



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT KITALE**

**ELC NO. 3 OF 2020**

**ORGANICS 4 ORPHANS INTERNATIONAL....PLAINTIFF**

**VERSUS**

**THRIVE FOR GOOD FOUNDATION.....1<sup>ST</sup> DEFENDANT**

**DALE PATRICK BOLTON.....2<sup>ND</sup> DEFENDANT**

**LINDA BOLTON.....3<sup>RD</sup> DEFENDANT**

**STEVE PIPPIN.....4<sup>TH</sup> DEFENDANT**

**PAUL WEIGEL.....5<sup>TH</sup> DEFENDANT**

**SOMY WINARDI.....6<sup>TH</sup> DEFENDANT**

**JAMES WOLLER.....7<sup>TH</sup> DEFENDANT**

**KERRI ROBERTS.....8<sup>TH</sup> DEFENDANT**

**AMBROSE LEMAIYAN MOOTIAN.....9<sup>TH</sup> DEFENDANT**

**RAPHAEL MUNENE.....10<sup>TH</sup> DEFENDANT**

**RACHEAL NGURI.....11<sup>TH</sup> DEFENDANT**

**JACOB LOTODO.....12<sup>TH</sup> DEFENDANT**

**JAPHETH LANGAT.....13<sup>TH</sup> DEFENDANT**

**STEPHEN MASATU.....14<sup>TH</sup> DEFENDANT**

**EZEKIEL ABURE FESTO.....15<sup>TH</sup> DEFENDANT**

ESTHER SIRET.....16<sup>TH</sup> DEFENDANT

JOYCE JUMA.....17<sup>TH</sup> DEFENDANT

## RULING

### (On whether or not costs should be borne by a party)

1. This is a ruling on a unique Application by some of the parties in the Suit. When the Plaintiff appeared before this Court through Counsel, on **06/02/2020**, to terminate the proceedings herein, the court reserved a ruling date to determine the issue of the withdrawal of the suit as well as the issue of representation. This was because the other parties alleged that the law firm on record for the Plaintiff, that is **Ms. Kraido & Company Advocates** did not have instructions to institute suit.

2. The ruling was finally delivered on **13/02/2020**. In it, my brother judge declined to issue an order to wit **Ms. M. M. Kimuli & Company Advocates** are properly on record for the Plaintiff instead of **Ms. Kraido & Company Advocates**. He further found that he was unable to discontinue the proceedings since the purported consent to withdraw the suit did not include all the Defendants to the proceedings. Consequently, he directed a stay of proceedings until the issue of representation of the Plaintiff was finally determined to pave way for discontinuance of the proceedings.

3. On **25/02/2021**, my brother judge delivered a subsequent ruling on the Application by **Ms. Kraido & Company Advocates** to determine the question whether the Court's order of **13/02/2020** staying these proceedings ought to be lifted and whether the notice of change of Advocates filed by the firm of **Ms. M. M. Kimuli & Company Advocates** ought to be struck out or lifted. In his wisdom, the learned Judge found that the Application dated **04/03/2020** lacked merit and dismissed the same with costs. He found that the persons appointing the said firm acted *ultra vires* since they had no control over the affairs of the Plaintiff.

4. Subsequently, on **02/12/2021**, the firm of **Ms. Kraido & Company Advocates** elected to cease acting for the Plaintiff. Following a protest by the other parties on the Application by learned counsel to withdraw from acting without a determination as to who would meet the costs hitherto incurred, it was submitted that the said law firm should be condemned to meet costs of the suit. The Court then directed parties to address it on the issue of payment of costs since it was the issue pending for hearing and determination presently.

### BACKGROUND

5. It would only be prudent to lay out the historical background of the proceedings herein without belaboring the point. Through the firm of **Ms. Kraido & Company Advocates**, the Plaintiff instituted the present suit. It did so vide a Plaint verified by an Affidavit which documents were accompanied with a list of witnesses, witness statements as well as a list and a bundle of documents. This was done on **23/01/2020**. The Plaintiff also filed an Application on the same date.

6. On **27/01/2020**, the Plaintiff extracted summons to enter appearance, **10<sup>th</sup>, 12<sup>th</sup> and 16<sup>th</sup>** Defendants appointed the firm of **Ms. Munyao Kayugira & Company Advocates** to come on record on their behalf on **28/01/2020**.

