



Malinda v County Government of Makueni; Muia (Interested Party) (Environment & Land Case E041 of 2021) [2024] KEELC 13892 (KLR) (18 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13892 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E041 OF 2021
TW MURIGI, J
DECEMBER 18, 2024**

BETWEEN

JOSEPH MUTUA MALINDA PLAINTIFF

AND

COUNTY GOVERNMENT OF MAKUENI DEFENDANT

AND

MIKE JULIUS KING'OO MUIA INTERESTED PARTY

RULING

1. This ruling is in respect of the Notice of Motion dated 7th September 2023 brought under Sections 1A, 1B, 3A and 3B of the *Civil Procedure Act*, Order 25 Rule 1, 2 and 3 of the Civil Procedure Rules in which the Applicant seeks the following orders:-
 - i. Spent.
 - ii. That the Honourable court be pleased to award costs of the suit to the Defendant.
 - iii. That costs of this application be borne by the Plaintiff.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Victor Mukhisa Sichangi sworn on even date.

The Applicant's Case

3. The Applicant averred that the Plaintiff's suit was instituted vide a Plaint dated 2nd December 2021 was opposed vide the 1st Defendant's Statement of defence dated 9th March 2022. He further averred that the Defendant filed a Notice of preliminary objection wherein the court gave directions on 9th June 2022. That the matter was fixed for mention on 11th July 2022 which date was gazetted as a



public holiday. He further averred that the Plaintiff's Counsel obtained a mention dated for 6th October 2022 without giving notice to the Defendant. That on the 6th October 2022, Counsel made an oral application to withdraw the suit which was allowed ex parte. He urged the court to re-open the issue of costs and award the same to the Defendant.

The Respondent's Case

4. The Respondent filed a replying affidavit in opposition to the application.
5. He averred that the application is frivolous, vexatious and an abuse of the court process. He further averred that the application is untenable as the issue of costs was dispensed with by the honourable court on 6/10/2022 hence the court is functus officio. He contended that the Applicant has not sought for review of the order or appealed against the same and hence it cannot purport to re litigate the issue of costs. He further averred that the court rescheduled the matter to 29/07/2022 after the mention date was gazetted as a public holiday. He argued that the Applicant having raised the preliminary objection ought to have kept abreast with the progress of the matter. He further argued that non attendance is not a justification for the Applicant to revisit the issue of costs and added that the court exercised its discretion in not awarding costs. In conclusion, he urged the court to dismiss the application with costs.
6. The application was canvassed by way of written submissions. Both parties filed their written submissions which I have duly considered.

Analysis and Determination

7. Having considered the application, the respective affidavits and the rival submissions, the issue that arises for determination is whether the Applicant is entitled to the orders sought.
8. It is not in dispute that the Plaintiffs suit was withdrawn on 6th October 2022 with no orders as to costs. The 1st Defendant contended that the order marking the suit withdrawn with no orders as to costs was issued ex parte since they were not served with the mention date. The 1st Defendant urged the court to award them costs for the suit.
9. It is not in dispute that this matter was fixed for mention on 11/07/2022. It is also not in dispute that the date was declared as a public holiday. The record shows that on 29th July Ms Kellen for Muumbi for the Plaintiff fixed this matter for mention in the registry with a view to confirm filing of submissions. It is therefore incorrect for the Respondent to state that the court rescheduled the matter to 29/07/2022.
10. On 6th October 2022, Mr Waiyaki holding brief for Muumbi for the Plaintiff applied to withdraw the suit with no orders as to costs. Neither the Defendant nor his Counsel were present in court. The court allowed the withdrawal of the suit with no orders as to costs.
11. From the foregoing it is clear that the 1st Defendant is aggrieved by the order marking the suit as withdrawn with no orders as to costs. Awarding costs is a matter of the discretion of the court. In my view, the Applicant ought to have applied for review of the order or appeal against the same.
12. In the end, I find that the application dated 7th September 2023 is devoid of merit and the same is hereby dismissed with costs. R/A 30 days

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HON. T. MURIGI

JUDGE



RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 18TH DAY OF DECEMBER, 2024.

In the Presence of:

Masila for the Defendant/Applicant

Waiyaki holding brief for Muumbi for the Plaintiff/Respondent

Court assistant Steve

