



**Kago & 2 others v Mwangi & 2 others (Environment & Land Case E087 of 2023) [2024] KEELC 1555 (KLR) (11 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1555 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE E087 OF 2023**

**BM EBOSO, J  
MARCH 11, 2024**

**BETWEEN**

**FRANCIS GITHUTHWA KAGO ..... 1<sup>ST</sup> PLAINTIFF  
LEERAND SCHOOL THIKA LIMITED ..... 2<sup>ND</sup> PLAINTIFF  
MARKERRYL COMPANY LIMITED ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**DAVID MAINA MWANGI ..... 1<sup>ST</sup> DEFENDANT  
BERNADETTE WAMBUI KARARI ..... 2<sup>ND</sup> DEFENDANT  
CELESTINE WANJIRU NGURE ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The substantive claim in this suit was marked “withdrawn” through a brief ex-tempore ruling rendered by this court on 31/1/2024. The ruling followed a notice of withdrawal of suit dated 18/1/2024, filed by the plaintiff, inviting the court to mark the suit as “withdrawn with no order as to costs”. When the parties appeared before the court on 31/1/2024, counsel for the defendants only acceded to the first limb of the notice - the limb relating to withdrawal of the suit. Counsel for the defendants insisted on an award of costs in favour of the defendants. Consequently, the court considered the parties’ oral submissions on the notice of withdrawal of suit and made the following verbatim orders:

“In the above circumstances, the court will allow withdrawal of the claim but reserve the issue of costs for determination based on affidavit evidence and brief written submissions. The suit is accordingly marked withdrawn on the above terms.”



2. Parties subsequently filed affidavits and written submissions on the issue of costs. The single issue that now falls for determination in this Judgment is the question as to what order should be made in relation to costs of the withdrawn suit.
3. The plaintiffs filed an affidavit sworn on 6/3/2024 by Francis Githuthwa Kago and written submissions dated 6/3/2024 drawn by M/s Makumi, Mwangi & Co Advocates. The case of the plaintiffs is that they instructed their advocates to file this suit together with an application seeking interlocutory injunctive orders. Their advocates duly filed the suit on 15/12/2023. They subsequently learnt that unknown to them, the defendants had filed an appeal against them on the same day, 15/12/2023, to wit, Thika ELCA No E076 of 2023, challenging the decision of the Kiambu County Physical and Land Use Planning Liaison Committee [the Liaison Committee] rendered in Appeal No 022 of 2023.
4. The plaintiffs contend that upon filing the suit, on 19/12/2023 this court issued directions on disposal of their application. On 4/1/2024, their advocates on record forwarded the directions of the court together with the application dated 15/12/2023 to the firm of WNK Advocates which represented the defendants in the preceding case at the Liaison Committee.
5. It is the case of the plaintiffs that at the time they sent the email to the said advocates forwarding the directions of the court alongside the application, the said advocates had neither filed a notice of appointment nor communicated to them that they had authority to receive pleadings on behalf of the defendants. They contend that the said directions and application were emailed to the said law firm “out of courtesy but not as an invitation to participate in the proceedings”. They add that their email did not contain summonses to enter appearance, pleadings, verifying affidavit, list of documents or list of witnesses. They add that on 18/1/2024, they instructed their advocates to file a notice of withdrawal of this suit without any order as to costs because their suit had been overtaken by events by the fact that the defendants had filed an appeal challenging the decision of the Liaison Committee.
6. The defendants filed an affidavit sworn on 21/2/2024 by David Maina Mwangi. The case of the defendants is that the three plaintiffs in this suit were the: (i) interested party; (ii) 3rd respondent; and (iii) 2nd respondent, respectively, in Appeal No CGK/KCLC/022 of 2023 at the Liaison Committee while they [the defendants] were the appellants. They add that they appointed M/s WNK Advocates LLP as their recognized representatives authorized to receive pleadings on their behalf in the said appeal at the Liaison Committee. They served the notice appointing the said law firm on all the parties, including the plaintiffs.
7. The defendants add that the Liaison Committee rendered its decision on 8/12/2023 and the decision was shared with all the parties via email on 11/12/2023. Thereafter, the plaintiffs filed the present suit and the court gave directions requiring them to serve the application immediately. In compliance, the plaintiffs served the suit papers and the directions of the court on their advocates on 4/1/2024. Their advocates shared the suit papers with them whereupon they convened a meeting on 13/1/2024 and instructed their advocates to represent them in the suit. They add that they duly complied with the directions of the court by filing a memorandum of appearance, grounds of opposition and statement of defence, challenging the jurisdiction of this court on the ground that they had filed an appeal before this court challenging the decision of the Liaison Committee.
8. It is the case of the defendants that they served their appeal papers on the plaintiffs’ advocates on 18/12/2023, hence the plaintiffs were aware of the appeal as of 18/12/2023. They add that the decision to withdraw the suit was informed by their defence in this suit, which made the plaintiffs realize that their suit was ill-fated. They contend that the plaintiffs’ actions amount to a mockery of the judicial



