



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC CASE NO. 172 OF 2017 (O.S)

ZABLON OOKO OTEYO.....PLAINTIFF

VERSUS

CHARLES ODHIAMBO ONGORO.....DEFENDANT

JUDGMENT

A. Introduction and Background

1. At the outset, it is noteworthy that the present judgment concerns only costs of the suit. Indeed, on 28th January 2021, L. Okota instructed by Messrs Abisai and company Advocates for the plaintiff, Zablun Ooko Oteyo informed this court that :-

“I have instructions from my client that a great milestone has been made further to orders of 19/7/2017. A report filed in court on 23/3/2018 by Maurice Samba ,County Surveyor, Thus, prayer No. 1 sought in the plaint was spent thereby. So, the remaining issue is costs of this suit.” (Emphasis added).

2. On 19th July, 2017, this Court ordered inter alia, that pursuant to consent of counsel for the respective parties, the Land Registrar and County Surveyor, Migori were to visit Land reference numbers North Sakwa/Kadera Lwala/1886 (the suit property herein) and North Sakwa/Kadera Lwala/118 (the neighbouring property) to establish and fix boundaries and filed report(s) in court within forty-five (45) days from that date for consideration. On that score, sections 18 and 19 of the Land Registration Act 2016 (2012), this court’s decision in **Registered Trustees Legio Africa Church Mission =vs= Simeon Nyamweya Obwocha (2018) eKLR and the reasoning in Andrew Marigwa =vs= Joseph Kebati Ondieki (2017) eKLR**, among other pronouncements, are quite instructive.

3. Accordingly, on 23rd March 2018, the County Surveyor Migori filed a report in this court. The same did determine prayer number (a) of the plaint (Fast track) dated 16th February 2017 and filed in court on 27th February, 2017.

4. The defendant, Charles Odhiambo Ongoro is represented by M/s Nelson Jura and Company Advocates further to a notice of appointment of advocates dated 29th January 2019 and duly filed in court on 11th February 2019. Previously, M/s Kerario Marwa and Company Advocates appeared for him.

B. The gist of the Plaintiff’s case:

5. Notably, the plaintiff originated the instant suit by way of the plaint seeking the following reliefs:-

- a) Spent
- b) Costs of the suit
- c) Interest on (b) above
- d) Any other relief this court may deem fit and just grant in circumstances.

6. The plaintiff laments that sometimes in February 2016, the defendant who is his neighbor trespassed onto the suit property and committed waste thereon. He pleaded particulars of trespass at paragraph 3 of the plaint. That the actions of the defendant have deprived him of his land causing him to suffer loss and damage thus, precipitating this suit.

7. During the hearing of this suit, the plaintiff (PW1) stated that he owns the suit property and relied on the plaint and his statement dated

16th February 2017 as part of his evidence. He also relied on his list of documents dated 16th February 2017 (PExhibits 1 to 5) as well as the surveyor's report (PExhibit 6) as stated in paragraph 3 hereinabove.

8. By three (3) paged submissions dated 1st February 2021 and duly filed in court on 10th February 2021, learned counsel for the plaintiff gave brief facts of the case and identified an issue for determination as observed in paragraph 1 hereinabove. To buttress the argument that the plaintiff is entitled to the costs of the suit, counsel cited **Section 27 of the Civil Procedure Act Cap 21** Laws of Kenya, the case of **Cecilia Karuru Ngayu=vs=Barclays Bank of Kenya and another (2016) eKLR** quoted in the **Supreme Court of Kenya decision in Jasbir Singh Rai and others =vs- Tarlochan Rai and others (2014) eKLR, Judicial hints on Civil Procedure, 2nd Edition page 99** and this court's reasoning in **the case of Jane Ghati Mwita =vs= Robert Matinde Moronge (2020) eKLR**.

C. The gist of the Defendant's case:

9. In a statement of defence dated 7th March 2017 and filed evenly, the defendant denied the plaintiff's claim. He sought dismissal of the suit with costs.

