



**Kitheka & 2 others v Kenya National Highways Authority & another (Environment and Land Appeal 38 of 2021) [2024] KEELC 5684 (KLR) (22 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5684 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
ENVIRONMENT AND LAND APPEAL 38 OF 2021**

**LG KIMANI, J  
JULY 22, 2024**

**BETWEEN**

**PETER KITHEKA ..... 1<sup>ST</sup> PLAINTIFF  
JANE NDUMI PHILIP ..... 2<sup>ND</sup> PLAINTIFF  
RAVELA PALMS GARDENS LIMITED ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... 1<sup>ST</sup> DEFENDANT  
NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The background to this suit is that the Plaintiffs filed a suit against the Defendants claiming that the Defendants identified and published in the Kenya Gazette the Plaintiffs' properties for purposes of compulsory acquisition to pave the way for the construction of the Kibwezi-Mutomo-Kitui-Kabati-Migwani(A9/B64) Road. They claimed that the amount the Defendants valued their properties Kyangwithya/Tungutu/2191, Kyangwithya/Tungutu/2268 is way below the actual value of the properties. They therefore sought a permanent injunction to prevent the Defendants from trespassing, alienating, acquiring, demolishing structures or in any way interfering with their properties, a declaration that the decision by the Defendants to forcefully gain access and to demolish or interfere with the properties without compensation is illegal, null and void and in the alternative special and general damages on the value of the land and the development costs therein.
2. The 5<sup>th</sup> defendant filed a defence, list of witnesses, witness statement and list of documents. The Plaintiffs filed a Notice of Withdrawal of the suit dated 3<sup>rd</sup> August 2023 against the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants. However, Counsel for the 1<sup>st</sup> Defendant opposed withdrawal of the suit against them stating that they were a necessary party to the suit since they would be affected by any possible outcome of the suit.



3. When the matter was scheduled for hearing on 17<sup>th</sup> October 2023, the court recorded a consent allowing the withdrawal of the suit against the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants. Counsel for the 5<sup>th</sup> defendant sought an order that the costs of the suit be paid by the plaintiffs. It was recorded by consent that the Counsel for the plaintiffs and Counsel for the 5<sup>th</sup> defendant negotiate and agree on whether the plaintiff would be held liable to pay costs of the suit in default of an agreement the court would decide on the issue.
4. The Counsels disagreed on the issue and the matter was referred to the court for hearing and determination. In the meantime, Counsel for the 5<sup>th</sup> defendant filed a party and party bill of costs dated 6<sup>th</sup> November 2023 amounting to a total sum of Kshs 3,591,195.94. The Plaintiff's position is that there is no reason for them to bear the costs of the suit against the 5<sup>th</sup> defendant.

#### **The 5<sup>th</sup> defendant's submissions.**

5. Counsel for the former 5<sup>th</sup> defendant submitted on the law regarding Withdrawal of suits under order 25 *Civil Procedure Rules, 2010*. They cited the Court of Appeal case of *Beijing Industrial Designing & Research Institute v Lagoon Development Ltd* (2015) eKLR where the Court held that a Plaintiff can give notice in writing of their intention to withdraw the suit before hearing, or by consent of the parties when a suit has been set down for hearing, or if there is no consent, the Plaintiff must obtain leave of the court to withdraw the claim. The 5<sup>th</sup> defendant's submission is that since the suit had been set down for hearing, the plaintiff's withdrawal is subject to leave of the court with orders as to costs.
6. Counsel for the 5<sup>th</sup> defendant also relied on section 27 of the *Civil Procedure Act* on costs being a discretionary award and also the decision on the case of *Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others* (2013) eKLR which cited with approval the holding of Murray C J in *Levben Products v Alexander Films (SA) (PTY) Ltd* 1957 (4) SA 225 (SR) at 227 that the judicial discretion of the award of costs must be exercised reasonably and that the general rule is that costs should be awarded to the successful party.
7. Their submission therefore is that the 5<sup>th</sup> defendant incurred costs in expenses and time and it is only fair that they are reimbursed for the same. Further, the damages sought by the Plaintiff of Kshs 125,601,750/= would attract the costs and interests if the suit were to proceed to judgment and have it delivered in their favour. They sought that the plaintiff's suit should stand withdrawn and costs be awarded to the 5<sup>th</sup> defendant and that the Bill of Costs be placed for taxation before the Registrar subject to Order 25 rule 3 of the *Civil Procedure Rules*.

#### **The Plaintiff's submissions**

8. Counsel for the Plaintiff submitted that the context within which the Kenya Power and Lighting Company was sued was that the said company erected its powerlines on part of the suit properties on arrangement with Kenya National Highways Authority which was compulsorily acquiring the suit parcels. There had been no prompt payment of compensation to the Plaintiffs in accordance with Article 40(3)(b)(ii) of the *Constitution* of Kenya(2010).
9. The Plaintiff highlighted that they decided to withdraw the suit against them after the company's request and their counsels filed a Notice of Withdrawal on the erroneous premise by the former advocates on record that the suit had not been previously set down for hearing. They therefore submit that the withdrawal falls under the provisions of Order 25(2) of the *Civil Procedure Rules,2010* on withdrawal by consent.



