



Wanjiku & 8 others v Del Monte Kenya Limited & another; National Environment Management Authority & 6 others (Interested Parties) (Environment & Land Petition E001 of 2024) [2024] KEELC 13818 (KLR) (17 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13818 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND PETITION E001 OF 2024
LN GACHERU, J
DECEMBER 17, 2024**

BETWEEN

**LYDIA WANJIKU 1ST PLAINTIFF
SAMUEL MWANGI 2ND PLAINTIFF
PATRICK NDONYE KATITI 3RD PLAINTIFF
MARTIN WAINAINA 4TH PLAINTIFF
JANE WANJIKU 5TH PLAINTIFF
MOSES NJOROGE 6TH PLAINTIFF
EDWARD NJENGA 7TH PLAINTIFF
MARTIN MUOKI MUTAVI 8TH PLAINTIFF
JOSHUA MULWA 9TH PLAINTIFF**

AND

**DEL MONTE KENYA LIMITED 1ST DEFENDANT
COUNTY GOVERNMENT OF MURANGA 2ND DEFENDANT**

AND

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY INTERESTED PARTY
TESCO PLC INTERESTED PARTY
WAITROSE LIMITED INTERESTED PARTY
J. SAINSBURY PLC INTERESTED PARTY
WM MORRISONS SUPERMARKETS LTD INTERESTED PARTY**



OCADO GROUP PLC INTERESTED PARTY
ASDA STORES LIMITED INTERESTED PARTY

RULING

1. Vide a Notice of Withdrawal of suit dated 29th August 2024, the Plaintiffs withdrew their suit against the Defendants herein, which suit had been commenced by way of an original Plaint dated 15th February 2024, and which was later amended on 3rd July 2024, and filed before the Court on 15th July, 2024.
2. The 1st Defendant brought a Request for Judgment dated 2nd September 2024, premised under Order 25, Rule 3 of the Civil Procedure Rules seeking for costs of the suit withdrawn by the Plaintiffs.
3. The 2nd Defendant filed a similar Request for Judgement, dated 17th September, 2024, also brought under Order 25, Rule 3 of the Civil Procedure Rules, seeking for costs of the suit withdrawn by the Plaintiffs.
4. The Plaintiffs, through their counsel Ms. Munyua, opposed the said Requests for Judgement on costs, on allegation that the two Defendants are not entitled to costs suit since they did not file any Defence. That if they are entitled to costs, then it is only costs of the Application. With the said opposition, the said Requests for Judgement became a dispute for determination by the court.
5. The Court directed the parties to file brief written submissions on the said issue of costs of the Plaintiffs' withdrawn suit.
6. The Plaintiffs did not file any written submissions as directed by the Court. However, the 1st and 2nd Defendants filed their respective written submissions, which this court has considered as below; -

THE 1ST DEFENDANT'S SUBMISSIONS

7. The 1st Defendant filed its written submissions dated 16th October 2024, through the Law Firm of HAMILTON HARRISON & MATHHEWS ADVOCATES, and after reiterating the prayers set out in the Plaintiffs' original Plaint dated 15th February 2024, as amended on 3rd July, 2024, the 1st Defendant submitted that a Request for Judgment for costs is dealt with by the Registrar of the Court before which the suit was filed.
8. Further, that upon receipt of such Request, the Registrar does not have any discretion in respect of the matter, and must enter Judgment. Reliance was sought in the decision of the Court in the case of C. Kalya & 3 Others (sued on their own behalf and on behalf of the Agricultural Society of Kenya) Vs Joseph Gachagua & Another [2017] eKLR, to support the proposition that the Registrar is the office which is legally mandated to handle Requests for judgment in respect of costs, under Order 25 Rule 3 of the Civil Procedure Rules.
9. Further reliance was placed in the holding of the Court in the case of Mudhihiri Mohammed & 2 Others Vs Ahmed Imani & Others [2009] eKLR, to anchor the submission that costs follow the event, and the withdrawal of a suit is subject to payment of costs. The 1st Defendant argued that it did not consent to withdrawal of the Plaintiffs' suit with no order as to costs.
10. That it is untenable for the Plaintiffs to contend that the 1st Defendant is entitled only to the costs in respect of the Plaintiffs' application dated 17th July 2024, to which the 1st Defendant responded on