7. When the matter was mentioned on **28/01/2020**, directions on the Plaintiff's Application were issued to the extent that parties would file their necessary pleadings and appear before the Court for *inter partes* hearing on **06/02/2020**.

8. In the meantime, the Plaintiff filed its Supplementary Affidavit on **31/01/2020**. Thereafter, the Plaintiff appeared to have instructed the firm of **Ms. M.M. Kimuli & Company Advocates** to take over the conduct of the matter since they filed a Notice of Change of Advocates on **06/02/2020**. It was on that date that the Court was informed of the Plaintiff's intention to withdraw the suit as it had never intended to institute any proceedings against the Defendants. Reference was made to the consent entered between **Ms. M.M. Kimuli & Company Advocates**, acting for the Plaintiff and **Munyao-Kayugira & Company Advocates**, acting for the **2<sup>nd</sup>, 3<sup>rd</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 12<sup>th</sup> and 16<sup>th</sup>** Defendants. It was filed on **06/02/2020**. It sought to discontinue the suit with no order as to costs. On the same day, the firm of **Ms. Munyao-Kayugira & Company Advocates** came on record for the **2<sup>nd</sup> and 3<sup>rd</sup>** Defendants. Counsel

further filed an Authority to sign Affidavits and a Replying Affidavit on that **06/02/2020**.

9. Following the dispute as to the issue of representation, on **13/02/2020** the Court rendered its decision as to representation of the Plaintiff. By the said decision, it directed that once the issue was resolved, it would pave way for withdrawal or discontinuance of the suit.

10. The firm of **Kraido & Company Advocates**, acting on the instructions of the Plaintiff filed an Application on **02/03/2020**. It was subsequently amended and filed on **04/03/2020**. Directions were issued on **05/03/2020** that the Application dated **04/03/2020** be heard on **18/03/2020**. The Application sought to lift the order of stay of proceedings herein and expunge the Notice of Change of Advocates filed by the firm of **M.M. Kimuli & Company Advocates**.

11. The firm of M/S **Munyao-Kayugira & Company Advocates** opposed the said Application through a response filed on **08/10/2020**. Subsequently, the said firm of **Munyao-Kayugira & Company Advocates** came on record for the **1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 11<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>** and **17<sup>th</sup>** Defendants on **12/10/2020**. They also filed a consent to discontinue the suit. It was entered between the said firm acting for all Defendants and **M.M. Kimuli & Company Advocates**, acting for the Plaintiff.

12. When the Application was poised to be heard on **18/10/2020**, the parties were granted leave to file rejoinders and submissions. Consequently, the matter was adjourned to **03/11/2020**. In the meantime, the Plaintiff through, the firm of **Kraido & Company Advocates**, filed a Supplementary Affidavit on **22/10/2020** and submissions on **26/10/2020**.

13. The firm of **M.M. Kimuli & Company Advocates** acting for the Plaintiff filed a list and bundle of documents on **10/11/2020**. The matter was mentioned on **11/11/2020** but adjourned to **28/01/2021**. It was then adjourned to **02/02/2021** when both Advocates acting for the Plaintiff attended court. Meanwhile, the firm of **M.M. Kimuli & Company Advocates** filed a Replying Affidavit sworn by the **9<sup>th</sup>** Defendant and submissions on **25/01/2021**. The firm of **Kraido & Company Advocates** filed a Supplementary Affidavit on **02/02/2021** on behalf of the Plaintiff.

14. In a ruling delivered on **25/02/2021**, the Court dismissed the Application. The judge reasoned that there was enviably a power struggle in the Plaintiff organization between **Boaz Oduor Ogollah, Douglas Kinaibei Makokha** and their associates on the one part and **Dale Patrick Bolton and Linda Bolton** on the other part. He added that the decision in **MILIMANI HIGH COURT COMMERCIAL AND TAX DIVISION MISC. APPLICATION NO. E0828 OF 2020** determined that **Boaz Oduor Ogollah, Douglas Kinaibei Makokha** and their associates were terminated from employment in the Plaintiff organization. As such, they were incapacitated from issuing any directives, orders or instructions on behalf of the Plaintiff organization. Resultantly, if the firm of **Kraido & Company Advocates** took instructions from them, they could not be deemed to have proper instructions from the Plaintiff to handle this matter.