10. Counsel for the Plaintiff relied on the case of *Republic v Kenya Ports Authority ex-parte Grain Bulk Handlers Limited & Coast Silos Limited*(2015)eKLR where the court found that since the suit was withdrawn by consent, there was no successful party on the merits of the case and therefore there was no basis for an award of the full costs. The Plaintiff's submission is that the withdrawal of the suit against Kenya Power and Lighting Company is not an event for which the company can be said to have been successful.
11. The Plaintiff submits that if they were to be condemned to bear the costs of the suit, it would set an unpleasant precedent for the sustenance of suits overtaken by events cited in the case of *Jasbir Singh Rai & 3 others v Tarcholan Singh Rai & 4 others*(2014)eKLR.
12. The Plaintiff concluded that the determination is still pending and the suit against the County Government and the project contractor being overtaken by events as has been against the Kenya Power and Lighting Company, they should also exit without any order as to costs. The company is a parastatal and wholly funded by the Exchequer through the taxes paid by the Plaintiffs and cannot be said to have incurred any costs on its own.
13. Further, the Plaintiffs submit that the Kenya Power and Lighting Company has a duty under Article 48 of the *Constitution* to ensure access to justice by inter alia, not making costs an obstacle thereto. They therefore urged the court to order that each party bears their costs in the interest of justice.

#### **Analysis and determination**

14. The court has considered the withdrawal by the plaintiffs of the suit against the 5<sup>th</sup> defendant, submissions by Counsel for the parties, the nature of the suit herein, the pleadings and the proceedings of the court leading to the withdrawal of the suit.
15. Order 25 of the *Civil Procedure Rules* stipulates the rules on the withdrawal of suits. Order 25(1) provides that:

“At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.”
16. Order 25 rule 2 stipulates that;
  - “ 1) Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn, upon the filing of a written consent signed by all the parties.
  - “ 2) Where a suit has been set down for hearing the court may grant the plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just.
  - “ 3) The provisions of this rule and rule 1 shall apply to counterclaims.”
17. The suit had previously been set down for hearing on 2<sup>nd</sup> March 2023 but was adjourned and the hearing began on 4<sup>th</sup> May 2023 with the Plaintiff's case and counsel for the 5<sup>th</sup> defendant was present for the said hearing.



18. This means that Order 25 rule 2(2) of the *Civil Procedure Rules* applies and leave of the court is required for the Plaintiffs to withdraw part of the claim upon such terms as to costs as are just.
19. In the Court of Appeal case of *Beijing Industrial Designing & Research Institute versus Lagoon Development Ltd* [2015] eKLR which the 5<sup>th</sup> Defendant has relied upon, the Learned Judges held that:

“The above provision presents three clear scenarios regarding discontinuance of suits or withdrawal of claims. The first scenario arises where the suit has not been set down for hearing. In such an instance, the plaintiff is at liberty, at any time, to discontinue the suit or to withdraw the claim or any part thereof. All that is required of the plaintiff is to give notice in writing to that effect and serve it upon all the parties. In that scenario, the plaintiff has an absolute right to withdraw his suit, which we agree cannot be curtailed. The second scenario arises where the suit has been set down for a hearing. In such a case, the suit may be discontinued or the claim or any part thereof withdrawn by all the parties signing and filing a written consent. In this scenario, the right of the plaintiff is circumscribed by the requirement that he must obtain the written consent of all the other parties. The last scenario arises where the suit has been set down for hearing but all the parties have not reached any consent on discontinuance of the suit or withdrawal of the claim or any part thereof. In such eventuality, the plaintiff must obtain leave of the court to discontinue the suit or to withdraw the claim or any part thereof, which is granted upon such terms as are just. In this scenario too, the plaintiff’s right to discontinue his suit is circumscribed by the requirement that he must obtain the leave of the court. That such leave is granted on terms suggests that it is not a mere formality.”
20. In this case, the former 5<sup>th</sup> Defendant contends that they have incurred costs in defending the suit and would have incurred further costs if the suit were to be determined in the Plaintiffs’ favour. Counsel for the plaintiffs on the other hand contends that the suit against the Kenya Power and Lighting Company(KPLC) was withdrawn upon their request and therefore was by consent. The Company’s Counsel confirmed that they had requested that the suit be withdrawn against them several times before but the Plaintiff took time before making the decision.
21. There is no contention that the Kenya Power and Lighting Company(KPLC) has incurred costs in the suit so far, but the issue is whether Plaintiff should cover those costs.
22. Section 27 of the *Civil Procedure Act* CAP 21 of the Laws of Kenya provides 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 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.”
23. The Court has the discretion to make orders as to who shall bear the costs of and incidental to a suit. In the case of *Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others* (2013),



eKLR cited with approval the words of Murray C J in *Levben Products v Alexander Films (SA) (PTY) Ltd* 1957 (4) SA 225 (SR) at 227 that it stated:

