REPUBLIC OF KENYA

IN THE HICH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 230 OF 2014

PETER MURIUKI NGURE……..PLAINTIFF

VERSUS

EQUITY BANK (K) LTD. ……....DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit vide a Plaint dated 14th August 2013 in which it is averred that the Plaintiff, on or about 11th November 2009, applied for a loan facility of Kshs 380,000 from the Defendant and charged his property title No. Kiine/Kiangai/1478 as security for the same. Subsequently, following an agreement whereby the Defendant agreed to allow him to dispose of one acre of the said portion of land at Kshs 1.2 million to repay the loan. He repaid the loan.

2. However, upon request for release of the title deed, the Defendant refused and/or neglected to return the same. As a result of which the Plaintiff filed this suit seeking for orders that;

(a) Mandatory injunction directed at the Defendant, its agents, servants and/or any other persons so authorized by it to release the Title in respect to Kiine/Kiangai/1478;

(b) Damages for breach of contract;

(c) Costs of this suit;

(d) Interest on (a) and (b) at Court rates;

(d) Any other orders as the Honourable Court may deem just and fit to grant.

3. It is noteworthy that, this suit was initially filed in the Environment and Land Court as Suit No. 996 of 2013. The parties filed their respective pleadings alongside a list and statement of witnesses and/or documents accordingly. However, subsequently on 29th May 2014, the Court was informed that the title deed had since been released to the Plaintiff and that the only issue in the matter was damages. As a result whereof, the parties agreed by consent that the matter be transferred to the Commercial & Tax Division of the High Court for further action. The matter was officially transferred to the said Division on

1st July 2014. The Court record reveals that thereafter the parties held negotiations with a view of recording a consent settlement, but unfortunately none was reached.

4. On 20th November 2015, the parties informed the Court that they had fully complied with the pre-trial directions and the matter was certified ready for hearing on 19th April 2016. For one reason or another, the matter did not proceed as the Defendant sought for time to file further witness statements and at one time the lawyer for the Plaintiff was said to be unwell.

5. On 28th September 2016, the Plaintiff was said to be unwell and the matter was adjourned, and on 5th February 2018. On that date, the Court was informed that the Plaintiff was not in a position to proceed with the case because he was unwell though present in court. The Court was then informed that the Plaintiff was not pursuing prayer (b) of the Plaint and so the only issue remaining was of costs. The Defendant had no objection to the same, whereupon the said prayer was marked as withdrawn. The parties agreed to dispose of the issue of costs through written submissions which were subsequently filed.

6. I have considered the submissions in this ruling. I find that, it is trite law that costs follow the event and are granted at the discretion of the Court. In this regard, Section 27 of the Civil Procedure Act, states 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 of 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."(emphasis mine).

7. It is quite clear therefore that the key word in this Section is "event". As stated in the submissions by the Respondent, this word has been addressed in the Judicial hints on Civil Procedure by Justice (Rtd) Kuloba as follows;

"The words "the event" mean the result of all the proceedings to the litigation. The event is the result of entire litigation. It is clear however, that the word "event" is to be regarded as a collective noun and is to be read distinctively so that in fact it may mean the "events" of separate issues in an action. Thus the expression "the costs shall follow the event" means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it. An issue in this sense need not go to the whole cause of action, but includes any issue which has a direct and definite even in defeating the claim to judgment in the whole or in part".

8. The other issue that arises and is settled in law, is that the Court has unfettered discretion of to award costs, (see *Republic vs Rosemary Wairimu Munene, Exparte Applicant vs Ihururu Dairy Farmers Co-operative Society (2014) eKLR, JR Application NO. 6 of 2014 and Halsbury's Laws of England 4th Edition (Re-issue), (2010), Vol. 10.*

9. In the exercise of this discretion though the Court must always have regard to the fact that costs

awards are all about indemnification, the purpose of costs should always be to indemnify fully or partially the successful party for the expenses incurred in hiring a Counsel to defend or enforce their legal rights. (see ***Harold vs Smith 1860, 5H. & N. 381.***

10. In the case of; ***British Columbia (Minister of Forests) v. Okanagan Indian Band, [2003] 3 S.C.R. 371, 2003 SCC 71.*** the Supreme Court of Canada noted that the traditional purpose of costs awards remained indemnification and that a regular award of costs has four standard characteristics;

(i) They are an award to be made in favour of a successful or deserving litigant, paid by the looser;

(ii) Of necessity, the award must await the conclusion of the proceedings as the success or entitlement cannot be determined before that time;

(iii) They are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceedings;

(iv) They are not payable for the purpose of assuring participation in the proceedings

11. However, it is noteworthy that in addition to indemnity, other justifications have been introduced in law for award of costs, which includes: encouragement of settlement, the prevention of frivolous and vexatious litigation and discouragement of unnecessary steps in the proceedings.

