



Periodontist Dental Centre v Holzeimer & another; Koinange (Suing as the Legal Representative of the Estate of the Late Joseph Karuga Koinange) (Interested Party) (Environment and Land Appeal 5 of 2022) [2024] KEELC 775 (KLR) (15 February 2024) (Ruling)

Neutral citation: [2024] KEELC 775 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL 5 OF 2022
MD MWANGI, J
FEBRUARY 15, 2024**

BETWEEN

THE PERIODONTIST DENTAL CENTRE APPELLANT

AND

ANDRES HOLZEIMER 1ST RESPONDENT

KIKANNO COMPANY LIMITED 2ND RESPONDENT

AND

GRACE NJERI KOINANGE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE JOSEPH KARUGA KOINANGE) INTERESTED PARTY

RULING

In respect to the issue of costs only

Background

1. This Ruling is in respect to the issue of costs only after the parties agreed to have the appeal herein marked as withdrawn. Parties were however unable to reach an agreement on costs.
2. The court on 5th December 2023 directed parties to file written submissions limited to the issue only. Parties complied. The Appellant’ submissions are dated 13th December, 2023, the 1st Respondent’s Submissions are dated 5th December, 2023 whereas the 2nd Respondent’s and the Interested Party’s submissions are dated 20th December, 2023.



The Context

3. The Appellant entered into a Lease Agreement with the 2nd Respondent over the suit property. The 1st Respondent claiming ownership of the suit property, instructed a firm of Auctioneers to distress for rent against the Appellant over the suit premises despite there being no Landlord/Tenant relationship between the 1st Respondent and the Appellant.
4. Consequently, the Appellant moved the subordinate court seeking to restrain the 1st Respondent through its agents from attaching or selling the Appellant's proclaimed goods awaiting the determination of the main suit. The subordinate Court in its Ruling delivered on 27th April, 2022 directed the parties to keep off the suit premises until the determination of the suit or further orders from the High Court in the pending appeal. It is the said Ruling that was the subject of this Appeal.

Appellant's submissions

5. On costs, the Appellant submits that it is entitled to costs of the Appeal from the Respondents and the Interested Party. The Appellant argues that the 1st Respondent proceeded to levy distress for rent against it despite there being no Landlord/Tenant relationship. The Appellant argues that the said distress for rent was illegal from the onset and offended the provisions of Section 3 (1) of the [Distress for Rent Act](#), Cap. 293.
6. As against the 2nd Respondent, the Appellant faults it for failing to disclose to it the existence of a dispute between it and the 1st Respondent over the ownership of the suit premises. The Appellant argues that if it had been made aware of the ownership dispute, it could not have entered into the tenancy agreement.
7. It is submitted that the Appellant is an innocent party who found itself subject of a dispute due to the 2nd Respondent's non-disclosure of material information and the 1st Respondent's illegal proclamation of its goods. It is stated that the Appellant has suffered loss and costs due to the 1st and 2nd Respondents' actions.
8. It is therefore submitted that the Appellant is entitled to recover the amounts spent in pursuing this appeal. Counsel for the Appellant cites the case of *Vinod Seth -vs- Davinder Bajaj* Civil Appeal No. 4891 of 2010 as quoted in the case of [Richard Brian Wekesa -vs- Board of Management Njiiri Schools & 3 Others](#) (2016) eKLR, where the court held that costs are awarded not as a punishment of the defeated party but as a recompense to the successful party for expenses to which he has been subjected to.

1st Respondent's submissions

9. The 1st Respondent equally submits that he is entitled to costs as against the 2nd Respondent and the Interested Party as a successful party. The 1st Respondent submits that the Appellant has had to withdraw the instant Appeal as there is no longer a threat of eviction pursuant to the Court of Appeal's order that rent be deposited in a joint account between the 1st Respondent's Advocates and Advocates of the Estate of Koinange (herein represented by 2nd Respondent and the Interested Party).
10. The 1st Respondent avers that he always held the same position and has been vindicated by the Court of Appeal. The 2nd Respondent and the Interested Party were at fault in insisting that rent must be paid directly to them to the exclusion of the 1st Respondent. He asserts that the High Court found that he owns 80% of the suit premises whereas the deceased owned 20% of the suit- premises. The High Court further directed that rent accruing from the property be apportioned in the ratio of 80:20 in favour of the 1st Respondent.



11. He argues that despite this knowledge, the 2nd Respondent and the Interested Party went ahead and discretely leased out the property to the Appellant without his knowledge. Upon discovery of the same, he requested that the rent be deposited in a joint account but the 2nd Respondent and the Interested Party declined. As such, the Court of Appeal having held that rent be held in a joint account as has been position, the instant Appeal was settled. Therefore, the Appellant and the 1st Respondent are the successful parties who should be granted costs as against the 2nd Respondent and the Interested Party.

