



Kingorani Investments Limited v Sigma Limited & 9 others (Environment and Land Case Civil Suit 1581 of 2016) [2022] KEELC 13512 (KLR) (22 September 2022) (Ruling)

Neutral citation: [2022] KEELC 13512 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 1581 OF 2016
SO OKONG'O, J
SEPTEMBER 22, 2022**

BETWEEN

KINGORANI INVESTMENTS LIMITED PLAINTIFF

AND

SIGMA LIMITED 1ST DEFENDANT

JAMES GICHUKI WAMBUGU 2ND DEFENDANT

SAMUEL MWANGI 3RD DEFENDANT

GARANCO FIVE LIMITED 4TH DEFENDANT

SAADIA OMAR SHURIE 5TH DEFENDANT

NURU SAID AHMED 6TH DEFENDANT

ABBAS IBRAHIM KHALIF 7TH DEFENDANT

NAIROBI COUNTY GOVERNMENT 8TH DEFENDANT

CHIEF LAND REGISTRAR 9TH DEFENDANT

WHITE LOTUS PROJECTS 10TH DEFENDANT

RULING

1. The plaintiff brought this suit against the defendants through a plaint dated December 14, 2016 in which the plaintiff sought among other reliefs, a permanent injunction restraining the defendants from entering upon, or trespassing, constructing or continuing with the construction of structures, offering for sale, selling, disposing of, charging, sub-dividing, dealing, alienating, occupying, managing, letting or otherwise using, residing and remaining or in any other way interfering with the plaintiff's proprietary rights including the right to quiet possession and enjoyment of all that piece of land known



as to LR No 209/11142 (IR No 48067), Nairobi (hereinafter referred to as “the suit property”), a declaration that the plaintiff was the legitimate and lawful registered owner of the suit property, a declaration that the purported transfer and registration of the suit property in the name of the 1st defendant was fraudulent, illegal, null and void, a declaration that the purported transfer and registration of the suit property in the name of the 4th defendant was fraudulent, illegal, null and void, an order directing the 8th and 9th defendants to rectify the records in their custody to reflect the plaintiff as the owner of the suit property and an order directing the 9th defendant to cancel the parallel title held by the 4th defendant and all the entries therein and general damages.

2. The plaintiff averred that it was at all material times the registered owner of the suit property and that on December 10, 1998 the suit property was illegally and fraudulently transferred from its name to that of the 1st defendant and subsequently by the 1st defendant to the 4th defendant. The plaintiff averred that the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th defendants participated in the fraud, collusion, conspiracy and illegality that caused the suit property to be registered in the 1st defendant’s name and subsequently to the name of the 4th defendant. The plaintiff averred that the 10th defendant who was developing the adjacent parcel of land was in collusion with the 8th defendant permitted to store building materials on the suit property thereby interfering with the plaintiff’s possession and use of the suit property.
3. From the record, only the 2nd and 5th defendants filed statements of defence denying the plaintiff’s claim. I have not seen a defence by any other defendant on record.
4. Together with the plaint, the plaintiff filed an application by way of a notice of motion dated December 14, 2016 seeking a temporary injunction restraining the defendants by themselves and/or through their principals, agents, employees, servants and any other persons acting under their authority from trespassing, remaining in occupation, entering, occupying, dealing and or in any manner howsoever interfering with its ownership, occupation, possession and use of the suit property pending the hearing if the suit.
5. On January 9, 2017, the court granted the injunctive orders that were sought by the plaintiff on a temporary basis pending the hearing of the application inter partes. On October 16, 2017, the court confirmed and extended the said orders until the hearing and determination of the suit.
6. On November 20, 2017 the plaintiff brought an application of the same date seeking the following orders:
 - 1) Pending the hearing and determination of this suit, the respondents and or their contractors, agents, directors, associates, partners or employees be ordered to vacate and be restrained from entering, occupying and or using the suit property and the said parties to vacate the suit property within 24 hours of being served with the order failing which eviction to issue forthwith with the assistance of the Officer Commanding Station, Upper Hill Police Post/ Station.
 - 2) The respondents herein or so many of them as may be found to have been directly responsible for the excavations and works on the suit property be ordered to refill the same and restore the suit property to the position it was before such excavations and works within such time as may be ordered and in default, the applicant be at liberty to secure due compliance at the personal costs of such respondents.
 - 3) The court be pleased to find that the 1st to 10th respondents are jointly and severally in contempt of court for disobeying and or disregarding the orders given on January 11, 2017 and October 18, 2017.



