



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 125 OF 2014

PAUL KIMISIK MUREI.....1ST PLAINTIFF

EMILY JEPTARUS MURGOR.....2ND PLAINTIFF

MARY NYABOKE ANCHINGA.....3RD PLAINTIFF

VERSUS

ALICE JEMUTAI TOO.....1ST DEFENDANT

THE CHIEF LAND REGISTRAR, UASIN GISHU COUNTY.....2ND DEFENDANT

RULING

[PURSUANT TO ORDER D OF THE CONSENT OF THE 28TH OCTOBER, 2020]

1. That pursuant to the consent order of the 28th January 2020, parties settled the main suit and subsequently agreed to file written submissions on the issue of costs. The learned Counsel for the Plaintiffs filed their written submissions dated the 14th January, 2020 on the 27th January, 2021 while that for the 1st Defendant filed theirs dated the 2nd March, 2021 on the instant date.
2. The learned Counsel for the Plaintiffs submitted that the suit has been pending in court for over six years and as the 1st Defendant was found to have encroached onto the Plaintiff's land, then she should pay their costs. The Counsel cited the decisions in the following two cases; Court of Appeal case of *Canyon Properties Ltd & 3 Others Vs Eliud Kipchirchir Bett & 2 Others [2017] eKLR* and Supreme Court decision of *Jasbir Singh Rai & 3 Others Vs Tarlochan Singh Rai & 4 Others (2014) eKLR* on what to consider in deciding whether or not to award costs.
3. The learned Counsel for the 1st Defendant submitted that **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya** leaves the discretion of whether or not to grant costs to the Court. That discretion must however be exercised judiciously. The Counsel referred to *Judicial Hints on Civil Procedure, 2nd Edition page 99 by Richard Kuloba, Party of Independent Candidate of Kenya Vs Mutula Kilonzo & 2 Others*, and *Orix Oil (Kenya) Limited Vs Paul Kabeu & 2 Others [2014] eKLR* among others and submitted that the 1st Defendant should be granted costs as she is likely to suffer loss and suffering if the implementation of the consent order results to her house being demolished.
4. The issue for the Court's determination is who between the Plaintiffs and 1st Defendant is entitled to costs of the suit.
5. The Court has carefully considered the pleadings filed, the record, the learned Counsel submissions, the provisions of the Constitution and Statute cited plus the Superior Courts' decisions relied upon and come to the following conclusions;
 - (a) That from the pleadings filed, it is apparent the suit was occasioned by the 1st Defendant's alleged action of encroaching onto the Plaintiffs' land by 0.8 acres or thereabout. That evidently, the dispute had been dealt with by the Land Registrar before being filed in Court. That the parties' consent number 4 clearly confirmed that the 1st Defendant had structures on the Plaintiff's land that they agreed to be removed in 30 days after placement of the beacons. That finding goes to show that the Plaintiffs' claim of encroachment against the 1st Defendant was not unreasonable. That the consent of 28th January, 2020 amounts to a win by the Plaintiffs who were vindicated in their claim that the 1st Defendant had encroached onto their land.

(b) That the Plaintiffs having been successful in their claim, and having definitely incurred expenses by instructing Counsel, court fees among others, are entitled to costs of the suit under **Section 27 of the Civil Procedure Act**, unless otherwise ordered. That the fact that the 1st Defendant's properties are likely to be demolished in execution of the consent judgment is not an indicator that she is the victorious party, but rather the losing party and hence not entitled to costs of the suit.

(c) That accordingly, the court awards the costs of the suit to the Plaintiffs as against the 1st Defendant.

It is so ordered.

DELIVERED VIRTUALLY AND DATED AT ELDORET THIS 28TH DAY OF APRIL, 2021.

S. M. KIBUNJA

JUDGE

In the presence of:

Plaintiffs: Absent.

Defendants: Absent.

Counsel: Mr. Ombego for Omboto for Plaintiff.

Mr. Songok for 1st Defendant.

Mr. Wabwire for 2nd and 3rd Defendants.

Court Assistant: Christine

and the Ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.