



**Matibuko v Avugwi (Environment & Land Case 38 of 2020)
[2023] KEELC 19081 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19081 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 38 OF 2020**

**FO NYAGAKA, J
JULY 27, 2023**

BETWEEN

DR. ISAACK K. MATIBUKO PLAINTIFF

AND

JANE NYAKINYWA AVUGWI DEFENDANT

RULING

1. The Plaintiff who was the purchaser of one (1) acre of land being part of LR No 2116/942 - Title IR 38387 which, under the then new land regime, the *Registered Land Act*, Chapter 300 (repealed) Laws of Kenya, finally became Kitale Municipality Block 10/67, sued the Defendant who was the vendor. His claim was for specific performance of the sale agreement entered into on March 26, 2007. He averred to have been let into possession and commenced developments thereon but these were stalled when the devolution came into being. He pleaded further that the Defendant informed him that the transfer documents had been lost during the setting up of the devolution units. He averred that the Defendant made fresh demands upon return from the United States of America in 2020 after having been there from 2013.
2. He sought the relief of specific performance for the transfer of the one (1) acre out of the larger parcel of land (referred to above), and in the alternative the Deputy Registrar of the High Court to be empowered to execute all documents and papers necessary for the effectual transfer of the suit property in his favour, and costs. In the interim, the Plaintiff sought an injunction over the part of the property claimed by him and the Court having listened to the arguments over the application determined it that there be a *status quo* maintained on both the title and physical suit land until the determination of the case.
3. The Defendant file Statement of Defence by which she denied all the allegations in the Plaint. Particularly, she refuted the fact of the Plaintiff and her entering into an agreement over the sale of the alleged portion or the paying her any part of the purchase price. She denied the allegation of the



- Plaintiff taking possession of the land or making any developments thereon or at all and stated that she had no obligation to transfer the portion of the land to the Plaintiff. She alleged that she did not freely enter into contract and that the Plaintiff did not perform his obligations under the contract and lastly that the claim was time-barred. She prayed for the dismissal of the Claim with costs.
4. Over time the Court impressed on the parties to reconsider the truth of over the claim and resolve it. The parties heeded and commenced negotiations with a view to settling the claim. On May 18, 2023 the parties entered into a consent which they duly signed and filed for adoption as the judgment of the Court. In brief it was to the effect that the Defendant does transfer one (1) acre of part land parcel No LR 2116/942 Kitale Municipality, being the area the Plaintiff already occupied, the Plaintiff to meet the costs of Survey pertaining to his one (1) acre entitlement and pay statutory arrears in respect of the share of the one (1) acre he is entitled to, the Surveyors to execute their mandate within 120 days and in the event of any delay parties be at liberty to apply, and finally, the Court to determine who to pay the costs of the suit, basing it on Affidavits to be filed over the issue by the parties.
 5. Subsequent to the consent the parties filed Affidavits urging their positions. The Plaintiff swore his Affidavit on July 11, 2023 and filed it on July 12, 2023. He deponed that he bought the one (1) acre from the Defendant as per the agreement entered into on March 26, 2007 and took possession of the same. He deponed further that the Defendant has been unfair to him in failing to transfer the one (1) acre to him despite several demands until he moved the Court. He swore that he had even been faithfully paying for the statutory rates over the portion of the land even though he did not have the ownership perfected in his favour. That the Defendant caused him to incur the costs of filing the suit and paying learned counsel for the services of filing and prosecuting the claim. He deponed further that had the Defendant transferred the property in time as agreed he was not have paid so much in terms of transfer fees then in 2008/2009 as he was going to pay now. He prayed for compensation.
 6. On her part the Defendant swore her affidavit for exemption on June 2, 2023 and filed it the same date. She deponed that she neither sold the property to the Plaintiff nor signed the agreement which was at the nerve centre of the suit herein. That instead it was her mother, one Leba Simon Obeli who made the agreement without her written authority and consent, and that she did not receive any monies pursuant to the said agreement. She annexed as JNA 1(b) a copy of a bank cheque deposit slip for the sum of Kshs 1,275,000/= issued by the Cooperative Bank of Kenya, Kitale, in favour of one Leba Simon Obeli. She alleged that her mother forged her signature when the agreement was signed between her and the Plaintiff's agent hence the agreement was not legally binding on her and it should not be used against her. She annexed as JNA 1(a) to the affidavit the copy of the agreement.
 7. She made a passionate deposition that despite her lack of involvement she only stepped in to settle the matter amicably to save her aged and ailing mother who was then facing criminal charges of obtaining money by false pretenses, and to spare her family from embarrassment. Further, she deponed that only the transfer of the title was outstanding and that she owned an adjacent parcel which she intended to construct a residential home and the two would be neighbours forever. She therefore deponed that in the interest of fostering a harmonious relationship between the Plaintiff and the Defendant and her relatives the matter be solved amicably.
 8. The Defendant deponed further that her actions were motivated by the familial duty and desire to shield her mother from adverse consequences of the litigation herein and that she too had incurred costs in defending the suit through instructions to learned counsel. Again, that she too would incur future expenses as a result of the transfer of the property to the Plaintiff. She asked the Court to order that each party bears own costs.



