



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 177 OF 2014

GEOFFREY GATIRIMA NG'ANG'A.....1ST PLAINTIFF

SOLOMON ITUU NGACHA.....2ND PLAINTIFF

SAVJI VITHAL PARMAR.....3RD PLAINTIFF

ATUL SAVJI PARMAR.....4TH PLAINTIFF

VERSUS

KAMAU WA RUHANGI.....1ST DEFENDANT

RUNDA MOTORS LIMITED.....2ND DEFENDANT

CLUB SIDAI OLENG.....3RD DEFENDANT

THE CHIEF LAND REGISTRAR.....4TH DEFENDANT

RULING

The Plaintiffs' advocate informed the court on 16/1/2020 that they wished to withdraw the suit for it had been overtaken by events and urged that the 1st Defendant was not entitled to costs. The 1st Defendant maintained that he was entitled to costs for opposing the application for injunction and for the court attendances. The court directed the parties to file concise submissions on the issue as to whether the Plaintiffs should pay costs to the 1st Defendant.

Parties filed submissions which the court has considered. The Plaintiffs submitted that they filed suit on 18/2/2014 claiming that the Defendants had encroached on the road reserve abutting the Plaintiffs' properties and blocked their frontage to Kiambu Road and obstructed the entrances to the Plaintiffs' properties. They also filed an application for injunction on the same date. The 1st Defendant entered appearance and filed a replying affidavit dated 28/3/2014 in opposition to the application for injunction. The Plaintiffs contended that the 1st Defendant did not serve on them the written submissions he filed and added that the matter had not come up in court from 29/7/2014 until 12/3/2019. The case was fixed for hearing on 16/1/2020 after the Plaintiffs withdrew their application for injunction dated 27/3/2019 to pave way for the fixing of the case for hearing. The Plaintiffs 1st Defendant did not file a defence despite entering appearance in 2014.

The Plaintiffs relied on the decision of Mativo J. in **Cecilia Karuru Ngayu v Barclays Bank of Kenya and Another [2016] eKLR** on the factors to be considered in determining the issue of costs. These include the conduct of the parties; the subject of litigation; the circumstances which led to the institution of the proceedings; the reasons for the termination of the suit; the stage at which the proceedings were terminated and manner in which they were terminated; the relationship between the parties and the need to promote reconciliation among warring parties under Article 159 of the Constitution.

The Plaintiffs filed this suit claiming that the Defendants had encroached on the road reserve abutting their properties. They joined the 4th Defendant to address the modalities of how the road reserve was alienated to the Defendants. They claimed that on instructions from the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works, the 4th Defendant investigated the encroachment of road reserves along Kiambu Road before that road was expanded, which will resolve this suit.

The 1st Defendant submitted that the Plaintiffs' decision to withdraw the case was an afterthought and an attempt to escape paying costs. He contended that had the Plaintiffs exhausted all the avenues for dispute resolution this case would not have ended up in court and he would not have been dragged to court. He submitted that having been brought to court by the Plaintiffs whose case was frivolous, he ought to be compensated for the trouble he had to go through in defending the case.

The issue for determination is whether the 1st Defendant should be awarded the costs of the suit. The Plaintiffs commenced this suit on claims that the Defendants had encroached on the road reserve abutting their parcels of land. The reason for discontinuing the suit is that the Ministry in charge of Transport had commenced works on the road in question with a view to expanding it. The exercise was preceded by investigations into how the road reserves were encroached onto. In the court's view the Plaintiffs suit was not frivolous considering that the 1st Defendant did not refute the Plaintiffs' claim.

Each party will bear its own costs.

Dated and delivered at Nairobi this 17th day of February 2020.

K.BOR

JUDGE

In the presence of:-

Mr. T. Miano holding brief for Mr. K. Mungai for the Plaintiffs

Mr. V. Owuor- Court Assistant

No appearance for the Defendants