2nd Respondent and Interested Party’s submissions

12. The 2nd Respondent and the Interested Party restates the background of the Appeal and submit that the 1st Respondent should be condemned to bear costs of the Appeal having illegally distrained against the Appellant.
13. The 2nd Respondent and the Interested Party submit on Section 27 of the *Civil Procedure Act*. They cite the case of *Party of Independent Candidate of Kenya & Another -vs- Mutula Kilonzo & 2 Others* (2013) eKLR which cited with approval the findings of Murray CJ in *Levben Products -vs- Alexander Films* (SA) (PTY) Ltd 1957(4) SA to the effect that firstly, the award of costs is a matter in which the trial judge is given discretion and secondly, that the successful party should be awarded costs generally and the court should have good grounds for denying the successful party costs.

Analysis and determination

14. Section 27 of the *Civil Procedure Act* provides that costs shall follow the event. The section states that:

“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 give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to 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 reasons otherwise direct.”

15. In the case of *DMG -vs- EWG* [2021] eKLR, the Court held that:

“While exercising its discretion as provided under Section 27, the court is among other issues called upon to look at the following factors:

- a. The subject of the suit;
- b. Circumstances that led to the institution of the suit;
- c. Events which constituted the termination;
- d. The stage at which they were terminated; and
- e. the relationship between the parties and the need for reconciliation amongst the parties.



16. In the case of *Republic –vs- Rosemary Wairimu Munene, Exparte Applicant -vs- Ibururu Dairy Farmers Co-operative Society Ltd*, Judicial Review Application No. 6 of 2014, the Court stated that:
- “The issue of costs is the discretion of the Court as provided under the above section (Section 27 of the *Civil Procedure Act*). The basic rule on attribution of costs is that costs follow the event. It is well recognized that the principle that costs follow the event is to be used for compensating the successful party for the trouble taken in prosecuting or defending the case.”
17. The ‘trouble taken in prosecuting or defending the suit’, as stated in the case of *Haraf Traders Ltd – versus- Narok County Government* [2023], eKLR, refers to:
- “... the various lawful and legitimate steps taken by the parties in the case in pursuit of remedy.”
18. Costs are at the discretion of the court, yet, follow the event. See the *Halsbury’s Laws of England; 4th Edition* (Re-issue), {2010}, Vol.10. Para 16
- “The court has 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 to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice” (Emphasis added).
19. See also the writing by Justice (Retired) Kuloba *Judicial Hints on Civil Procedure, 2nd Edition*, (Nairobi) Law Africa) 2011, Page 94 that: -
- “Costs are {awarded at} the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise...”
20. From the jurisprudence in this area of law, the exercise of discretion on costs depends on the facts of each case, and is guided by the principle that costs should follow the event unless the court orders otherwise. Such circumstances as are relevant include;
- 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*;
 - ix. public interest.



- 21. In the instant suit, the Appellant entered into a Lease Agreement with the 2nd Respondent over the suit property. The 1st Respondent claiming ownership of the suit property, initiated distress for rent against the Appellant over the suit premises despite there being no Landlord/Tenant relationship between the 1st Respondent and the Appellant. It is the 1st Respondent's actions that informed the Appellant's move to file a suit in the Chief Magistrate's Court. The subordinate court delivered a Ruling, which the Appellant being aggrieved with challenged by way of the instant appeal.
- 22. The 2nd Respondent, on the other hand has been faulted for failing to disclose the existence of a dispute between it and the 1st Respondent over the ownership of the suit premises. The Appellant has argued that if it had been made aware of the ownership dispute, it could not have entered into the tenancy agreement in the first place.
- 23. I agree with the Appellant that it is an innocent party who found itself subject of a dispute due to the 2nd Respondent's non-disclosure of material information and the 1st Respondent's proclamation of its goods through an otherwise unlawful levying of distress. Therefore, considering the circumstances of this case, the Court is persuaded that the Appellant is entitled to costs for the trouble of prosecuting this appeal.
- 24. However, having in mind the stage at which the appeal was terminated and the relationship between parties herein, the Court will award what it considers nominal costs; a sum of Kshs. 100,000/= which I consider sufficient and appropriate to be paid by the 1st and 2nd Respondents. The said costs to be paid within 30 days from the date of this Ruling.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF FEBRUARY, 2024.

M.D. MWANGI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the virtual presence of:

Ms. Tazita holding brief for Kangogo for the 2nd Respondent.

Mr. Abdullahi for the 1st Respondent

No Appearance for the Appellant

No Appearance for the Interested Party

Court Assistant: Yvette

