



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT BUSIA

CIVIL CASE NO. 14 OF 2015

IN THE MATTER OF: LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF: REGISTERED LAND ACT CAP 300 LAWS OF KENYA

AND

IN THE MATTER OF: A CLAIM FOR ADVERSE POSSESSION OVER

LR. SOUTH TESO/ANGOROMO/9754

PAUSTINA AUMA OJWANG..... APPLICANT

VERSUS

1. JOHN ONYANGO OWANGI.....1ST RESPONDENT

2. JAMES ODHIAMBO OWANGI 2ND RESPONDENT

3. JOSEPH OMONDI ONYANGO..... 3RD RESPONDENT

R U L I N G

1. The plaintiff withdrew her suit on 21st November 2019. She urged the Court to order each party to bear their costs of the withdrawn suit. The defendants however urged the Court to award them costs of the withdrawn suit. The counsels for the parties agreed to address the court on the issue through written submissions.

2. The plaintiff filed her submissions on 13th November 2019. She submitted that she withdrew the suit because she did not plead particulars of constructive trust and or address the issue of limitation in her plaint. It is her case that although costs follow the event, she should be exempted from paying the costs because;

a) The suit herein was instituted by the plaintiff through her advocates Luchivya & Co. Advocates who failed to adequately appreciate he reclaim and properly advise her on its proper institution. The plaintiff is an old and lay person who had relied on her advocates to give her the proper direction but they failed her. That mistake of her counsel should not be visited on her and it was not an ordinary mistake. It was a technical blunder which could not easily be noted by the ordinary plaintiff who desperately wanted help to get title to her purchased portion of land.

b) As explained in the affidavit in support of the originating summons and the sale of land agreement dated 19/8/2002, the plaintiff bought a piece of land from JAMES ODHIAMBO OWANGI and paid the full purchase price of Kshs.31,500/= and was placed into possession and use. She embarked on cultivation and planted trees on the subject sold portion of land within parcel no. SOUTH TESO/ANGOROMO/6169 which was later on subdivided to give rise to SOUTH TESO/ANGOROMO/9754 in the name of JOHN ONYANGO OWANGI and SOUTH TESO/ANGOROMO/9755 in the name of JOSEPH OMONDI ONYANGO.

3. The plaintiff submits that the defendants entered into a transaction and conspired to defeat it. That the Court should not allow the Respondents to benefit from their breach of the sale agreement for which they received payment from the plaintiff but failed to transfer the

sold portion. She relied on the High Court decision of *Aggrey George Namenge Vs Claire Makokha (2011) eKLR* and urged the court not to award costs of the withdrawn suit to the defendants.

4. The defendants in their submissions filed on 31st October 2019 gave a brief history of this case from inception to the time it was withdrawn. The defendants submit that costs follow the event and in this instance the plaintiff has not given any reason for the court to order otherwise. That the narration given by the defendants also confirm that they have incurred expenses in defending the suit. The defendants urged the court to award them costs of the suit in full.

5. I have considered the issues raised in the submissions. It is trite law that when a suit is withdrawn, it cannot be taken that there is a winner or a loser. This was the finding of the court in the Case of *Rufus Njuguna Miringu & Another Vs Martha Muriithi & 2 Others [2012] eKLR*, where the Court stated as follows;

“Consent cannot be interpreted to mean that one or the other party has succeeded in a suit. Even if in the present case such a settlement has worked out in the defendants’ favour, the successful determination of the dispute is still attributable to both the plaintiff and the 1st and 2nd defendants In the circumstances, it would be just for the parties to bear their own costs of the proceedings”.

6. Section 27(1) of the Civil Procedure Act provides that costs follow the event. However it is still left to the discretion of the trial court to make the award or not. The plaintiff gave a narration on why she should not be condemned to pay costs as to do so would amount to enabling the defendants to benefit from their own breach of the terms of the sale agreement entered into with the plaintiff. As already stated above, it is not possible for the court to determine whether the defendants were in breach or not as a result of the withdrawal.

7. I have perused the record and note that the defendants were awarded specific costs during the pendency of this suit. In the circumstances if I make a general order that each party does meet their respective costs of the suit without taking into account the costs earlier awarded, my order would be tantamount to setting aside existing orders unprocedurally. Secondly the plaintiff was obligated to demonstrate that she is deserving of this courts discretion not to award costs to the defendants.

8. The plaintiff did this by stating that the defendants subdivided the land to defeat her cause of action. The defendants in countering this averment submitted that they have incurred costs as a result of the several court attendances. I weighed the scales on both reasons given and to the extent that the plaintiff did demonstrate that she had a valid reason to come to court for remedy although she chose the wrong mode to do so, I will not award full costs as prayed for by defendants.

9. Consequently, the Orders commendable to be made in the present circumstances is;

(i) I award ½ costs on instructions fees to be agreed on or taxed.

(ii) Costs awarded to the defendants by the ruling delivered on 6th December 2017 to be paid as is.

(iii) Costs for the remainder of the attendances and or items chargeable to be borne by each respective parties.

Dated, signed and delivered at BUSIA this 29th day of April, 2020.

A. OMOLLO

JUDGE