- 23rd August, 2024. Further, that the 1st Defendant on 7th March 2024, had served the Plaintiffs with a request for particulars dated 5th March 2024, to enable the 1st Defendant enter appearance in the suit and file its Defence, which request was the subject of follow-ups by the 1st Defendant advocate's emails dated 2nd April 2024, and 15th April, 2024.
11. The 1st Defendant further submitted that on 24th April 2024, the matter was mentioned before the Deputy Registrar of this court, whereupon the Plaintiffs' Advocates requested for 30 days to furnish the said particulars. However, the Plaintiffs failed to provide the particulars as requested for by the 1st Defendant by 24th May, 2024, and as directed., by the Deputy Registrar.
 12. Further, that the 1st Defendant filed a Notice of Motion Application dated 21st June 2024, seeking to compel the Plaintiffs to furnish the particulars requested by itself, and also sought to strike out the 1st to 7th Interested Parties from the suit. It was noted that the Plaintiffs provided inadequate particulars on 22nd July, 2024, which was four (4) months from the date the request was made.
 13. That on 23rd July 2024, the 1st Defendant withdrew its application dated 21st June 2024, because the Plaintiffs filed an amended Plaintiff, and thereafter, the Court directed that the 1st Defendant's application dated 22nd July 2024, be heard together with the Plaintiffs' application dated 17th July 2024, to which the 1st Defendant responded to via a response dated 23rd August, 2024.
 14. Reliance was sought in the provisions of Order 2 Rule 1 (3) and paragraph 1 of Schedule 6 (b) of the Advocates Remuneration Order to anchor the submission that the suit could have progressed, but for the delay occasioned by the Plaintiffs.
 15. It was the 1st Defendant's further submissions that where a suit is withdrawn after the hearing date has been set, the Defendant is entitled to costs, having engaged an advocate to defend the suit. Reliance was sought in the Judgment of the Court in the cases of Pacis Insurance Company Ltd Vs Francis Njeru Njoka [2018] eKLR; and, Samson K.A. Tim Vs D.M. Machage [2019] eKLR.

THE 2ND DEFENDANT'S SUBMISSIONS

16. The 2nd Defendant filed its written submissions dated 31st October 2023, through the Law Firm of CK & ASSOCIATES, and submitted that the Plaintiffs brought a vexatious and frivolous suit with the intention of coercing the Defendants into an out-of-Court-settlement, and they only withdrew their suit once it became evident that no settlement was forthcoming.
17. Reliance was placed in the reasoning of the Court in the case of Peter Solomon Gichira Vs A-G & Another [2020] eKLR and Samuel Kahiu vs Jacinta Akinyi Assistant County Commissioner Illoodokilani Ward/Division & Another [2018] eKLR, on the elements of a frivolous suit.
18. On the question of costs of suit, reliance was sought in the holding of the Court in the case of DGM Vs EWG [2021] eKLR. The 2nd Defendant argued that the Plaintiffs were represented by three different Law Firms with one of the said Law Firms coming on record on two occasions prior to the withdrawal of the suit. Further, that the 2nd Defendant expended both time and money in respect of the Plaintiffs' suit; therefore, the Plaintiffs are liable to costs.
19. The above is the summary of the dispute before this court, and the submissions by the two Defendants, who have sought for costs. As indicated earlier, the Plaintiffs failed to file their written submissions against the 1st and 2nd Defendants, Requests for Judgement, and therefore, in essence, the two Requests are unopposed. Considering the circumstances of these Requests, the single issue for determination is; -
 - i. Whether the 1st and 2nd Defendants Requests are merited?



20. The two Requests for Judgements are anchored under Order 25 Rule 3 of the Civil Procedure Rules, which provides;

“Upon request in writing by any defendant the registrar shall sign judgment for the costs of a suit which has been wholly discontinued, and any defendant may apply at the hearing for the costs of any part of the claim against him which has been withdrawn.”

21. It is evident that vide a Notice to withdraw the suit, the Plaintiffs herein sought to withdraw the entire suit against the Defendants. On 25th September 2024, Ms Munyua, the Plaintiffs’ counsel informed the court that the Plaintiffs had wholly withdrawn the suit, as they could not sustain it. Order 25 Rule 1 of the Civil Procedure Rules, allows a Plaintiff to withdraw its suit any time before the hearing.

22. The said Order 25 Rule 1 of Civil Procedure Rules states;

“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.”