Issue, Analysis And Determination

9. I have deeply considered the issue before me. It calls on Solomonian wisdom to decide on it. I am alive to the fact that the law is clear on how the court or judge is to handle the issue of costs.
10. This suit is at the verge of full settlement following a consent judgment as stated above. Only the issue of costs outstands. It is indeed true that on March 26, 2007 an agreement was entered into between two parties over the sale of the one (1) acre in issue. As to the validity or otherwise of the transaction, it is water under the bridge. This is because the parties herein have already agreed to a settlement that the said one (1) acre be transferred to the Plaintiff from the Defendant's parcel of land herein referred to as LR 2116/942 - title IR 58387. The issue then is whether the Defendant should be condemned to pay the costs of the suit or not.
11. Regarding the payment of costs to either party, the starting point is a consideration of the law on the law on award of costs. Section 27 (1) of the [Civil Procedure Act](#) provides that,

“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.”
12. The Supreme Court of Kenya was called upon to consider what may amount to “good reason” to base for not awarding costs. It did so in the case of [Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 others](#) [2014] eKLR where it held as follows:

“It is clear that there is no prescribed definition of any set of “good reasons” that will justify a Court’s departure, in awarding costs, from the general rule, costs-follow-the-event. In the classic common law style, the Courts have proceeded on a case-by-case basis, to identify “good reasons” for such a departure. An examination of evolving practices on this question, shows that, as an example, matters in the domain of public-interest litigation tend to be exempted from award of costs. In *Amoni Thomas Amfry and Another v The Minister for Lands and Another*, Nairobi High Court Petition No 6 of 2013, Majanja, J concurred with the decision in *Harun Mwau and Others v Attorney-General and Others*, Nairobi High Court Petition No 65 of 2011, [2012] eKLR, in which it was held [para 180]:

“In matters concerning public-interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a party who has brought a case against the State but lost. Equally, there is no reason why the State should not be ordered to pay costs to a successful litigant.”
13. It follows that it is in the discretion of the Judge or Court handing the matter to decide on who to bear costs and to what extent although ordinarily they follow the event. Where the judge or court is of the view that the success of the matter or failure of the matter should not be the basis of determining the party to bear costs, he/she ought to give the reason therefor. One of the reasons that courts have



considered is whether the matter is a public interest litigation one or not, and whether or not one is a frivolous or vexatious one. But the Court may consider a raft of other issues such as the conduct of the parties throughout the matter, the concessions given by either of the parties, the pleas for exemption and their basis, the future relationships of the parties, and so on.

14. Thus, in *Republic v Independent Electoral and Boundaries Commission & 2 Others Ex-parte Alinoor Derow Abdullahi & Others* (2017) eKLR, Odunga J (as he then was) summarized some of the factors to consider on whether or not to award costs in a public litigation case as follows:

“In determining the issue of costs, the Court is entitled to look at inter alia the conduct of the parties, the subject of litigation, the circumstances which led to the institution of the legal proceedings, the events which eventually led to their termination, the stage at which the proceedings were terminated, the manner in which they were terminated, the relationship between the parties and the need to promote reconciliation amongst the disputing parties pursuant to Article 159(2)(c) of the *Constitution*. In other words, the court may not only consider the conduct of the party in the actual litigation, but the matters which led up to litigation, the eventual termination thereof and the likely consequences of the order for costs. See *Hussein Janmohamed & Sons vs Twentsche Overseas Trading Co Ltd* [1967] EA 287 and Mulla (12thEdn) P 150”.

