



**Colti Construction Co. Ltd v Cigma Business Centre Ltd & 2 others;
Kabucho (Applicant); Muraguri (Respondent) (Environment & Land Case
E012 of 2021) [2023] KEELC 317 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 317 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE E012 OF 2021**

YM ANGIMA, J

JANUARY 19, 2023

BETWEEN

COLTI CONSTRUCTION CO. LTD PLAINTIFF

AND

CIGMA BUSINESS CENTRE LTD 1ST DEFENDANT

THE COUNTY PHYSICAL PLANNER, LAIKIPIA COUNTY . 2ND DEFENDANT

**THE COUNTY EXECUTIVE COMMITTEE MEMBER FOR
INFRASTRUCTURE LAND AND URBAN DEVELOPMENT LAIKIPIA
COUNTY GOVERNMENT 3RD DEFENDANT**

AND

EDWARD MUIGAI KABUCHO APPLICANT

AND

JOHN MWANGI MURAGURI RESPONDENT

RULING

A. Introduction

1. By a plaint dated April 9, 2021 which was later amended on June 16, 2022 the Plaintiff sued the Defendants who included one, John Mwangi Muraguri (the Respondent) as the 1st Defendant seeking various reliefs in respect of alleged unlawful development on LR No Nyahururu Municipality Block 8/701 whose user was restricted to one private dwelling house (excluding a guest house) and that the Respondent had commenced construction of a 3 storey building in violation of the condition and the zoning regulations for the area.



2. It was further contended that the County Government of Laikipia had fraudulently effected change of user and approved the Respondent's unlawful development on Parcel 701 with the consequence that the Plaintiff had suffered discomfort and inconvenience as a result of invasion of its right to privacy. The Plaintiff, therefore, wanted the said development stopped and demolished amongst other reliefs sought in the suit.
3. When it became apparent that the Respondent's property was allocated as a commercial plot for the development of shops, offices and flats; that there had, in fact, been no change of user by the County Government of Laikipia; and that the developments had been duly approved as required by law, the Plaintiff applied to withdraw the suit against him on January 26, 2022. The record shows that the Respondent's advocate did oppose the withdrawal but sought costs of the suit. The court consequently marked the suit against the Respondent as withdrawn with costs.

B. The Plaintiff's Instant Application

4. By an undated application filed on 03.08.2022 expressed to be based upon sections 1A, 1B, 3A, 63(e) and 80 of the *Civil Procedure Act* (Cap. 21), order 45 and order 51 of the *Civil Procedure Rules*, 2010 (the Rules), articles 47, 50 and 159 of the *Constitution* of Kenya, 2010, and any other enabling provisions of the law the Plaintiff sought a review and setting aside of the order made on January 26, 2022 awarding the Respondent costs of the withdrawn claim. The Plaintiff also sought to have the court to hear all concerned parties on whether or not the Respondent ought to be awarded any costs in the first place.
5. The application was based upon the grounds set out on the face of the notice of motion and the contents of the supporting affidavit sworn by David Mathea Gikunju, the Plaintiff's advocate on record, on August 2, 2022 and the exhibits thereto. It was contended that the court had erred in awarding the Respondent costs of the withdrawn claim without hearing the Plaintiff on the issue. It was further contended that the Respondent was not entitled to any costs since he had failed to respond to the Plaintiff's demand letter dated November 11, 2020 because if he had responded thereto and disclosed that his land permitted the impugned user, then the suit against him would not have become necessary. That was the gist of the Plaintiff's application.

