



Mugwe & another v Keberere (Environmental and Land Originating Summons E002 of 2023) [2024] KEELC 13459 (KLR) (20 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13459 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2023**

JG KEMEI, J

NOVEMBER 20, 2024

BETWEEN

MARY GATHONI MUGWE 1ST PLAINTIFF

KIPKOECH HILLARY RONOH 2ND PLAINTIFF

AND

KEREN KANUTHU GITUNDU KEBERERE DEFENDANT

JUDGMENT

1. By way of brief background, the parties herein are equal shareholders and directors of a Company known as Sustainable Energy Initiative (SEI). Vide an Originating Summons dated 10/1/2023, the Plaintiff filed the instant suit against the Defendant principally seeking an order for amalgamation of 26 Parcels of land known as RUIRU EAST/JUJA EAST BLOCK 2/17658 – 17683 (the suit land). That upon such amalgamation of the suit land, the Hon. Court be pleased to order its subdivision into three equal portions to be held by both Plaintiffs and Defendant respectively. The Plaintiffs also prayed for costs to be borne by the Defendant.
2. Objecting to the Originating Summons, the Defendant swore her Replying Affidavit on 6/2/2023. She averred that she is not opposed to the proposed amalgamation and subsequent subdivisions but her contention was to the transfer and/or sale of the suit land as per the minutes of a meeting held on 20/9/2017.
3. It is against that backdrop that parties opted to settle the matter by way of mediation culminating into a Partial Mediation Settlement Agreement dated 24/11/2023. The Settlement was adopted as an order of this Court on 9/7/2024.
4. The only pending issue for determination is the Plaintiffs' prayer for costs, the subject of this Ruling.



5. On 19/9/2024 directions were taken and parties agreed to canvass the issue of costs by way of written submissions to be filed within 14 days. None of the parties complied.
6. Section 27(1) of the *Civil Procedure Act* provides that generally costs follow the event. It provides;

“27. Costs

- (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.”

7. The Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 Others* [2014] eKLR detailed the parameters for consideration in applying the general rule that costs follow event. The apex Court in ordering each party to bear their own costs after the Court declined to hear a petition for want of jurisdiction observed that;

“(22) Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.”

8. It is trite, therefore, that much as the rule is to the effect that costs follow event, such award of costs shall remain at the discretion of the Court. Additionally, Halsbury’s Laws of England, 4th Ed. Re-Issue (2010) Vol. 10, para 16 also provides that costs lie at the Court’s discretion, including, but not limited to, whether to award costs or not, and no party has a right as to costs unless and until the Court awards them. Of course, this discretion, ought to be exercised judiciously and not arbitrarily. See the Supreme Court decision in *Trattoria Limited Vs. Maina & 3 Others* (Petition (Application) 26 (E029) of 2022) [2024] KESC 54 (KLR) where the Court dismissed the Applicant’s appeal since it did not disclose a question touching on the interpretation and application of *the Constitution*.
9. What is the event in this case noting that the parties have reached a settlement? The answer can be traced in the case of *Morgan Air Cargo Limited Vs. Everest Enterprises Limited* [2014] eKLR where the Court while looking into a matter where consent had been recorded opined that Consent does not extinguish one’s right to costs and stated as follows:

“(12) I need to discuss one important issue: the law on compromise, and the work of David Foskett, Q.C of Gray’s Inn at page 77 of his book *In the Law and Practice of Compromise* is relevant that;

“An unimpeached compromise represents the end of the dispute or disputes from which it arose. Such issues of fact or law as may have



formed the subject-matter of the original disputation are buried beneath the surface of the compromise. The Court will not permit them to be raised afresh in the context of new action.”

But, 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 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.”

10. It follows therefore that recording a consent does not on its own form a basis for an award or non-award of costs. The Court in exercising its discretion can for good reasons as provided in the proviso of Section 27(1) of the Civil Procedure Act above depart from the general rule on award for costs.
11. In the case of Rai (supra) it was stated that Courts have to proceed on a case by case basis, to identify "good reasons" for such a departure and in that case, public interest litigation was exempted from award of costs.
12. Further in Bukusu Vs. Kizito [2024] KEHC 6354 (KLR) the Court identified some of the relevant factors a Court may consider to include the conduct of the parties, the subject of litigation, the circumstances which led to the institution of the proceedings, the events which eventually led to their termination, the stage at which the proceedings were terminated, the manner in which they were terminated, the relationship between the parties and the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of the Constitution.
13. As earlier stated the parties herein are shareholders and Directors of SEI. The dispute revolved around amalgamation and subdivision of the suit property they jointly purchased. The parties reached a settlement and commendably so before the matter was set down for hearing. All the parties are therefore winners in the strict sense of the case.
14. None of the parties complied with directions to canvass the prayer for costs as directed. Be that as it may I am of the view that this is a ripe case for the Court to order each party to bear their respective costs and the matter be closed.
15. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 20TH DAY OF NOVEMBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Kimiti for 1st and 2nd Plaintiffs

Defendant - Absent

Court Assistant – Phyllis