15. Following the ruling, the firm of **M.M. Kimuli & Company Advocates** acting for the Plaintiff and the firm of **Munyao-Kayugira & Company Advocates** acting for the Defendants filed a consent on **01/03/2021** seeking to wholly discontinue the suit with no orders as to costs.

16. The matter was then mentioned on **30/06/2021**. It was the intention of the Advocates to the consent that the same adopted. However, the firm of **Kraido & Company Advocates** sought leave to file an Application. The matter was consequently adjourned. The said firm filed an Application on **08/07/2021** for review of this Court's antecedent orders. On **22/07/2021**, the court directed that the parties file their respective responses. The Defendants further filed an Application dated **29/07/2021**. They sought to have the firm of **Kraido & Company Advocates** and/or his instructing clients condemned to meet the costs of the suit.

17. The matter was then listed on **14/10/2021** for directions. It was then listed on **01/12/2021** for further directions. A Supplementary Affidavit was also filed by the Defendants on the said date. However, the matter was adjourned to **02/12/2021** when the firm of Ms. **Kraido & Company Advocates** sought leave to cease acting for the Plaintiff. The Defendants' Counsel protested stating that the firm's instructing clients, associates and the said firm should be condemned to meet the costs of the suit after which he may withdraw from the proceedings. The law firm of **Kraido & Company Advocates** was permitted to withdraw from acting for the Plaintiff subject to the determination of the issue of payment of costs. Parties were directed to submit on the same.

## **SUBMISSIONS**

18. The firm of Ms. **Kraido & Company Advocates** filed its submissions on **27/01/2022**. The Defendants filed theirs on **16/02/2022** while the Plaintiff filed its submissions on **16/02/2022**. According to Ms. **Kraido & Company Advocates**, the suit was neither withdrawn nor dismissed. It argued further that the said law firm merely withdrew from acting for the Plaintiff. It submitted further that no basis had been laid out for the Court to exercise its discretion under **Section 27 (1)** of the **Civil Procedure Act**. It maintained that there was no basis to condemn former Advocates on record for a party to meet the costs of a suit. It urged this Court to dismiss the Defendants' Application as frivolous.

19. On their part, the Defendants cited that **Section 27** of the **Civil Procedure Act**. They posited that the provision grants the Court power to determine the issue of payment of costs, that is to say, who is to bear the same and to what extent, besides making such further orders as necessary. They submitted that costs follow the event. They submitted that there was no Board resolution by the Plaintiff's officials passed directing that the present suit be instituted. They cited that the Plaintiff distanced itself from the proceedings, maintaining that it never issued any instructions to commence the suit. In this regard, the Defendants submitted that costs should be met by **Boaz Oduor Ogollah** and **Douglas Kinaibei** for falsifying the intentions of the Plaintiff. They then submitted that the two individuals illegally, erroneously and unlawfully issued instructions to Ms. **Kraido & Company Advocates** under the guise that they were acting for the Plaintiff. On the part of Ms. **Kraido & Company Advocates**, the Defendants submitted that the firm of Ms. **Kraido & Company Advocates**, **Boaz Oduor Ogollah** and **Douglas Kinaibei** be condemned to meet the costs because they continually proceeded with this matter against the decisions of other courts and continued to be in contempt of those orders. They named the matters as:

- a. **Organics 4 Orphans International & 3 others v Boaz Oduor Ogollah & 2 Others [2019] eKLR;**
- b. **Organics 4 Orphans International v Thrive for Good Foundation & 16 Others [2020] eKLR;**
- c. **Organic 4 Orphans International v Thrive for Good Foundation & 9 Others [2020] eKLR;**
- d. **Organics 4 Orphans International & 3 others v Boaz Oduor Ogollah & 2 Others [2021] eKLR.**

20. They submitted further that the failure by the said law firm to abide by the decisions of the courts mentioned condemned the Defendants and Plaintiff to gratuitous litigation spanning over two (2) years. They urged this court to find that the Plaintiff and Defendants spent a considerable amount of time and resources and thus ought to be indemnified for the same.

21. The Plaintiff reiterated the Defendants' submissions in that the suit was fraudulently filed by imposters. Its submission was that **Boaz Oduor Ogollah's** instructions to institute suit were an act of sabotage and acerbity following his termination from employment. It submitted further that **Boaz Oduor Ogollah** was in breach of existing orders of other courts relating to the subject matter. Its position was that he had instructed Ms. **Kraido & Company Advocates** who attended Court proceedings in those other matters (listed above herein) and were therefore very aware of the full meaning and tenor of the orders of other courts.

