



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.28 OF 2015

1. RALF KEPPER

2. ROSHAN KEEPER.....PLAINTIFFS

=VERSUS=

ERUSTUS GICHARU KIMANI.....DEFENDANT

R U L I N G

1. This suit was filed on 25th February, 2015. In the Complaint, the Plaintiffs alleged that their advocate, the Defendant, held out to them that he was able to draw and register a conveyance for them for L.R. NO. 5336, Malindi.
2. Having paid to the Defendant the purchase price, the Plaintiffs were aggrieved that by 9th February 2015, the Defendant had not effected the Transfer in their names.
3. In the Complaint, the Plaintiffs sought for the surrender of the original title and the conveyance documents, a refund of Kshs.1.15 million, special damages and the costs of the suit.
4. On the same day the Complaint was filed, the Plaintiffs filed an Application in which they were seeking for an order to compel the Defendant to surrender the original title document and Kshs.1.15 Million.
5. The Defendant filed a Replying Affidavit in which he explained the difficulties he had encountered in registering the conveyancing documents at the land offices.
6. In the Replying Affidavit, the Respondent annexed the extract of the Certificate of Title showing that he managed to have the Plaintiffs registered as proprietors of the suit property on 6th March, 2015.
7. Mr. Binyenya, the Vice-Chairman of the Law Society of Kenya, Malindi offered to arbitrate in the matter.
8. On 11th May 2015, Mr. Binyenya informed the Court that the parties had agreed to have the suit withdrawn with no orders as to costs. However, Ms. Otieno, counsel for the Plaintiffs, informed the court that the Defendant should pay the costs of the suit.
9. This Ruling is therefore confined to the issue of whether costs are payable by the Defendant or not.
10. Having gone through the detailed submissions and authorities by counsels, and without going into the merits of whether the Defendant should pay costs in the circumstances of this case, I shall just restate the law.
11. A suit always belongs to the Plaintiff. Where the Plaintiff compromises a suit, he is the one who should decide whether he will forfeit the costs incurred in filing the suit or not. Indeed, pursuant to the provisions of Order 25 of the Civil Procedure Rules, it is the Defendant who is entitled to costs

- when a suit is withdrawn.
12. It is trite law that costs always follow the event, and the “event” is always that the unsuccessful party will be ordered to pay the costs of the successful party. However, as was held by Gikonyo J in **Little Africa Kenya Limited Vs Andrew Mwili Jeson (2014) eKLR**, the court has discretion as to who pays costs, if at all, although the discretion must be exercised judicially.
 13. It is therefore not true that a party shall be entitled to costs in every occasion it wins a case. There are those circumstances that may sway the court to direct that each party should bear its costs. Indeed, a successful party may be ordered to pay to the unsuccessful party costs if the circumstances demand it, like where a suit is filed prematurely or without notice. However, each case is supposed to be determined on its own facts.
 14. In the circumstances of this case, the Plaintiffs should either withdraw the suit with no order as to costs or prosecute the suit whereafter the court will make a determination as to who is entitled to costs.
 15. I will not, at this particular moment, decide as to who is entitled to costs before determining the merits of the suit and whether a reasonable notice was given to the Defendant before the suit was filed.
 16. It is the Plaintiffs to decide the path they want to take: to either withdraw the suit with no orders as to costs, which option the Defendant is agreeable to, or to prosecute the suit and await the decision of the court on the issue of costs. They cannot withdraw the suit and in the same breath insist on being paid costs.

Dated and delivered in Malindi this 3rd day of July 2015.

O. A. Angote

Judge