C. The Respondent's Response

6. The Respondent filed a replying affidavit sworn by his advocate on record, Irene Njeri Wamithi, on September 23, 2022 in opposition to the application. It was pointed out that when the Plaintiff's advocate applied to withdraw the suit against the Respondent, he did not indicate to the court that he wished to tender any submissions on the issue of costs. It was contended that it is the party withdrawing a suit who should bear the costs of the withdrawn suit and not otherwise.
7. The Respondent further stated that it was evident from the material on record that the Plaintiff had failed to do due diligence and to establish the user of Parcel 701 before filing suit against him whereas such information could easily be obtained from public offices. It was further contended that the award of costs was always at the discretion of the court and that it had exercised its discretion properly by awarding the Respondent costs of the withdrawn claim.
8. Finally, the Respondent contended that the Plaintiff had failed to demonstrate any legitimate reasons for review or setting aside of the order on costs and averred that the instant application was brought in bad faith and merely to delay taxation and payment of the awarded costs. The court was consequently urged to dismiss the application with costs.



D. The Plaintiff's Rejoinder

9. The Plaintiff filed a supplementary affidavit sworn on September 29, 2022 in reply to the Respondent's replying affidavit. It was contended that the award of costs to a successful party is not automatic as the court has judicial discretion to direct otherwise. It was further contended that all the Plaintiff was seeking was an opportunity to demonstrate that the Respondent was not entitled to any costs in the circumstances of this suit on account of his default.

E. Directions on Submissions

10. When the application was listed for inter partes hearing it was directed that it shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Plaintiff filed its submissions on November 22, 2022 whereas the Respondent filed his on October 25, 2022.

F. The Issues for Determination

11. The court has considered the Plaintiff's application, the replying affidavit in opposition thereto, the Plaintiff's supplementary affidavit as well as the material on record. The court is of the opinion that the following are the key issues for determination herein:
 - a. Whether the Plaintiff has satisfied the conditions for review of the order made on January 26, 2022
 - b. Who shall bear costs of the application.

G. Analysis and Determination

Whether the Plaintiff has satisfied the conditions for review of the order made on January 26, 2022

12. The legal provisions for review of an order are contained in order 45 of the *Rules*. Order 45 rule 1 thereof stipulates as follows:
 1. Any person considering himself aggrieved -
 - a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
13. The court has considered the material and submissions on record on this issue. Whereas the Plaintiff submitted that the order on costs could be reviewed under the rubric of "any other sufficient reason" the Respondent contended that the Plaintiff had failed to demonstrate any of the grounds for review set out in order 45 rule 1 of the *Rules*.
14. If the court understood the Plaintiff correctly, it was contending that there was sufficient reason to review the order on costs on two grounds. Firstly, because it was denied an opportunity to make



representations on whether or not the Respondent was entitled to costs. It was submitted that such a denial was a violation of its constitutional rights under article 47 of the *Constitution* of Kenya, 2010 and the *Fair Administrative Action Act*, 2015. Secondly, it was contended that there was a good reason why the Respondent ought not to have been awarded costs in that he had failed to respond to the Plaintiff's demand letter before action.