22. The Plaintiff contended further that it had every intention of discontinuing the suit but the same was fettered by several Applications at the instance of Ms. **Kraido & Company Advocates**. It urged this Court to find Ms. **Kraido & Company Advocates** liable in costs since the firm was fully aware that his instructing clients had no capacity to commence the present suit. It submitted that the said firm, as officers of the court, had a duty to obey court orders. In the alternative, it asked the Court to hold **Boaz Oduor Ogollah** and **Douglas Kinaibei** liable in costs.

#### **ANALYSIS AND DETERMINATION**

23. I have considered the rival responses. I have also considered the respective written submissions by the parties. I shall now proceed to determine the issue. **Section 27 (1)** of the **Civil Procedure Act** provides that the costs of a suit shall be at the discretion of the Court. It provides further that in making a determination thereon, the Court shall have the power to make a finding on by whom and to what extent such costs shall be paid. Again, while acknowledging the above, the proviso to the Subsection is to the effect that costs shall follow the event unless for good reason the Court decides otherwise.

24. This Court is called upon to determine if costs of the suit herein are to be paid, and if so, by who and to what extent. The prayers are that the costs be paid by both the parties who instituted the suit and the Advocates whom they instructed to institute the suit. The

starting point is that it is clear from the law that unless otherwise determined by the Court, costs will follow the event. Thus, the starting point is, what is the does the law regard as "the event?" An event means an occurrence that follows the steps and process taken in a matter. The learned author Richard Kuloba in his book, **Judicial Hints on Civil Procedure, 2<sup>nd</sup> Edition** at page 99 defined the phrase 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 event in defeating the claim to judgment in the whole or in part."**

25. The question that follows is, who may be termed as a successful litigant? In judicial proceedings, a matter may be concluded in several ways. These include, an award of reliefs or declaration or grant of orders sought whether in the Court of first instance or appeal, dismissal of suit or application, withdrawal of the matter or a compromise of the matter in whichever manner as may be agreed between the parties, among many others. In any of the instances, there will be a party in whose favour the orders or reliefs are granted. That is the successful party. In terms of the definition of "the event" which costs follow, the successful party will be entitled to costs unless the Court is of a contrary view for good reason.

26. In the instant case, the argument by the law firm of Ms. **Kraido and Company Advocates** is that the suit has not been withdrawn hence the Court should not grant the orders herein. The arguments by the opposing parties is that they have incurred costs as a result of taking steps in a matter that ought not to have found its way into Court. Of importance to note, is that both the Plaintiff (through directors who had the requisite authority to take any steps on behalf of the Company) and Defendants have, at all material times to this suit, had every intention of abandoning (by withdrawal) the proceedings herein by consent. However, the struggle for representation of the Plaintiff became the focal kernel of the proceedings with diverse, and in other instances contradictory, instructions which was aptly demonstrated from the pleadings presented before this Court.

27. On **13/02/2020** this court determined that the suit ought to be determined once the issue of representation was finalized. I see no reason why I should depart from these findings. It appears that when the firm of Ms. **Kraido & Company Advocates** ceased acting for the Plaintiff on **02/12/2021**, the firm of **M.M. Kimuli & Company Advocates** were deemed properly on record for the Plaintiff and with instructions to conduct the matter. The matter cannot be kept alive when a consent withdrawing it is properly on record. Thus, the consent the said law firm entered into with that of the law firm representing the defendants was effective. This enviably meant that the suit should be discontinued. This is the event herein: parties were sued wrongly, they have succeeded to get the suit out of the way; the initiators of the suit were found to be lacking authority to institute the suit and maintain it, and are now are out of the way, in favour of the rightful parties or directors. In any event, whether recorded or not, the consent on withdrawal is duly entered into by the parties' learned counsel who are properly on record. Thus, the argument by Ms. **Kraido & Company Advocates** that the suit has neither been dismissed nor withdrawn is neither here nor there.

28. The Plaintiff and Defendants, both in consonance, accuse the firm of Ms. **Kraido & Company Advocates** and its instructing clients of maintaining gratuitous, undeserved or unnecessary litigious proceedings that have condemned them to expend resources they otherwise would not have incurred hence seek costs. The basis of their claim lay in the multifaceted decisions of other courts relating to the present subject matter. I need not belabor the same as they were well captured in the ruling of **25/02/2021**.

