



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC. NO. 144 OF 2013

JOSEPH NYUMBU.....1ST PLAINTIFF

JACOB NYUMBU.....2ND PLAINTIFF

VERSUS

PAUL OKELLO GAUNYA.....DEFENDANT

R U L I N G

1. This matter was brought by the plaintiff on 29th November 2013. Upon serving the Summons to enter appearance, the defendant filed his memorandum of appearance and defence on 24/12/2013 and 10th January 2014 respectively. Both parties filed their documents and witness statements in support of their claim/defence. Subsequently, the matter was listed for hearing on several dates and on 12th May 2015 the plaintiff and 2 of his witnesses gave their evidence and duly cross-examined by Ms Maloba learned counsel for the defendant.

2. After the date of 12/5/2015, the matter came up severally in court but did not proceed until on 19th November 2020 when the matter was listed for defence hearing when parties agreed to have the matter settled on terms of the survey report filed in court on 13th July 2020. The report was filed pursuant to a visit on the disputed land by the County Surveyor and Land Registrar on 9th February 2017. The parties however could not agree on who should meet the costs of the suit.

3. In determining the issue of costs, both parties filed written submissions through their respective advocates. Mr. J. V. Juma counsel for the plaintiff submitted that the surveyor's report confirmed that indeed Bunyala/Bulemia/2248 existed before the suit had merit at the time it was filed. That the plaintiff's family had been using L.R No. Bunyala/Bulemia/2245 and now known as 2248 without hindrance until this suit was filed. That the survey report confirmed the defendant had placed his beacons deep into the plaintiff's land No. 2245 making the suit necessary to recover his land. The plaintiff concluded that the defendant should pay the costs of this suit.

4. The defendant on his part submitted that the plaintiff should pay him costs of this suit. According to him, the plaintiff's claim was that L.R No. Bunyala/Bulemia/2248 does not exist and was imposed on parcel No. Bunyala/Bulemia/2245. As per the defendant, the plaintiff lost the case because the survey report confirmed that L.R No. Bunyala/Bulemia/2248 was existing independent of L.R No. Bunyala/Bulemia/2245. The defendant submits that he is entitled to costs because he was dragged to court and he had to hire an advocate; travel to court to attend mentions and hearing and assemble documents/witnesses. That this matter would not have come to court if the plaintiff was diligent to first engage a surveyor to determine veracity of his claim. He cited the provisions of section 18(2) of the Land Registration Act to support this averment.

5. Section 27 of the Civil Procedure Act provides that costs follow the events and in case of a dispute, the court is given the discretion to determine on whether or not to award costs and where awarded, which party should benefit. In the case of *Cecilia Karuru Ngayu Vs Barclays Bank of Kenya & Another (2016) eKLR*, Mativo J stated what the court should consider in award costs, thus **“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 words 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.”**

6. Further in the case of *Little Africa (K) Ltd Vs Andrew Muli (2014) eKLR* the Gikonyo Judge had this to say at paragraph 12 & 13 of his ruling;

“[12] Whereas a compromise of a suit by way of consent suppresses all the issues which were in contention, it does not necessarily mean that, where parties have entered into consent to settle a proceeding, no costs should be awarded, or there is no successful party in the matter. I will, therefore, hesitate profoundly to make any generalized propositions on the law in

that behalf without reference to the context of the particular case. There are obvious reasons I say so; the nature of settlement in the consent will determine the course of the event and, thus, the place of costs in the suit; parties may as well in the consent indicate that costs shall be borne by a particular party and I do not think that can be faulted on the argument that a settlement by consent means no party pays costs. These are real legal as well as practical issues which abound in this subject. Even the RUFUS NJUGUNA MIRINGU Case (Supra) which is most cited on this subject was decided...*in the circumstances...* of the case. Nonetheless, the incidence of settlement by consent of the parties becomes a vital factor the court should consider, within the circumstances of each case, in deciding whether costs are payable or not. For now, I will look at the event within the circumstances of the case. But first, what does ‘costs follow the event entail’?

“[13] See what the word “event” entails in the elucidation provided in the literally work by Justice Kuloba (as he then was), *Judicial Hints on Civil Procedure* 2nd edition at page 99 that;

“The words “the event” mean the result of all the proceedings to the litigation. The event is the result of entire litigation. It is clear however, that the word ‘event’ is to be regarded as a collective noun and is to be read distinctively so that in fact it may mean the “events” of separate issues in an action. Thus the expression “the costs shall follow the event” means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it. An issue in this sense need not go to the whole cause of action, but includes any issue which has a direct and definite event in defeating the claim to judgment in the whole or in part.”

7. I am alive to the fact that both decisions are persuasive however, I find the discussions on what to consider whether to award costs or not quite detailed and founded in statute. In determining the issue before me, I will also consider the matters set out in the case of Cecilia Karura Ngaru supra. What are the circumstances that led to the filing of this suit? The same is set out in paragraph 5 & 6 of the plaint which impleaded thus;

“5) Unknown to the Plaintiffs, the Defendant fraudulently cause himself to be registered as owner of Land Parcel No. BUNYALA/BULEMIA/2248, the said Parcel of Land being imposed on the Plaintiffs’ said Parcel of Land and now shown as bordering Land Parcel No. 2245 on one side and Land Parcel No. 2246 on the other side.”

“6) The Plaintiffs aver that the said Land Parcel No. 2248 is part and parcel of the Plaintiffs’ Land Parcel No. 2245 and as such Land Parcel No. 2248 should not exist where it currently is.”

8. According to the plaintiffs’ pleadings, the defendant had caused a portion of the plaintiffs’ land to be registered as number 2248 in his name. The plaintiff pleaded that in furtherance to the fraud, the defendant had abstained from cultivating or otherwise using the land for fear of being discovered. That it is him who was using the land. The inference drawn from these pleadings is that the plaintiff was aware the defendant held title to L.R No. 2248. Besides holding title, the plaintiff was under no threat since he was using the entire land. Consequently, he had all the opportunity to engage the Land Registrar or even a private surveyor to determine the boundaries of his land parcel Bunyala/Bulemia/2245 before bringing his claim to court.

9. Secondly, after filing of the case and before proceeding with hearing, the plaintiff still had an option of seeking a court order to have the surveyor and the Land Registrar ascertain the boundaries of the two plots. Instead, the plaintiff prosecuted his case prior to the visit and subsequently reporting of the surveyor, which then resolved the matter. The proceedings were terminated at an advanced stage. The conduct and relationship of the parties is also to be considered. In 10 of the statement of defence which pleaded the existence of a previous case between the parties albeit before the Land Disputes Tribunal.

10. The court forms the impression that the plaintiff has dragged the defendant to court to have the dispute resolved prior to pursuing alternative channels provided for under section 18(2) of the Land Registration Act. The report by the County Surveyor did not demonstrate that the plaintiffs had a merited case as submitted. Instead, it confirmed that the defendant’s parcel No. Bunyala/Bulemia/2248 existed both on the map and on the ground contradicting the pleading that the said land was super-imposed on L.R No. Bunyala/Bulemia/2245.

11. In light of the foregoing, I find that the matter having been filed before exhausting available avenues; that it was terminated at an advanced stage and that the reason for termination pointed more in favour of the defendant rather than the plaintiff. Therefore, the person entitled to costs of this suit is none other than the defendant. Accordingly an order be and is hereby issued awarding costs of the suit to the defendant.

DATED, SIGNED & DELIVERED AT BUSIA THIS 14TH DAY OF APRIL, 2021.

A. OMOLLO

JUDGE