- 4) Leave be granted for the committal to jail for a period of 6 months of Poosapati Sita Ramchandra Raju, Mohamud Mahat Noor and Abbas Ibrahim Noor and additionally, each of the said persons be required to pay such amount as may be ordered by the court for the said contempt.
 - 5) Sequestration and/ or attachment do issue for the properties of the 1st to 10 respondents or each and all of them and the same be attached for the amount to be determined pending the purging of their contempt.
 - 6) The court be pleased to issue other or further reliefs as it may seem just and expedient.
 - 7) The costs of and occasioned by the contempt of court proceedings herein be taxed and met by each of the respondents herein jointly and/or severally and in default thereof, execution to issue forthwith.
7. In a ruling delivered on December 20, 2018, the court found the 1st defendant and, Poosapati Sita Ramachandra Raju and Mohamud Mahat Noor who were added as parties to the contempt application jointly and severally in contempt of court and condemned the 4th and 10th defendants jointly and severally to pay the costs of the contempt application.
 8. On March 6, 2019, the court sentenced Mohamud Mahat Noor to pay a fine of Kshs 500,000/- in default of which he was to serve a jail term of 60 days. The court made a further order that Poosapati Sita Ramachandra Raju be arrested and brought to court for sentencing. On November 28, 2019, the advocates for the plaintiff and the 4th and 10th defendants who are the main protagonists in the suit informed the court that the suit had been settled as between them and that what was outstanding was the issue of costs. They agreed that the suit be marked as settled save for the issue of costs that they would agree on failure to which the same was to be determined by the court. The court thereafter made the following order:

"The suit is marked as settled save for the issue of costs. The parties shall endeavor to agree on the issue of costs failure to which the parties shall address the court on the same and the court shall make a determination."
 9. On November 24, 2020, the parties informed the court that they were unable to agree on the issue of costs and that they wished to address the court on the same by way of written submission to enable the court determine the same. I have not seen a copy of the plaintiff's submissions on record or in the Judiciary Case Tracking System (CTS). From the submissions by the 6th defendant, the plaintiff is said to have filed its submissions dated September 27, 2021 in which it argued that the defendants were liable for the costs of the suit. On the liability of the directors of the 1st and 4th defendants who were also sued, the plaintiff is said to have submitted that they were complicit in the manipulation and backdating of records. The plaintiff is also said to have argued that the 1st to 6th defendants were liable for the costs of the suit for having destroyed the suit property through cutting down of trees and dumping of soil.
 10. The 5th defendant filed her submissions on October 29, 2021 while the 6th defendant filed his submissions on November 22, 2021. The 5th and 6th defendants submitted that they were advocates of the High Court and that they were sued for actions carried out in the course of their normal professional duties. The 5th and 6th defendants submitted that they were separate and distinct from the 4th defendant and as such should not have been sued in their personal capacities. The 5th and 6th defendants submitted that the suit disclosed no cause of action against them and that having participated in the suit and filed defences to the suit, they were entitled to costs. They submitted that



the 4th defendant surrendered the title to the suit property to the land registry on November 28, 2021 for cancellation. The 5th and 6th defendants submitted that they were wrongly joined as parties to the suit and that the submissions by the plaintiff disclosed no reason why they should be made liable for the costs of the suit. The other defendants to the suit did not file submissions.

11. I have considered the submissions on record on the issue before the court for determination. I have also considered the authorities cited in support of those submissions. In the text, [Judicial Hints On Civil Procedure](#), 2nd Edition the author has stated as follows on costs at page 100:

The law on costs as it is understood by the courts in Kenya, is this, that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part- no omission or neglect, and no vexatious or oppressive conduct attributable to him which would induce the court to deprive him of his costs – the court has no discretion and cannot take away the plaintiff's right to cost. If the defendant however innocently, has infringed a legal right of the plaintiff, the plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course.

12. In [Farah Awad Gullet v CMC Motors Group Limited](#) [2018] eKLR, the court stated as follows:

"As for costs, it was correctly submitted by the respondent that the discretion of the court to grant or withhold costs is enshrined in section 27 of the [Civil Procedure Act](#). It provides *inter alia* as follows:

Sec 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 who 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.

In the Party of Independent Candidates of Kenya versus Mutula Kilonzo & 2 others, HC EP No 6 of 2013, the High Court had this to say on the issue of costs:-

“It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs is a matter in which the trial judge is given discretion But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the



successful party, is a rule which should not be departed from without the demonstration of good grounds for doing so.”

13. The court stated further in *Farah Awad Gullet v CMC Motors Group Limited* (*supra*) as follows:

“The trial judge’s failure to take into consideration the factors that triggered the litigation and the fact that it is the respondent which substantially contributed towards the causation of those factors in our view resulted in an injustice to the appellant with regard to the issue of costs. We therefore find sufficient justification for us to interfere with the trial courts order on costs.”

14. In *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another* [2016] eKLR that was cited by the 6th defendant, the court stated as follows:

“To my mind, in determining the issue of costs, the court is entitled to look at *inter alia*

- (i) the conduct of the parties,
- (ii) the subject of litigation,
- (iii) the circumstances which led to the institution of the proceedings,
- (iv) the events which eventually led to their termination,
- (v) the stage at which the proceedings were terminated,
- (vi) the manner in which they were terminated,
- (vii) the relationship between the parties and
- (viii) the need to promote reconciliation amongst the disputing parties pursuant to article 159 (2) (c) of the *Constitution*.