23. It is trite that when the Plaintiff withdraws a suit, the award of costs is at the discretion of the Court. In determining whether to award costs or not, the court will consider the circumstances of the case, and maybe the outcome. Indeed, a court cannot deprive a party of their costs unless it can be shown that they acted unreasonably. See the case of *Morgan Air Cargo Limited vs Everest Enterprises Limited* [2014] eKLR, where 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 “Costs follow the event” was driven by the fact that there could be no “one-size-fit-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 works 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.”

24. It is also clear that this discretion of the courts must be exercised judiciously and the courts should not deprive a litigant/Defendant its costs unless it can be shown that it acted unreasonably. See *Halsbury Laws of England* 4th Edition (2010) Vol. 10 para 16, which states;

“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 or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice” (Emphasis added).

25. However, courts can depart from the above trite law, but for a good reason, which was stipulated by the Supreme Court in the case of *Jasbir Singh Rai & Others vs Tarlochan Rai & Others* (2014) eKLR, and these reasons included public interest litigation. Was this case a public interest litigation? The Plaintiffs failed to oppose the Requests for Judgements, and this court cannot adequately answer that question.



26. The factors to be considered while determining the issue of whether to award costs or not were set out in the case of *Morgan Air Cargo Lts Vs Evrest Enterprise ltd(supra)*.
 - 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*.
27. The instant suit was filed by the Plaintiffs, and after service of summons to the Defendants, the 1st Defendant engaged in a number of activities, such as Request for particulars, filed an Application for Striking out, and Response to the Plaintiffs Notice of Motion dated 17th July, 2024.
28. Even if the Defendants did not file their Defences, it is evident that failure to do so was caused by the delay by the Plaintiffs to serve summons to all, the other sued parties and also failure to provide particulars as requested, and filing an Amended Plaintiff. When the Plaintiffs were unable to provide the full particulars as sought by the 1st Defendant, they chose to withdraw the suit.
29. Therefore, this court finds that there are no good reasons shown by the Plaintiffs who withdrew the suit herein after the 1st and 2nd Defendants had started the process of defending the same, as to why the two Defendants are not entitled to costs.
30. As was held by the court in *Mudhihiri Mohammed & 2 Others vs Ahmed iman & others(supra)* costs follow the event, and withdrawal of suits is subject of payment of costs. The withdraw of this suit by the Plaintiffs herein was subject of payment of costs to the Defendants who had participated in the proceedings after they were served with summons.
31. The Plaintiffs herein caused the 1st and 2nd Defendants to participate in this suit, and they incurred expenses of filing various pleadings and undertaking certain actions, and therefore, they are entitled to costs. See the case of *Pacis insurance company ltd(supra)*.
32. Indeed, the 1st and 2nd Defendants engaged advocates to defend this suit on their behalf, and even if no Defences had been filed, the various actions undertaken by their advocates in preparation to filing the Defences, must have led them to incur expenses, and thus they are entitled to costs.
33. Further, to borrow from the findings of the court in the case of *Samson K.A Tim vs D.M Machage (supra)*, that the general rule is for the Plaintiff to pay the Defendant costs of the suit once it is withdrawn, and that the Plaintiffs have failed to put forward any compelling reasons for this general rule not to apply.
34. The above position applies in this case, since the Plaintiffs herein have chosen to withdraw the suit after the 1st and 2nd Defendants had engaged advocates to defend them, and in the process they therefore, incurred costs, the Plaintiffs are bound to pay costs, as no reasons have been shown, why this general rule should not apply herein.



35. Having analyzed the issue set out as above, this court finds that the Plaintiffs herein had discretion to withdraw their suit under Order 25 Rule 1 of the Civil Procedure Rules, which withdrawal was allowed by the court. However, the issue of costs is at the discretion of the court, and as provided by Order 25 Rule 3 of the said Civil Procedure Rules, this court exercises its discretion and awards costs to the 1st and 2nd Defendants. The two Requests for Judgement are allowed to proceed as filed by the two Defendants; the 1st and 2nd Defendants are entitled to costs of the withdrawn suit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANGA THIS 17TH DECEMBER 2024.

L. GACHERU

JUDGE

17/12/2024

Delivered online in the presence of;

Joel Njonjo - Court Assistant.

Ms Munyua for the Plaintiffs.

Mr. Mosobera H/B for Kiragu Kimani for 1st Defendant

Mr. Chege for 2nd Defendant

L. Gacheru

Judge

17/12/2024

TABLE

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