



Cannon Aluminium Fabricators Ltd v Wendano Matuu Co Ltd (Environment & Land Case 455 of 2017) [2023] KEELC 19180 (KLR) (25 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19180 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 455 OF 2017**

CA OCHIENG, J

JULY 25, 2023

BETWEEN

CANNON ALUMINIUM FABRICATORS LTD PLAINTIFF

AND

WENDANO MATUU CO LTD DEFENDANT

RULING

1. What is before court for determination is the issue of costs. The Plaintiff seeks the costs of this suit but the defendant vehemently opposes it. Parties were directed to file their respective submissions to canvass the issue of costs.
2. The Plaintiff in its submissions has provided a background of this matter and insists that costs follow the event. It argues that it honoured the terms and conditions of the Agreement of Sale but the Defendant's intention was to disappoint it by not transferring the suit property, and granting it vacant possession, which culminated in the claim herein. It contends that it is entitled to costs as it engaged an Advocate who prepared the Complaint, Application, affidavits and argued the Application for specific performance. To support its averments, it relied on the following decisions: *Orix Oil (Kenya) Ltd v Paul Kabuu & 2 others* (2014) eKLR and Embu CA N 16 of 2016 (*Robert Mwaniki Ndwiga v Agatha Kaugi Riungi*).
3. The defendant in its submissions insists that the plaintiff is not entitled to the claim sought as it acted in good faith with the motive not to waste the court's time and transferred the suit property to the Plaintiff. It argues that it acted with an aim not to abuse the court process and the court should hence consider its efforts and not subject it to payment of costs of the suit. It contends that the Plaintiff's claim is a violation to the maxim of equity. Further, that the Application for costs should be struck out. To buttress its arguments, it relied on the following decisions: *Morgan Air Cargo Limited v Everest Enterprises Limited* (2014) eKLR; Cecilia Karuru Ngayu v Barclays Bank of Kenya & another (2016)



Analysis and Determination

4. I have considered the rivalling submissions filed by the respective parties herein as well as perused the court record, and the only issue for determination is whether the plaintiff is entitled to the costs of the suit. Before I proceed to make a determination on costs, I will provide a brief background of this matter.
5. The plaintiff herein filed a suit vide a Plaint dated the November 15, 2017 where it sought for the following orders:
 - a. A mandatory injunction compelling the defendant to transfer to the plaintiff Eight Five (85) acres of Title No. Ndonyo Sabuk/ Kiboko Block 1/884.
 - b. Mesne profits.
 - c. General damages for breach of contract
 - d. Costs of the suit and interest.
6. The Plaintiff contemporaneously filed a Notice of Motion Application dated the November 15, 2017 seeking various orders.
7. The Defendant filed a Replying Affidavit and Grounds of Opposition dated the January 26, 2018, opposing the Notice of Motion Application dated the November 15, 2017. The Defendant further filed a Defence including Counter-claim dated the March 2, 2018, after which the Plaintiff filed a reply to Defence and Defence to Counter-claim dated the March 13, 2018. I note both the plaintiff and defendant filed their respective written submissions to canvass the Notice of Motion Application dated the November 15, 2017. Further, there was an Application filed by two intended Interested Parties dated the May 23, 2018. From the court record, it emerged that when the Ruling to the Application dated the November 15, 2017 was pending, the defendant proceeded to transfer land parcel number Donyo Sabuk/Kiboko Block 1/812 to the Plaintiff and the Plaintiff was issued with a Certificate of Title dated the April 28, 2019. The defendant is hence opposing the granting of costs and argues that it acted in good faith by transferring the suit property during the pendency of the suit.
8. The legal provisions governing costs is contained in section 27 of the [Civil Procedure Act](#) which provides that:

“27 (1) 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 give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers.”
9. Further, on award of Costs, the [Halsbury's Laws of England](#), 4th Edition (Re-issue) [2010], Vol.10. para 16, states that:

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has



an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice.”

10. 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.”

11. See also the decision of *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another* (2016) eKLR.

12. In the current scenario, the Plaintiff filed the Plaintiff, an interlocutory Application including a reply to Defence and Defence to Counter-claim. I note from the court record that there were several court appearances and even though the defendant proceeded to transfer the suit property to the plaintiff, during the pendency of the suit, to my mind, the Plaintiff had already put in a lot of effort in this suit, which as a court I cannot disregard. Insofar as the defendant insists, it acted in good faith by transferring the suit land to the plaintiff hence it is not entitled to costs, however based on the circumstances at hand while associating myself with the decisions I have cited including the legal provisions quoted, in the interest of justice, I find that the plaintiff is indeed entitled to costs since it already undertook several steps to seek resolution of the dispute herein as well as making several court appearances. In the foregoing, I will proceed to Award the plaintiff costs of this suit which will be subject to taxation by the Taxing Officer.

I so order.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 25TH DAY OF JULY, 2023

CHRISTINE OCHIENG

JUDGE

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