29. In summary, **Boaz Oduor Ogollah** and **Douglas Kinaibei**, jointly and/or severally instructed the firm of **Kraido & Company Advocates** bereft of any authority from the Plaintiff. When they instructed the said law firm to institute the present suit, the said instructing clients had already been barred from interfering with the affairs of the Plaintiff pending the determination of the dispute by way of arbitration. Ultimately, the upshot of the arbitration findings adopted were that **Boaz Oduor Ogollah** and **Douglas Kinaibei** had since been terminated from the employ of the Plaintiff. All the while, these parties were represented by the firm of Ms. **Kraido & Company Advocates**.

30. Since the said **Boaz Oduor Ogollah** and **Douglas Kinaibei** were not officials of the Plaintiff, they could not render substantive or otherwise instructions to anyone in that behalf; they could not of any aptness render instructions to institute proceedings in this matter. This was a fact well within the knowledge and purview of the firm of Ms. **Kraido & Company Advocates**.

31. It is deplorable that regardless of the orders that remained in force and which were never appealed against, varied or set aside in any way whatsoever, the instructing clients, that is to say, one **Boaz Oduor Ogollah** and **Douglas Kinaibei**, continued to hold themselves out as officials of the Plaintiff organization yet they were incapacitated. Even more baffling were the actions of the firm of Ms. **Kraido and Company Advocates** as officers of the Court, who conducted themselves in the manner demonstrated herein. Their conduct was in total disregard and defiance of legally binding orders of properly instituted courts. It must be emphasized that Court orders are not made in vain. They must be obeyed in the absence of any others to the contrary. To allow a party or Counsel to conduct themselves in such crafty machinations as denoted by **Boaz Oduor Ogollah, Douglas Kinaibei** and their legal counsel is tantamount to subverting the course of justice. This Court shall not be tooled as such.

32. The continued sustenance of the litigation proceedings herein for over **two (2)** years could have been avoided had the two individuals and their learned counsel headed to and followed the clear findings of the Courts. On their part, both the Plaintiff organization upon discovering the existence of this suit and the Defendants, had the very intention not to engage further in the matter; it was never their intention or desire engage each other *ab inito* in any Court proceedings.

33. Time and again, courts are dutifully required to reduce backlog of cases. But the said **Boaz Oduor Ogollah** and **Douglas Kinaibei** and learned counsel intentionally, willfully, maliciously and with impunity trudged on the path forbidden. Such an initiative conceived, incubated, hatched and advanced intentionally cannot by any stretch of imagination be indirectly placed on the innocent parties by burdening them with costs, and the Court be called upon to cement the scheme by not awarding costs. Had this matter been discontinued **two (2)** years ago, a lot of time, energy and resources would have been saved or utilized for other matters with issues in dispute. I therefore find that it is only prudent that the innocent Plaintiff and the Defendants be compensated by way of costs for the considerable amount of time and resources expended in ventilating the case. And since the law firm of Ms. **Kraido & Company Advocates** acted as agents for and on behalf of the two individuals as the principals, namely, **Boaz Oduor Ogollah** and **Douglas Kinaibei**, and they did not swear affidavits to renounce that fact so that it would be clear that the said law firm acted outside of their instructions. Under the law of agency, it is deemed that all the actions of the said law firm bind the principals. It is the principals who are to blame for all the woes in this matter. They must dance into the tune of the music they orchestrated in this opera of events.

34. I take further note that the Application dated **07/07/2021** and filed on **08/07/2021** was done so without authority, following withdrawal of representation of the Plaintiff by the firm of Ms. **Kraido & Company Advocates** who lodged it. The same cannot be with any merit whatsoever.

#### **ORDERS AND DISPOSITION**

35. In light of the above, I make the following consequential orders:

- a. The Application dated 07/07/2021 and filed on 08/07/2021 is marked as struck out with costs to the respondents.**
- b. The suit is marked as wholly discontinued.**
- c. The costs of the entire suit and interlocutory proceedings shall be borne by the individuals who instructed the firm of Ms Kraido & Company Advocates who were their agents. To be clear, one Boaz Oduor Ogollah and Douglas Kinaibei shall personally meet the costs of the Plaintiff and the Defendants' herein.**

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 6<sup>TH</sup> DAY OF APRIL, 2022**

**DR. IUR FRED NYAGAKA**

**JUDGE, ELC, KITALE**



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