No.66 of 2009; (2012) eKLR where Odunga, J. observed that:
- “.....whereas this Court has the discretion when awarding costs, that discretion must, as usual, be exercised judicially. The first point of reference, with respect to the exercise of discretion is the guiding principles provided under the law. In matters of costs, the general rule as adumbrated in the aforesaid statute (the Civil “Procedure Act”]) is that costs follow the event unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words, where the Court decides not to follow the general principle, the Court is enjoined to give reasons for not doing so. In my view it is the failure to follow the general principle without reasons that would amount to arbitrary exercise of discretion...” (emphasis supplied).
23. The Court further emphasized that costs are awarded at the discretion of the Court and placed reliance on *Halsbury’s Laws of England*, 4th ed. Re-Issue (2010), Vol.10, para.16:
- “The Court discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him and the court has an absolute and unfettered discretion to award or not award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice” (emphasis supplied).
24. Expounding on the rationale for costs the court cited Justice Kuloba’s words (*Judicial Hints on Civil Procedure*, at p.94):
- “The object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure....Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action.”



25. The Court observed that:

“....It is clear that there is no prescribed definition of any set of “good reasons” that will justify a Court’s departure, in awarding costs, from the general rule, costs-follow-the-event.... An examination of evolving practices on this question, shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs. In *Amoni Thomas Amfry and another V. The Minister for Lands and Another*, Nairobi High Court Petition No.6 of 2013, Majanja, J concurred with the decision in *Harun Mwau and Others V. Attorney –General and Others*, Nairobi High Court Petition No.65 of 2011, (2012) eKLR, in which it was held (para.180):

“In matters concerning public-interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore, not be imposed on a party who has brought a case against the State but lost. Equally, there is no reason why the State should not be ordered to pay costs to a successful litigant.”

Another example is the landmark Presidential election Petition Ruling in *Raila Odinga and Others V. The Independent Electoral and Boundaries Commission and Others*, Supreme Court Petition No.5 of 2013, in which the parties were required to bear their own respective costs.”

26. The same reasoning was applied in the case of *Samuel K. Macharia & Another V. Kenya Commercial Bank & 2 Others*. S.C Application No.2 of 2011 (2012) eKLR.
27. What can be gleaned from the above judicial pronouncements is that though Section 27 of the *Civil Procedure Act* provides that costs follow the event, the judge may in his or her discretion, backed by sound reasons, decide whether to grant costs.
28. In the instance case, counsel for the Plaintiff contends that since the Plaintiff is a non-profit making organization running a health centre for the benefit of the community, they should be absolved from paying costs. This is a very persuasive argument, save that it has come rather late in the day. The Court Justice Ombwayo, J) having made the order for costs way back in December 2018 and the 2nd Defendant having taxed its costs and a Certificate of Costs issued, followed by execution, I am afraid the Plaintiff has closed the stable after the horse has bolted.
29. I say so for three reasons; First, the Plaintiff had the chance to request the Court not to award any costs at the time of withdrawal of the suit but chose not to do so. Secondly, the application was filed four years after the Order for costs was made and after the process of execution had been set in motion and extra costs incurred. Lastly and more importantly, the Order for payment of costs having been made by my brother Justice Ombwayo, and considering that this is not an Application for review, I have no jurisdiction sit on appeal on an Order of a judge of concurrent jurisdiction.
30. For the above reasons I am constrained to disallow the Application. Considering the status of the Plaintiff/Applicant which is a non-profit making organization running a Health Centre for the benefit of the local community and that it gets donations from World Vision and the 2nd Defendant, each party shall bear their respective costs.

DATED, SIGNED AND DELIVERED THIS 24TH DAY OF JANUARY 2024



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J. M. ONYANGO

JUDGE

In the presence of;

No appearance for the parties

Court Assistant: H. Akidor