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs is a matter in which the trial Judge is given discretion ...But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place, the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

24. Since the suit is yet to be fully heard and determined, there is no successful party as yet and the Court has the opportunity to determine the matter of the costs of the 5<sup>th</sup> defendant with reasonable discretion. Kariuki J in the case of *DGM v EWG* [2021] eKLR quoted with approval the holding in these cases as follows:

In *Reid, Hewitt & Co v Joseph*, AIR 1918 Cal 717 and *Myres v Defries* (1880) 5 Ex D 180, the House of Lords noted that: -

“The expression ‘costs shall follow the event’ means that the party, who, on the whole, succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.”

The drift therefore is that it is not on every issue that success will bring a right to the costs. As Kuloba notes in *Judicial Hints (supra)*, in case of total success, the successful party may be deprived of the costs of a separate issue on which he was unsuccessful.

The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case.

25. In *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR the court noted that;

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follows the event” was driven by the fact that there could be no “one-size-fits-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute, and even all literally work and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.....it does not necessarily mean that, where parties have entered into consent to settle a proceeding, no costs should be awarded, or there is no successful party in the matter. The incidence of settlement by consent of the parties, to my mind, is just but a vital factor the court should consider, within the circumstances of each case, in deciding whether costs are payable or not. A consent recorded in the settlement of a proceeding is not an automatic disentitlement of costs and I, would, therefore, hesitate profoundly to make any generalized propositions on the law that consent is an automatic disentitlement of costs without reference to the context of the particular case. There are obvious reasons I say so; the nature of settlement in the consent may determine the course of the event and, thus, the place of costs in the suit; parties may as well in the consent indicate that costs shall be borne by a particular party and I do not think that can be defeated on the argument that a



settlement by consent of the parties means no party pays costs unless it is expressly stated or by implication inferred in the case."

26. Kariuki J in the *DGM v EWG* (*supra*) summarized the above criteria for consideration of grant of costs as follows:
- 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*.
25. The court has taken into account the nature of the plaintiff's claim which in summary is the compulsory acquisition of the plaintiffs' parcels of land without adequate compensation. The court has looked at the difference between what the plaintiffs claim and what was awarded to them by the 2<sup>nd</sup> defendant. Consideration has also been given to the fact that the plaintiff's land was acquired before compensation was paid that. The court has also considered the provisions of Order 1 Rule 3 on who should be joined as a defendant in a suit which states that "All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where if separate suits were brought against such persons any common question of law or fact would arise" The court concludes that it is only by way of a full trial that it would have concluded that the 5<sup>th</sup> defendant was wrongly sued.
26. Further, it is noted that the Counsel for the plaintiff Mr. Wamunga first came on record on 26<sup>th</sup> July 2023 and first appeared in court on 27<sup>th</sup> July 2023 when the plaintiff's previous law firm sought to withdraw from acting for the plaintiffs. He indicated that he needed time to study the matter and seek instructions. When he appeared in court on 17<sup>th</sup> October 2023, he indicated to the court that after reviewing the matter he had concluded that the suit ought to be withdrawn against 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants. He ended up retaining the 1<sup>st</sup> defendant as a necessary party.
27. In the court's view the 5<sup>th</sup> defendant was joined to the suit in good faith taking into account the circumstances existing at the time when the suit was filed. Further, the circumstance that led to the withdrawal of the suit has been explained as the fact that the suit properties have already been put to public use, rendering the permanent injunction sought earlier otiose. The suit against the Kenya Power and Lighting Company (KPLC) was terminated at the beginning of the hearing when only one of the plaintiff's witnesses had testified partly.
28. It is also noted that even though the plaintiffs filed a notice of withdrawal of the suit the said withdrawal was done by consent of the parties and the court is of the view that the attendant good faith ought to be encouraged in the spirit of Article 159 of the *Constitution* of Kenya.



29. For the foregoing reasons the court directs that arising out of withdrawal of this suit against the 5<sup>th</sup> defendant by consent of the parties the plaintiff and the 5<sup>th</sup> defendant will pay their respective costs of the suit.

**DELIVERED, DATED AND SIGNED AT KITUI THE 22<sup>ND</sup> OF JULY 2024.**

**HON. L. G. KIMANI**

**JUDGE ENVIRONMENT AND LAND COURT, KITUI**

The ruling was read in open court and virtually in the presence of:

C/A Musyoki

Paskal Amunga for plaintiff

Maanzo for 3<sup>rd</sup> defendant

