



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC. NO. 72 OF 2012

HERBERT WANGANYA WANGA.....PLAINTIFF/RESPONDENT

VERSUS

JONAI MAKANA OBORA.....1ST DEFENDANT/APPLICANT

JOSAM A. WANGA.....2ND DEFENDANT

R U L I N G

1. The 1st Defendant/Applicant has moved the court vide an application dated 8th October 2020 seeking the following orders;

- (a) That this Honourable Court be pleased to review part of the judgment delivered on 7th July 2020 to the extent that costs be paid to the applicant/1st defendant.**
- (b) That consequently, this Honourable Court be pleased to award costs of the suit to the 1st Defendant/applicant herein.**
- (c) That costs of this suit be provided for.**
- (d) That such further and other relief be granted to the Plaintiff as this court deems fit.**

2. The application is supported by the affidavit of Jonai Makana Obora who stated that he had engaged the services of a legal counsel who is entitled to his professional fees for instructions and all attendances. That the plaintiff's claim, against him did not succeed thus he is entitled to costs as per the Bill of Costs he annexed as **J.M.O-2**. He urged the Court to review its order and make provision for the Respondent to pay costs in tandem with Section 27 of the Civil Procedure Act.

3. The Respondent/Plaintiff filed a Replying Affidavit where he stated that the applicant did not appeal the judgment as required by the law; instead that the applicant filed a bill of costs seeking the same to be taxed against him despite the court record being clear who should meet the costs of this suit. He further stated that this court already issued its judgment and cannot review its own orders.

4. This court vide its judgment delivered on 7th July 2020 found that the plaintiff had proved its case against the 2nd defendant and ordered that the 2nd defendant to pay costs of the suit to the plaintiff. Both parties filed written submissions on the issue of payment of costs which I have considered. The matter of costs is provided for under Section 27 of the Civil Procedure Act which the 1st Defendant has quoted verbatim basically that awarding of costs is left to the discretion of the Court. The discretion of the Court usually must be exercised judiciously taking into account the circumstances of each case. In the case of *Cecilia Karuru Nganyu Vs- Barclays Bank of Kenya and Another (2016) eKLR*, Mativo, J. set out the issues to be determined while considering whether or not to award costs as follows:

- (i) The conduct of the parties.**
- (ii) The subject of litigation.**
- (iii) Circumstances which led to the instructions of the proceedings.**
- (iv) Events which led to the termination of the case.**
- (v) Stage at which the proceedings were terminated and**
- (vi) The manner in which they were terminated.**

5. The applicant/1st defendant also relied on Section 80 of the Civil Procedure Act which gives the court powers to review its own judgment or order. The applicant in urging the court to review its order on costs which it made in the judgment delivered on 7.7.2020 stated that they incurred costs in defending the suit and the plaintiff's case against them was dismissed. Thus, he wants to be compensated for the costs he incurred for defending the suit.

6. The Court relied on the evidence adduced in making the order for costs. This Court can only review its order/decreed if it is demonstrated that there is a mistake/error on the face of the record; where there is discovery of new and important evidence that could not be found at the time of hearing and or for any other sufficient cause. The 1st Defendant/Applicant has not indicated which of the headings he wants the court to review its decision.

7. From the copy of the map which was produced by both parties, the three parcels of land in dispute; Marachi/Elukari/1128 share a boundary on either side with Nos. 1129 and 1159 owned by the 1st and 2nd defendants. The County Surveyor in his letter dated 20th March 2017 said the boundary established by the elders of the Land Disputes Tribunal was acted upon on 4th February 2016. The 1st Defendant is the son to the 2nd defendant and the elders in the earlier suit had observed that, *"a judgment was passed allowing the claimant to claim one acre from Josam A Wanga and Jonai be evicted with their entire family on the claimant's parcel 1128 measuring 1.47ha."*

8. The evidence thus shows that for the determination of the dispute conclusively, the participation of the 1st defendant whose name featured in the Tribunal case was important. Secondly, the boundaries were only established in the year 2016 during the pendency of this suit meaning the plaintiff had a genuine cause of action against both defendants when the suit commenced. Consequently, I find no basis to condemn the plaintiff to pay any costs to the 1st defendant as prayed merely because in the finally suit against him did not succeed. On the contrary he was a necessary party to the proceedings and I see no argument presented on his behalf (1st defendant) that he was wrongly sued.

9. In the foregoing analysis, I find no merit in the 1st defendant's application and herewith dismiss it with costs to the plaintiff/respondent.

DATED, SIGNED & DELIVERED AT BUSIA THIS 23RD DAY OF MARCH, 2021.

A. OMOLLO

JUDGE