system and an abuse of the process of the court. It is their case that their association has incurred expenses in form of legal fees, hence they should be awarded costs of the suit.

9. I have considered the pleadings filed in this suit, the evidence and the submissions presented on the single issue that falls for determination in this Judgment. As observed in the opening paragraphs of this Judgment, the substantive claim in this suit was marked withdrawn. The single issue to be determined in this Judgment is the question as to what order should be made in relation to costs of the withdrawn suit.
10. The general guiding principle on costs of a suit is contained 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: 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.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

11. The prevailing jurisprudence on the exercise of powers relating to costs of a suit is that jurisdiction to make orders relating to costs is a discretionary one. Secondly, the discretionary jurisdiction is exercised judiciously; It is not exercised arbitrarily. It is exercised in accordance with reason and clear tenets of justice. The Halsbury’s Laws of England, 4th Edition sums up the prevailing principle as follows:

“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 them. This discretion must be exercised judiciously; it must not be exercised arbitrarily but in accordance with reason and justice.”

12. In *Jasbir Singh Rai & others v Tarlochan Pai & others* [2014] eKLR, the Supreme Court outlined the following as some of the factors that may warrant a departure from the general principle that costs follow the event:

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the



exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.”

13. In *Morgan Air Cargo Limited v Evrest Enterprises Limited* [2014] eKLR Mativo J [as he then was] outlined the following as some of the factors that a court would take into account when exercising the discretion relating to award of costs.

“As earlier stated at paragraph 9, the court must therefore ask itself what factors should be taken into consideration when determining the costs of suit. This issue was addressed by the learned judge in *Morgan Air Cargo Limited V Everest Enterprises Limited* (Supra) to include:

- a. the conduct of the parties
- b. the subject of litigation
- c. the circumstances which led to the institution of the proceedings
- d. the events which eventually led to their termination
- e. the stage at which the proceedings were terminated
- f. the manner in which they were terminated
- g. the relationship between the parties and
- h. The need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of *the Constitution*.”

14. It is clear from the pleadings and from the evidence placed before this court that it became necessary to withdraw this suit because the plaintiffs had filed an appeal before this court challenging the decision of the Liaison Committee. The defendants contended in paragraph 11 of the affidavit of David Maina Mwangi that they served the plaintiff’s advocates with the memorandum of appeal on 14/12/2023. The only evidence exhibited in relation to the alleged service was an email dated 18/12/2023 through which they forwarded the memorandum of appeal to the plaintiffs’ advocates on 18/12/2023 at 11.03 a.m. They did not exhibit any evidence relating to service of the memorandum of appeal on 14/12/2023.
15. The e-filing portal relating to this suit reveals that the suit was filed on 17/12/2023. The physical copies in the file bear the date of 18/12/2023.
16. It does therefore emerge from the above evidence that the plaintiffs were not aware of the appeal at the time they initiated this suit. Once they were served with the appeal papers, they promptly decided to withdraw the suit and let the appeal proceedings be disposed first. In my view, the above circumstances justify a departure from the general principle in Section 27 of the *Civil Procedure Act*. The view of the court would have been different if the defendants brought evidence demonstrating that while aware of the appeal against the decision of the Liaison Committee, the plaintiffs proceeded to initiate this suit. The defendants did not tender that evidence.
17. For the above reasons, it is the finding of the court that the circumstances of this case justify an order that this suit be marked “withdrawn with no order as to costs”. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 11TH DAY OF MARCH 2024**



**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Ms Muli for the Plaintiffs

Mr Kioko (muted) for the Defendants

Court Assistant: Hinga

