



**Mulwa v Kilonzo & 3 others (Environment and Land Appeal
39 of 2021) [2024] KEELC 1343 (KLR) (12 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1343 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 39 OF 2021
CA OCHIENG, J
MARCH 12, 2024**

BETWEEN

PATRICK MASILA MULWA APPELLANT

AND

DOUGLAS MUTINDA KILONZO 1ST RESPONDENT

CAXTON MUTUA MWANZA 2ND RESPONDENT

LABAN MBUVO NZAU 3RD RESPONDENT

EMMANUEL GOD WITH US SELF HELP GROUP 4TH RESPONDENT

RULING

1. What is before Court for determination is the Appellant's Chamber Summons Application dated the 15th June, 2023 where he seeks for the following Orders:-
 1. That this Honourable Court be pleased to assess costs in this matter (costs in appeal) and in Machakos CMCC No. E52 of 2020 (lower court costs).
 2. That in the alternative to 1 above, this Honourable Court pleased to give directions as to the assessment of costs in this Appeal as well as in Machakos CMCC No. E52 of 2020 (Costs in the lower court).
 3. That costs of this Application be in the cause.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of the Appellant. The Appellant explains that he was the Plaintiff in Machakos CMCC No. E52 of 2020 which suit was dismissed vide a Judgment delivered on 6th August, 2021. He states that he subsequently lodged an Appeal and vide a Judgment delivered on 23rd June, 2022 the Appeal was allowed with costs to him. He contends that he wrote a letter dated the 25th June, 2022 addressed to the Advocates for the



Respondents, which letter has never been replied to. He avers that he filed an Application dated the 14th July, 2022 seeking for review in so far as who should bear costs in Machakos CMCC No. E52 of 2020 is concerned but vide a Ruling delivered on 25th May, 2023 the subordinate court held that he had already been awarded costs by the High Court. He insists that a successful party deserves costs of the suit as well as costs on Appeal.

3. The Application was opposed by the Respondents who filed a Replying Affidavit sworn by Caxton Mutua Mwanza who deposes that the instant Application is frivolous, vexatious, incompetent and/ devoid of merit. He explains that the Appellant had filed Machakos CMCC E052 of 2020 *Patrick Masila Mulwa v Douglas Mutinda Kilonzo & 3 Others* which was dismissed with costs. Further, that the Appellant appealed before this court and vide a Judgment delivered on 23rd June, 2022, the Appellant was awarded costs of the Appeal. He reiterates that the Appellant filed an Application before the trial court for review on who should bear costs in the lower court and the same was dismissed on 25th May, 2023. He reiterates that the issue of costs has been substantively dealt with, but the Appellant seeks to reopen it. He reaffirms that the Appellant's decision in filing the present Application amounts to an absurdity after the issue on costs was determined by this Court in its Judgment.
4. The Application was canvassed by way of written submissions.

Analysis and Determination

5. I have considered the instant Chamber Summons Application including the respective Affidavits as well as the Appellant's submissions and the only issue for determination is whether the Appellant is entitled to the sought in the said Application.
6. The Appellant has sought assessment of costs in this Appeal and in Machakos CMCC No. E52 of 2020 (lower court costs). Further, in the alternative the Court to give directions as to the assessment of costs in this Appeal as well as in Machakos CMCC No. E52 of 2020 (costs in the lower court).
7. For the avoidance of doubt, I wish to reproduce an excerpt of the Judgment herein:-

I will proceed to set aside the Judgment delivered on 26th August, 2021 in Machakos CMCC No. E52 of 2020 and substitute it with the following orders:

- a. That the Respondents be and are hereby directed to effect transfer of Plot Nos. 39, 40 and 61 to be subdivided from LR No. Konza South/Konza South Block 5 (Konza) 2790 to the Appellant within ninety (90) days from the date hereof; failure of which the Appellant will grant them vacant possession and obtain refund of Kshs. 825,000 being the purchase price that was paid.
 - b. The amount of Kshs. 825,000 to attract interest at court rates from the date of payment, until payment in full.
 - c. That costs of this Appeal be borne by the Respondents.
8. I note the trial court in its Judgment which was set aside directed each party to bear their own costs. Further, this court granted the Appellant the costs of the Appeal. The Appellant now seeks direction on costs in the lower court. It is trite that costs are discretionary. Further Section 27 of the *Civil Procedure Act* stipulates that costs follow the event. In the case of *Republic vs Rosemary Wairimu*



Munene (ex parte Applicant) Ihururu Dairy Farmers Cooperative Society Ltd (2014) eKLR, it was held that:-

"The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case."

9. While in the case of Nelly Kalia Kilonzo & 3 others v CIC General Insurance Limited & another [2021] eKLR, it was held that:-

"In that case, Section 27(1) of the Civil Procedure Act Cap. 21 Laws of Kenya which was cited by the parties herein provides that the issue on costs of all suits (and appeals) lies with the discretion of the courts and that such costs shall follow the event. It is therefore clear that it is upon the courts to determine who ought to bear the costs incidental to suits, applications and appeals. Emphasis mine

10. In the current scenario, it seems to me the Appellant seeks an interpretation of the order on costs emanating from the lower court matter, since the impugned Judgment was set aside in the Appeal. It is my view that since I set aside the Judgment of the trial court, this in essence means that the issue of each party bearing its own costs was also set aside. Further, I note, the Appellant who was the Plaintiff in the lower court had sought for costs in his Plaint dated the 25th September, 2020. From a reading of Section 27 of the Civil Procedure Act, that provides that costs follow the event, this in essence means that a successful party in a suit is indeed entitled to costs unless there are reasons why the said costs cannot be awarded. In this instance, I opine that the Appellant being the successful party in the lower court, is hence entitled to costs of that suit. In the circumstance, while associating myself with the decisions cited, I find that the Appellant is indeed entitled to costs in Machakos CMCC No. E52 of 2020 and in the Appeal, as had already been awarded. The Appellant is free to proceed to file his Bill of Costs in the Appeal to be subjected to taxation by the Taxing Officer.

11. In the foregoing, I do find the instant Chamber Summons application merited and will allow it but make no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 12TH DAY OF MARCH, 2024

CHRISTINE OCHIENG

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of;

Ms. Musau holding brief for Ms. Kui for Respondents

No appearance for Appellant

Court Assistant – Simon/Ashley

