



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT 17 OF 2007

JULIUS KENYATTA OGACHI:.....PLAINTIFF

VERSUS

MARY NJAMBI GITHENJI:.....DEFENDANT

RULING

By his plaint dated 27th January, 2007, and filed on 5th February, 2007 the plaintiff sought two orders of the court apart from costs namely:

(a) An order of specific performance against the defendant to transfer parcels of land known as Eldoret Municipality Block 14/354, Plot Nos. 1774 and 1775 to the plaintiff and in default thereof the Deputy Registrar to sign the transfer and all other documents to vest the said land in the plaintiff.

(b) Damages for breach of contract.

In the defence delivered by the defendant, the plaintiff's claim was denied. The defendant further set up the defence of frustration and contended that he had thereby been discharged from further performance of the contract. In the particulars of frustration, the defendant cited an order in Eldoret HCCC NO. 151 of 1998 restraining the said transfer.

On 16th April, 2007 the plaintiff framed issues which included the following:-

- 2) Whether or not on or about 1st July, 1999, the plaintiff purchased the suit land.**
- 3) Whether or not the defendant gave vacant possession of the suit land to the plaintiff and undertook to transfer the suit land to the plaintiff within two months of the contract.**
- 4) Whether the plaintiff is entitled to an order of specific performance.**
- 5) Whether the sale agreement was frustrated.**
- 6) Whether there is breach of contract.**

7) Whether notice of intention to sue was served.

8) Who should be condemned to pay costs?

The record shows that the plaintiff testified and was cross examined. He blamed the defendant for not disclosing the encumbrance against the title. On 10th March, 2008, judgment was entered in favour of the plaintiff by consent and the question of costs was to be agreed or be argued. There was no agreement, hence this decision.

On 14th March, 2012, Counsel agreed to file written submissions on the issue of costs which submissions were in place by 16th May, 2012. I have considered those submissions. I have also considered the authorities relied upon by counsel. Having done so, I take the following view of the matter. It is plain that the principal claim of the plaintiff was determined in his favour. The defendant did not raise a counter-claim. Under Section 27(1) of the Civil Procedure Act, costs are at the discretion of the court. Ordinarily, however, they follow the event save for good reason. In this case, the plaintiff succeeded in his principal claim. So, under the provisions of Section 27 of the Civil Procedure Act, costs should follow that event.

In the circumstance of this case, a notice of intention to sue whether served or not would not affect the order on costs because even by the time the suit was set down for hearing, the defendant was not in a position to complete the contract of sale because of the encumbrance which was not registered against the title at the behest of the plaintiff. The plaintiff performed his part of the bargain and expected the defendant to do the same which she did not until he filed this suit and testified. The plaintiff therefore played no part in the alleged frustration.

The case of Amradha Construction Company -Vs- Sultan Service Station [1968] E.A. 85, relied upon by the defendant is distinguishable from the present case. There, the respondent sued the appellant for Kshs. 5,652/85. He then deposited that sum in court with an admission of liability and the sum was paid out to the respondent. With regard to costs the appellant objected to any order in that regard because he had not been served with a notice of intention to sue before action. The subordinate court nevertheless ordered him to pay costs to the respondent thereby provoking an appeal to the Tanzanian High Court which held as follows:-

“ (i) it is clear from r. 61 of the Rules of Court (Advocates’ Remuneration and Taxation of Costs Rules) that where a suit is brought without notice to the defendant and the defendant pays the amount claimed before or even on the date of the first hearing, no advocates costs will be allowed except on a special order of the court;

(ii) the payment into court was made for the purpose of discharging the liability of the appellant to the respondent;

(iii) on the facts, the respondent had not made out a special case which would entitle him to costs.”

Those facts are clearly distinguishable from the facts herein. In this case, there was no admission of liability by the defendant before the suit came up for hearing. Indeed the consent judgment was recorded when the plaintiff had testified and had been cross-examined. In the premises, Rule 53 of the Advocate’s Remuneration Order which would appear to be in the same terms as Rule 61 of the Rules of Court (Advocates Remuneration and Taxation of Costs Rules) of Tanzania, is not therefore applicable in this case.

In my judgment, there are no circumstances in this case which would make me depart from the principle that costs follow the event. I accordingly hold that costs of this suit are payable to the plaintiff by the defendant. However, the plaintiff has not demonstrated that his claim could not have been determined by the subordinate court. He pleaded in paragraph (4) of his plaint that he purchased the suit land for Kshs. 700,000/-. The value of the subject matter was therefore within the pecuniary jurisdiction of the subordinate court and the order of specific performance which was finally recorded by consent

could also have been made by that court. In the premises, the plaintiff's costs shall be assessed on the subordinate court scale.

Orders accordingly.

DATED AND DELIVERED AT ELDORET

THIS 20TH DAY OF JUNE, 2012

F. AZANGALALA

JUDGE

Read in the presence of :-

Mr. Kirwa for the plaintiff and

Mr. Kitiwa H/B for Mr. Njuguna for the defendant.

F. AZANGALALA

JUDGE

20TH JUNE, 2012