10. The defendant's counsel was duly served for hearing of the present suit on 12th October 2020 as disclosed in the affidavit of service sworn on 13th October 2020. However, neither the counsel nor the defendant attended the hearing. Thus, the defendant's case was deemed closed as justice shall not be delayed; see **Article 159 (2) (b)** of the Constitution of Kenya 2010.

D. Issues for Determination

11. It is settled law that the issues for determination in a suit generally flow from either the pleadings or as framed by the parties for the court's determination; see **Great Lakes Transport Company (U) Limited =vs= Kenya Revenue Authority (2009) KLR 720**.

12. I have carefully examined the parties' respective pleadings and the plaintiff's submissions including all the authorities relied upon and the issues for determination framed therein. On that account, the only issue for determination is as noted at paragraph 1 herein above.

E. Analysis and Determination:

13. In paragraph 4 of the plaint, the plaintiff stated that he has suffered loss and damage due to the actions of the defendant. That the defendant be held liable thereby. He is seeking costs of the suit against the defendant as per prayer number (b) in the plaint.

14. In his testimony, PW1 stated in part; -

“ I have incurred costs of this suit.”

15. The **Concise Oxford English Dictionary 12th Edition** by Angus Stevenson and Maurice Waite at page 323, defines the term “costs” as follows; -

“Legal expense, especially, those allowed in favour of the winning party or against the losing party in a suit.”

16. Similarly, in the **Black's Law Dictionary 10th Edition** by Brian A. Garner at page 422 the term “Cost” means: -

“The amount paid or charged for something; price or expenditure “

17. In that regard, I approve the position taken in **Judicial Hints (supra)**, at page 94 that Costs; **“Reimburse the successful party for amounts expended on a case”**

18. The award of costs in a suit is anchored on the proviso to **section 27 (1) (supra)** which I find superfluous to reproduce herein. Essentially, the same is within the absolute and unfettered discretion of the court, must be exercised judicially and follows the event; **see also Halsbury's Laws of England 4th Edition Volume 10**.

19. In **Cecilia Ngayu case (supra)**, it was held that the fundamental principle in respect of the award of costs is that it is within the discretion of the trial Judge. That the discretion must be exercised reasonably.

20. In addition, in **Jane Ghati Mwita case (supra)** this court held that the plaintiff suffered financial burden courtesy of the defendant. That therefore, she was entitled to costs incurred in the suit.

21. In **Rai case (supra)**, it was held that the basic rule that costs follow the event, is not invariable. That indeed, the ultimate factor on award or non-award of costs is the judicial discretion.

22. It is well settled that the burden is always on the plaintiff to prove his case on the balance of probabilities. That such burden is not lessened even if the case was heard by way of formal proof; see the Court of Appeal decision in **Kirugi and another =vs= Kabiya and 3 others (1087) KLR 347** applied by this court in **Ghati Mwita case (supra)**.

23. I subscribe to the **case of Ogada=vs= Mollin (2009) KLR 620** where the Court of Appeal observed inter alia, that it was the court's duty to ensure that the respondent was made aware of the existence of the matter before court and to have that respondent served with all the necessary papers. That the respondent had the right to appear or decline to appear. In the present case, the respondent was duly served but declined to appear during hearing of the same without reason.

24. In this suit, the statement of defence in its entirety, is hereby borne in mind. However, the same is unsubstantiated and fails to thwart the plaintiff's case which has attracted costs by dint of the proviso to Section 27(1), **Rai, Ghati Mwita** cases (supra), among others.

25. To that end, it is the finding of this court that the plaintiff's claim regarding costs of this suit, is sound and has been proved to the requisite standards. He is therefore, entitled to the costs of the suit.

26. A fortiori, Judgment be and is hereby entered for the plaintiff against the defendant in terms of prayer (b) and (c) as sought in the plaint dated 16th February, 2017. Interest on costs to run at court rate from the date of this judgment.

DATED SIGNED and DELIVERED in open Court at **MIGORI** this **23rd** day of **FEBRUARY 2021**.

G.M.A ONGONDO

JUDGE

In presence of :-

1. Mr. Singei learned Counsel for the Plaintiff
2. Plaintiff – Present
3. Tom Maurice, Court Assistant