15. One important and virtually exempt issue that stands out except if the matter was frivolous is if it was in public interest. The Supreme Court of Kenya, in *Mumo Matemu vs Trusted Society of Human Rights Alliance and 5 others* [2014] eKLR, explained the essence of public interest litigation thus;

“Public Interest Litigation plays a transformative role in society. It allows various issues affecting the various spheres of society to be presented for litigation. This was the *Constitution*'s aim in enlarging *locus standi* in human rights and constitutional litigation. *Locus standi* has a close nexus to the right of access to justice. In instances where claims in the interest of the public are threatened by administrative action to the detriment of constitutional interpretation and application, the Court has discretion on a case by case basis, to evaluate the terms and public nature of the matter vis a vis the status of the parties before it. This discretion is drawn from the command of Article 259 (1), to interpret the *Constitution* in a manner that promotes its values and purposes, advances the rule of law, human rights and fundamental freedoms, permits the development of the law and contributes to good governance”.

16. In the case of *Brian Asin & 2 others v Wafula W Chebukati & 9 Others* [2017] eKLR the issue as to whether public interest litigation should attract costs was determined as follows:

60. The Public Interest Litigation was designed to serve the purpose of protecting rights of the public at large through vigilant action by public spirited persons and swift justice. But the profound need of this tool has been plagued with misuses by persons who file Public Interest Litigations just for the publicity and those with vested political interests. The courts therefore, need to keep a check on the cases being filed and ensure the bona fide interest of the petitioners and the nature of the cause of action, in order to avoid unnecessary litigations. Vexatious and mischievous litigation must be identified and struck down so that the objectives of Public Interest Litigation aren't violated. The *constitution* envisages the judiciary as “a bastion of rights and justice...”

63. The question is whether the proceedings before me are frivolous or vexatious bearing in mind that it is the duty of the court to see whether the petitioner who approaches the court has



a bona fide intention and not a motive for personal gain, private profit or political or other oblique considerations.”

17. In *Feisal Hassan & 2 others v Public Service Board of Marsabit County & another* [2016] eKLR it was held that:

“3. In constitutional litigation, the principle of access to the court must, consistently with the public importance and interest in the observance and enforcement of the Bill of Rights in the *Constitution*, override the general principle that costs follow the event, unless it can be shown that the petition was wholly frivolous, or that petitioner was guilty of abuse of the constitutional court process by say filing a constitutional petition on matters that do not raise purely constitutional issues and which properly belonged to other competent courts or tribunals, and which should, therefore, have been filed and competently disposed of by those other courts or tribunals. However, a petitioner for constitutional enforcement need not present a case that must succeed and it cannot therefore, be taken against him that his petition is eventually lost if it otherwise meets the public interest criteria. Although developed in the realm of protection and enforcement of rights and fundamental freedoms, the principle applies with the same force in general constitutional litigation for interpretation and enforcement of the *Constitution*. Indeed, the rights of access to court under Article 22 and 258 of the *Constitution* for the enforcement, respectively, of the Bill of Rights and the other parts of the *Constitution* are in the same terms.”

18. In the instant case, on one hand the Plaintiff deponed that the Defendant had been unfair to him in failing to transfer the one (1) acre to him causing him to incur expenses in bringing the suit, and making him to pay high fees in the transfer of the property now compared to 2008/2009 when he should have done so at a lower cost.
19. On the other hand, the Defendant deponed that she never sold the property to the Plaintiff but that her mother did it without her written authority and consent by forging her signature. That she only decided to settle the suit herein to save her aged and ailing mother who was then facing criminal charges of obtaining money by false pretenses, and spare her family from embarrassment. She argued that she owned an adjacent parcel which intended to construct a residential home and the two remain neighbours forever hence she wished they have a harmonious relationship.
20. Considering the law as it is, the case law quoted above, the fact that, indeed there documents annexed by the Defendant in the affidavit for exemption show that indeed it was the mother who was paid virtually all the transaction money yet the agreement did not indicate that the Defendant authorized the payment to be in her name, and given that the parties are likely to be lifelong neighbours, and given that the sum that is likely to be paid as stamp duty for the transfer of the land to him presently appears to be high compared to the sum payable for the service in 2008/2009 yet it is as a result of the fall of the “Shilling” in value, I am convinced that the discretion of the Court be exercised in favour of the Defendant. Moreover, the suit did not proceed to hearing, and the Defendant willingly agreed to transfer the suit land [one (1) acre], upon realizing that her mother had duped the Plaintiff. Thus, given that the Plaintiff incurred fees in instructing learned counsel to represent him, but on the other hand, in the spirit of fostering good future relations between the parties I would exercise my discretion to award the Plaintiff costs which I will cap at a maximum of Kenya Shillings fifty thousand (Kshs 50,000/=) only. This may be in instalments of Kenya Shillings twenty-five (Kshs 25,000/=) only each month, beginning from 01/09/2023, in default, execution to issue.
21. Orders accordingly.



**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 27TH
DAY OF JULY, 2023.**

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE

