



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

ELC. NO.363 OF 2012

SAMWEL KIPKENY YEGO.....-PLAINTIFF/APPLICANT

VERSUS

LUKA NGOSOEL.....1st DEFENDANT/RESPONDENT

MATHEW KETER.....2nd DEFENDANT/RESPONDENT

ERNEST BIRGEN.....3rd DEFENDANT/RESPONDENT

BENJAMIN KATAM.....4th DEFENDANT/RESPONDENT

COSMAS KORIR.....5th DEFENDANT/RESPONDENT

JANE JEPKORIR.....6th DEFENDANT/RESPONDENT

ROSE MAIYO.....7th DEFENDANT/RESPONDENT

RULING

1. The plaintiff moved the court through the application dated the 14th June, 2021 seeking for among others that;

a. Spent.

b. Pending the inter partes hearing of the application, the delivery of the ruling on the 2nd and 4th defendants' bill of costs dated the 3rd July, 2020 set for 15th July, 2021 be arrested.

c. The court to strike out the 2nd and 4th defendants' bill of costs dated the 3rd July, 2020.

d. The 2nd and 4th defendants to pay the costs of the application.

The application is based on the eighteen (18) grounds on its face marked (a) to (r), among them being that the judgement delivered on 9th April, 2019 does not contain an implicit award of costs; that the 2nd and 4th defendants' bill of costs was erroneously filed, and should be struck out. The application is supported by the affidavit sworn by **Samwel Kipkeny Yego**, the plaintiff on the 14th June, 2021. The application was certified urgent by the Deputy Registrar on the date it was filed, and set for *inter partes* hearing on the 16th June, 2021 when both Counsel were heard and directions on filing a reply and submissions issued.

2. The application is opposed through the replying affidavit sworn by **Benjamin Katam**, the 4th defendant, on the 13th July, 2021. His depones that they are entitled to costs as their counterclaim was allowed in its entirety. That their bill of costs was drawn pursuant to the orders of the judgment delivered on 9th April, 2019 as costs follow the event. That **Section 27 of the Civil Procedure Act** contains the general rule that costs should be awarded to the successful party, unless directed otherwise for good reasons. That the application was not brought in good faith and should be dismissed with costs.

3. The learned counsel for the 2nd and 4th defendants filed their submissions dated the 13th July, 2021 while that for the plaintiff filed theirs dated the 11th August, 2021.

4. The following are the issues for the court's determinations;

a. Whether the 2nd and 4th defendants are entitled to costs under the judgment of the court delivered on the 9th April, 2019.

b. Who pays the costs in this application?

5. The court has carefully considered the grounds on the notice of motion, the affidavit evidence, written submissions by both counsel for the parties, superior courts decisions cited thereon and come to the following findings;

(a) That the issue of costs in civil dispute cases is as guided by **Section 27 of the Civil Procedure Act, chapter 21 of Laws of Kenya** 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 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.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.” [emphasis mine]

The record confirms that the plaintiff commenced this suit against the seven (7) named defendants through the plaint dated and filed on the 6th July, 2007 seeking for among others, permanent injunction and declaratory order in respect of land parcel Uasin Gishu/Kormamet Scheme/120, which he claimed was registered in his name. The defendants opposed the claim through their Joint Statement of Defence and Counterclaim dated the 30th November, 2007 in which they sought for the plaintiff's suit to be dismissed with costs, judgment be entered for them against the plaintiff for declaratory order that they are the owners of portions of the suit land, or alternatively refund of purchase price paid, damages, costs and interests among others.

(b) The record further confirms that the defendants participated in the proceedings throughout, and have had counsel on record from the time of filing the Joint Statement of Defence and Counterclaim to date. The defendants, just like the plaintiff, must have incurred expenses in instructing counsel, prosecuting and defending their respective suit and or counterclaim.

(c) That further, the record shows that the suit was heard and determined on merit through the judgement delivered on the 9th April, 2019. The following paragraphs of the said judgment leaves no doubt as to who between the plaintiff and defendants was successful;

“... Though there is no consent of the Land Control Board in respect of the agreements dated 10th January, 2004, 23rd December, 2003, 5th august, 1998, this court is satisfied that the plaintiff entered into agreement with the 2nd and 4th defendants. He sold the 2nd defendant 5.3 acres of Uasin Gishu/Kormamet Scheme/120 in the year 2003 and 2005. He had sold the 4th defendant 123 acres between 1197 (sic) and 2000.

This court finds that the defendants are in possession of the disputed parcels of land having been put in possession by the plaintiff after they entered into contracts for the sale of the disputed parcel.....

I do find that in this matter, the plaintiff signed the agreements of sale and gave the defendants possession of the suit property, hence he is estopped from repudiating the sale. By receiving money from the defendants and entering into agreement of sale and giving possession to the defendants, a constructive trust was created relating to the suit parcel. The upshot of the above is that the suit is dismissed. The counterclaim is allowed; thus, a declaratory order is hereby issued that the defendants are the owners of the portions of land under title No. Uasin Gishu/Kormamet Scheme/120 and that the said parcel be registered in the names of the defendants.

Orders accordingly.” [emphasis mine]

The foregoing confirms that the plaintiff's suit was dismissed, and as the court did not order otherwise on the issue of costs, the proviso in **section 27 of the Civil Procedure Act** that costs ***“shall follow the event”***, leaves no doubt that the defendants, being the successful parties in the dismissal of the plaintiff's suit, are entitled to costs of that suit. That further, the defendants being the successful parties in their counterclaim are by the application of the said proviso and reasoning, also entitled to costs thereof.

(d) That had the court intended not to grant or award the defendants costs in respect of the plaintiff's suit, and or their counterclaim, a specific order to that effect would have been issued. That accordingly the I find that the defendants are pursuant to the court's judgment of the 9th April, 2019 at liberty to file, serve and prosecute their Bill of Costs, as they have already done, for taxation by the court's taxing master.

6. The foregoing shows that the plaintiff's application dated the 14th June, 2021 is without merit and is hereby dismissed with costs.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 16TH DAY OF FEBRUARY, 2022.

S M KIBUNJA, J.

ENVIRONMENT AND LAND COURT JUDGE

IN THE VIRTUAL PRESENCE OF:

PLAINTIFF: *Absent*

DEFENDANTS: *Absent*

COUNSEL: *Absent*

ONIALA: COURT ASSISTANT