12. Be that as it may, the fixing of costs is to be governed by an overarching principle of reasonableness. In the case of; *Zesta Engineering Ltd vs Cloutier (2002) O.J.No. 4495(C.A.)(QL* it was stated that:

"In our view the costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant."

13. Finally the court will also consider inter alia; the subject matter of suit, the circumstances under which the suit was instituted and/or terminated and the general conduct of the parties.

14. In the instant case, I note that, when the Plaintiff instituted this suit, he had not been given back his title deed by the Defendant. Although I did not see among the documents any letter filed by the Plaintiff showing that the Plaintiff had written to the Defendant to be given the same and the Defendant had refused, it is clear that the title deed was released after the suit was filed.

15. I have looked at the Defence filed in response to the allegation under paragraph 9 of the Plaint that, the Defendant refused and/or neglected to give back to the Plaintiff his original title deed, the Defendant responded to the same, under paragraph 6 of the Defence as follows;

"the Defendant denies the contents of paragraph 8 and 9 of the Plaint and puts the Plaintiff to strict proof thereof"

16. It is therefore clear that the Defendant does not expressly deny that they were holding the Plaintiff's title deed. I have also looked at the statement written by Gerald Gakiri, the Credit Manager at the Defendant's Karatina Branch and note that at paragraph 10, he states as follows;

"the Plaintiff filled a security withdrawal request form on 13/2013 which request was sent to the Central Custody Unit who informed the Karatina Branch that they could not trace the title."

17. At paragraph 11 the witness further states as follows;

"the Central Custody Unit are adamant that they did not receive the said title since then all our efforts to locate and/or otherwise recover the original title deed No. Kiine/Kiangai/1478 has been in vain."

18. It is therefore clear as aforesaid that the Defendant did not release the title deed to the Plaintiff as and when it was due and necessary. That is what informed the filing of the suit herein. In that regard, the Defendant cannot deny that they are liable to indemnify the Plaintiff for any costs incurred from the date of filing of the suit, the 14th August 2013 to the date when the title deed was finally released to the Plaintiff. According to the Court record, that should have been on or before 29th May 2014.

19. In relation to the prayer seeking for general damages for breach of contract, as aforesaid, the law is settled that, costs follow the event. The Defendants instructed a lawyer to defend the suit and indeed filed a statement of Defence, witness statements and list of documents. They have been defending the matter from the date of inception up to the 5th February 2018, when the prayer relating to general damages was withdrawn.

20. The Plaintiff argues that the substantive prayer in the suit was one of release of the Title document to the Plaintiff and the issue of damages was just a corollary to the loss of the title and would not have arisen was there no loss of the title. With due respect, if that was the case, then the Plaintiff should have withdrawn the claim for damages. It was not done the time when the title was released.

21. However in view of the fact that this claim was not fully canvassed in Court, so as to determine which party would have been the successful, it is only fair and just that the Defendant be paid costs for defending the claim up to and including the date of withdrawal.

22. In conclusion therefore, I find that the Plaintiff is entitled to costs in relation to prayer (a) of the Plaint, that is, from the date of filing of the suit until the date when the title was released, and the Defendant is entitled to costs from the date of entering appearance in this matter and defending the claim under prayer (b) of the Plaint until the time it was withdrawn. No other orders are given on costs.

23. Those then are the orders of the Court.

Dated, delivered and signed in an open Court this 3rd day of May 2018.

G.L. NZIOKA

JUDGE

In the presence of;

Ms. Nthiwa for Mr. Kabiru for the Plaintiff

Ms. Muchui for the Defendant

Lang'at…….....Court Assistant