15. The court is aware that it is a legal requirement that any party seeking a review under Order 45 of the Rules must move the court expeditiously and without undue delay. The record shows that the impugned order on costs was made against the Plaintiff on January 26, 2022. The record further shows that the instant application was not filed until August 3, 2022. The Plaintiff has not rendered any credible explanation for the delay of over 6 months in filing the instant application. In the absence of an explanation the court is entitled to hold, and hereby holds, that the instant application was not filed without unreasonable delay in violation of the law.
16. The court shall, nevertheless, proceed to consider the other aspects of the application. The Plaintiff submitted that it was not accorded an opportunity to address the court on the issue of costs before the Respondent was awarded costs of the withdrawn claim. Mr. Mathea for the Plaintiff contended that on the material date, he had requested Mr. Ojare to hold his brief for the purpose of withdrawing the claim against the Respondent and seeking a date for submissions on the issue of costs. The record, however, shows that on the material date, Mr. Ojare simply applied for withdrawal of the suit against the Respondent and he did not seek any other orders. He did not even oppose the prayer by the Respondent's advocate for costs of the withdrawn claim.
17. The court has noted that Mr. Ojare who was holding brief for Mr. Mathea on the material date has not filed any affidavit to indicate that he had additional instructions from Mr. Mathea which he did not execute and the difficulties, if any, he may have encountered in executing those instructions. It has not been explained why Mr. Mathea wanted a separate date to oppose an award of costs to the Respondent instead of communicating his reasons through the advocate who was holding brief.
18. Be that as it may, the court is willing to consider the reasons which the Plaintiff intended to advance to oppose the award of costs to the Respondent. The main reason advanced in the application is that the Respondent had failed or neglected to respond to the Plaintiff's demand letter before action. It was contended that if the Respondent had responded and explained that his certificate of lease allowed the kind of development he was undertaking, then the suit against him would not have been filed. In other words, it was contended that it was the Respondent's silence which provoked the filing of the suit.
19. The court is far from satisfied that the Plaintiff has rendered any reasonable explanation which would justify the Respondent, as the successful party, from being deprived of the costs of the withdrawn claim. It was the business of the Plaintiff to undertake all necessary inquiries, investigations and due diligence before issuing a demand letter and filing suit. In our adversarial system of justice, the Respondent had no legal obligation to assist the Plaintiff in his inquiries and investigations. The permitted user of the Respondent's property was not a matter peculiarly and exclusively within the Respondent's knowledge. That is information which would be available in various government offices. So, if the Plaintiff intended to employ its demand letter as part of its fishing expedition then the Respondent had no obligation to bite the bait.
20. The legal provisions on the award of costs are to be found in section 27(1) of the *Civil Procedure Act* (Cap. 21). The said sub-section stipulates as follows:

“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.”

21. The Plaintiff has cited some authorities which confirm the above legal position. For instance, in the case of *party of Independent Candidates of Kenya and Another v Mutula Kilonzo and 2 Others* [2013] eKLR the court quoted the following passage on costs by *Murray CJ in Leoben Products v Alexander Films (SA) (PTY) Ltd* 1957(4) SA 225(SR) at 227:

“It is clear from authorities that the fundamental principle underlying the award of costs is twofold. 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.”

22. Similarly, in the case of *David Kiptum Korir v Kenya Commercial Bank and Another* [2021] eKLR it was held, inter alia, that:

“Notably, it is clear that a successful Defendant, who after all is brought into court against his/her will, can only be deprived of his/her costs when it is shown that his conduct, either prior to or during the course of the suit has led to litigation which but for his own conduct might have been averted.....”

23. In the circumstances of this case, the court is far from satisfied that there is any good reason or lawful justification to deprive the Respondent of costs of the withdrawn claim. The mere fact that he failed to reply to a demand letter and divulge information which was publicly available in various government offices cannot be a good reason to deprive him of his costs. Accordingly, the court finds that the Plaintiff has failed to satisfy the requirements for review of the order on costs made on January 26, 2022. Accordingly, the Plaintiff is not entitled to any of the orders sought in its application filed on August 3, 2022.

Who shall bear costs of the application

24. This issue takes us back to the first issue which has been considered above. Although costs are at the discretion of the court, the general rule is that the costs of a suit, action or proceeding shall follow the event in accordance with the proviso to section 27 of the *Civil Procedure Act* (Cap. 21). Accordingly, the successful party is entitled to be awarded costs at the conclusion of the proceedings. See *Hussein Janmohamed and Sons Ltd v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. There being no good reason why the Respondent should be deprived of costs of the application, he shall be awarded costs of the application too.

H. Conclusion and Disposal

25. The upshot of the foregoing is that the court finds no merit in the Plaintiff’s application filed on August 3, 2022. Accordingly, the same is hereby dismissed with costs to the Respondent.

It is so ordered.



RULING DATED AND SIGNED AT NYAHURURU THIS 19TH DAY OF JANUARY, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

.....

Y. M. ANGIMA

JUDGE

In the presence of:

Mr. Maina Kairu for the Plaintiff

Mr. Nderitu Komu for the 2nd Defendant

Ms. Wairimu Mburu holding brief for Ms. Njeri Wamithi for the Respondent

N/A for the 3rd and 4th Defendants

C/A - Carol