In other wards (*sic*) the court may not only consider the conduct of the party in the actual litigation, but the matters which led to the litigation, the eventual termination thereof and the likely consequences of the order for costs...in cases whereby the parties enter into a consent, the court does not go further to inquire the reasons for the consent, this court is not bound to dig into the reasons why the plaintiff seeks to resolve the matter with the first defendant, nor can an adverse inference be made against the plaintiff while determining costs.”

15. In *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR, the Supreme Court stated as follows:

“It emerges clearly that, whether in this court or any other superior court, costs are awarded at the discretion of the court or judge...It is plain to us that, at the time the petition was lodged in the Supreme Court, it was, in every respect, a valid cause of action; and thus, no blame attaches to the act of filing. By article 50(1) of the *Constitution of Kenya, 2010* –

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court...”

16. From the material on record, I am of the view that the plaintiff is entitled to the costs of the suit. This however is the easier part. The difficult question is from which of the defendants should the plaintiff recover its costs? Then there is the question of the costs for the innocent defendants. It appears not



to be disputed that the 4th defendant has surrendered the title it held over the suit property to the 9th defendant for cancellation. The 4th defendant took that action upon recognizing that it did not acquire a valid title to the suit property from the 1st defendant. The 1st defendant did not defend the suit. The 2nd and 3rd defendants were joined in the suit as directors of the 1st defendant while the 5th and 6th defendants were joined in the suit as directors of the 4th defendant. The 7th defendant was said to be the mastermind and the brain behind the fraudulent scheme through which a parallel fraudulent title for the suit property was created. The 8th and 9th defendants were also said to have participated in the fraud. The 10th defendant was not a party to the fraud. The 10th defendant came to the picture later as the 4th defendant's tenant on the suit property. The 7th, 8th and 9th defendants did not also defend the suit. Since the suit was terminated before hearing, the allegations made by the plaintiff against the 2nd, 3rd, 5th, 6th, 7th, 8th and 9th defendants were not established. The surrender of the title for the suit property that was held by the 4th defendant however meant that the 1st defendant held a fraudulent title which it transferred to the 4th defendant. In the circumstances, the suit was properly instituted against the 1st and 4th defendants which held illegal and fraudulent parallel titles and competing interests with the plaintiff in respect of the suit property. I will therefore condemn the 1st and 4th defendants to pay the plaintiff's costs of the suit as they were the cause of the dispute that necessitated the filing of the suit.

17. I am of the view that due to the nature of the plaintiff's claim, the 2nd, 3rd, 5th, 6th, 7th, 8th, 9th and 10th defendants were necessary parties to the suit. Limited liability companies act through their directors. When a limited liability company is accused of fraud, collusion and conspiracy in the acquisition of a property of the magnitude that featured in this suit, it may be necessary to join its directors as parties to a suit for the recovery of the property. I am not satisfied therefore that 2nd, 3rd, 5th and 6th defendants were wrongly joined in this suit. Of these defendants only the 5th and 6th defendants have insisted on being paid their costs of the suit. It is admitted that as at the time the 4th defendant acquired the suit property, the 5th and 6th defendants were its directors and that they were the ones who executed the transfer instrument that conveyed the suit property to the 4th defendant. It is also admitted by the 5th and 6th defendants that the 4th defendant has surrendered the title for the suit property that it acquired when the 5th and 6th defendants were its directors for cancellation. In the circumstances, I am of the view that it will not be in order to condemn the plaintiff to pay the costs of the 5th and 6th defendants who were properly joined as necessary parties to the suit.
18. In conclusion, I will award to the plaintiff the costs of the suit to be paid by the 1st and 4th defendants. I have noted that the 4th defendant has surrendered the title that it held for the suit property for cancellation without a prolonged fight. The 4th defendant appears to have been defrauded by the 1st defendant. I am of the view in the circumstances that the 1st defendant should bear heavier cost burden compared to the 4th defendant.
19. For the foregoing reasons, the plaintiff shall have the costs of the suit to be paid by the 1st and 4th defendants in the ratio of 60% and 40% respectively.

DELIVERED AND DATED AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2022

S OKONG'O

JUDGE

Ruling delivered through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Obuya for the Plaintiff

Mr. Muganda for the 4th and 10th Defendants



Ms. Maina for the 5th Defendant

Mr. Gichuhi for the 6th Defendant

N/A for the 2nd Defendant

N/A for the 8th Defendant

Mr. A. Kamau for the 9th Defendant

N/A for the 1st and 3rd Defendants

Ms. C.Nyokabi-Court Assistant

