



**Mungai v Mungai & 3 others (Civil Suit 356 & 266 of 2018 (Consolidated))  
[2024] KEHC 1641 (KLR) (Commercial and Tax) (23 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1641 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 356 & 266 OF 2018 (CONSOLIDATED)  
FG MUGAMBI, J  
FEBRUARY 23, 2024**

**BETWEEN**

**TERRY WANGUI NJOROGE MUNGAI ..... PLAINTIFF**

**AND**

**JOSEPH MUNGAI ..... 1<sup>ST</sup> DEFENDANT**

**HOUSING FINANCE BANK ..... 2<sup>ND</sup> DEFENDANT**

**NELSON RIBUTHI GAICHUHIE ..... 3<sup>RD</sup> DEFENDANT**

**SAMUEL M GATHOGO T/A VALLEY AUCTIONEER ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

**Background**

1. This ruling focuses on the question of costs. The origin of this case involves the plaintiff and the 1<sup>st</sup> defendant, who are spouses. The 1<sup>st</sup> defendant obtained a loan from the 2<sup>nd</sup> defendant bank, using their joint matrimonial property located at Nairobi/Block 112/168-Runda Mimosa as collateral. Upon the 1<sup>st</sup> defendant's failure to repay the loan, the 2<sup>nd</sup> defendant invoked its statutory right to sell the property and instructed the 4<sup>th</sup> defendant to initiate recovery of the outstanding loan amount from the 1<sup>st</sup> defendant.
2. The 4<sup>th</sup> defendant advertised the property for auction and the 3<sup>rd</sup> defendant was the highest bidder of the property for the sum of Kshs 35,000,000/=. The 3<sup>rd</sup> defendant paid an initial deposit for the suit property. In the meantime, the plaintiff moved the court seeking to preserve her interest in the property by the amended plaint dated 24<sup>th</sup> September, 2018.



3. Before the hearing of the suit, the 3<sup>rd</sup> defendant relinquished his interest in the suit property and the deposit he had paid was later refunded by the 2<sup>nd</sup> defendant. The suit was subsequently settled by a consent dated 24<sup>th</sup> October, 2023 which was adopted as a judgment of this Court. Parties did not agree on the issue of costs and the 3<sup>rd</sup> defendant seeks to be awarded the costs of the suit. Pursuant to the Court's directions of 15<sup>th</sup> June, 2023 the parties were directed to file written submissions limited only to costs.
4. The plaintiff's submissions, dated June 26, 2023, contend that the 3<sup>rd</sup> defendant's decision to withdraw from the suit when the suit had been scheduled for hearing cannot be interpreted as a victory that would justify the awarding of costs. The plaintiff supports this argument by referring to the case of *Davis Kiptum Korir v Kenya Commercial Bank & Another*, Civil Case No. 64 of 2018, which established that when a case is resolved through mutual consent, no party is deemed victorious in a manner that would automatically entitle them to costs. The plaintiff argues that if anything, she was the one entitled to costs as the suit was merited.
5. The 1<sup>st</sup> defendant filed submissions dated 24<sup>th</sup> July 2023, in which he asserts that the 3<sup>rd</sup> defendant is not entitled to costs. He avers that costs follow the event and in the instant suit the plaintiff is the successful party who is entitled to costs but having waived the claim to costs is a gesture of good faith which ought to be adopted by all parties. He urges the court to find that the 3<sup>rd</sup> defendant is undeserving of the orders of costs.
6. The 3<sup>rd</sup> defendant in opposition of this view filed submissions dated 24<sup>th</sup> July, 2023. It is his argument that he is entitled to costs as he was an innocent purchaser for value and incurred huge costs in defending the suit as well as the numerous court attendances. He also argues that the suit between him and the plaintiff is still subsisting, justifying his entitlement to costs.
7. The 2<sup>nd</sup> and 4<sup>th</sup> defendant filed submissions on 6<sup>th</sup> July, 2023 in which they opted not to take sides on which party ought to be awarded costs and left the issue to the discretion of the court.

### **Analysis**

8. I have read and carefully considered the submissions filed by respective parties. Parties have referred to section 27 of the *Civil Procedure Act* which provides for costs. The provision underscores that the awarding of costs lies within the court's discretion and is not automatic. An examination of this section further reveals that under general circumstances, the successful party in a suit is entitled to recover costs. This principle, that costs typically follow the outcome of the case, has been reinforced through numerous cited legal precedents by the parties, highlighting the established practice within legal proceedings.
9. The Court (Mativo J as he then was) discussed the purpose behind the awarding of costs in *Republic v Rosemary Wairimu Munene (Ex parte Applicant) v Ibururu Dairy Farmers Co-operative Society Ltd*, Judicial Review Application No. 6 of 2004. The court clarified that the intention of awarding costs is to compensate the successful party for the efforts and resources expended in defending the suit. This rationale emphasizes compensation over punishment, indicating that costs are not intended to penalize the party that does not prevail in the litigation.
10. Even then, it is a well-established principle that when exercising discretionary powers regarding the awarding of costs, courts must take into account not only the outcome of the case but also the specific circumstances surrounding each individual case. This approach ensures a fair and equitable determination of costs, reflecting the nuances and complexities of the legal matters at hand, as well as considering the conduct and circumstances of the parties involved.



11. 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 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.”
12. What then are the circumstances of this case? I have looked at the consent dated 24<sup>th</sup> October 2023, which is executed by all the parties. Notably, there are no settlement terms on costs, which aspect parties were unable to agree. Contrary to the assertion by the 3<sup>rd</sup> defendant that there still exists a dispute between the plaintiff and the 3<sup>rd</sup> defendant, the language of the consent agreement clearly indicates a comprehensive settlement among all parties.
13. I agree with the judicial opinion that settling a matter through consent should not automatically negate the possibility of awarding costs. Nor does it imply that there is no successful party in a lawsuit, although it is an important aspect for the court to weigh in determining the award of costs. This perspective was upheld in the case of *Morgan Air Cargo Limited V Everest Enterprises Limited*, [2014] eKLR, where the Court noted that the resolution of a case through settlement does not inherently negate the possibility of awarding costs.
14. Instead, the Court must evaluate the specifics of the settlement, the conduct of the parties, and the broader context of the case to decide regarding costs. This approach underscores the court's discretion in awarding costs, ensuring that the principle of fairness is maintained in accordance with the circumstances surrounding each individual case.
15. Given the circumstances, the veracity of the 3<sup>rd</sup> defendant's defense was not subjected to scrutiny against the plaintiff's evidence, as the case did not advance to a hearing and the 3<sup>rd</sup> defendant withdrew from the suit. Consequently, even if we adhere to the general principle that costs are awarded in favor of the successful party, it cannot be conclusively stated that the 3<sup>rd</sup> defendant emerged as the successful party in this matter. On the contrary, the plaintiff, in her effort to safeguard her interests in the subject property, effectively achieved her objectives when the 3<sup>rd</sup> defendant voluntarily relinquished any claim to the property.
16. The plaintiff persisted with her claims against the defendants, indicating a commitment to protecting her rights. Therefore, it would be inequitable to impose the financial burden of costs on the plaintiff, considering her actions resulted in the preservation of her interests in the property.
17. It is my view that all the parties contributed to the just determination of this suit. In the circumstances and considering what is a fair compromise, especially since fault and liability is not clear-cut, the Court finds that it is in the interest of justice that each party bears their own costs.

### **Determination**

18. I therefore order that the parties to the suit herein shall bear their own costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 23<sup>RD</sup> DAY OF FEBRUARY 2024.**

**F. MUGAMBI**

**JUDGE**

