



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 93 OF 2015 (OS)

FRANCIS KAAI M' RINTURA.....1ST PLAINTIFF

FRANKLINE MURITHI KAAI.....2ND PLAINTIFF

VERSUS

SAMSON MWORIA RUKWARU.....DEFENDANT

RULING

1. The plaintiffs instituted this suit vide an Originating Summons filed on 8.10.2016 seeking a declaration that the plaintiffs have been in adverse possession of land parcel No. **Nyaki/ Mulanthankari/1580** for a period of more than 12 years.
2. An interlocutory judgement was entered in favour of the plaintiff's on 5.9.2016, but the same was set aside by this court on 18th April 2018. The Defendant entered appearance and filed his Replying affidavit on 5.9.2018. The matter was set down for hearing on 6/5/2019 and subsequently on 11/7/2019 where the 1st and 2nd plaintiffs testified.
3. On 28/10/2019 **Mr. Ashaba for the Plaintiff** sought to withdraw the suit with no order as to costs. **M/s Miriti, counsel for the Defendant** did not oppose the withdrawal of the suit but prayed for costs. This court proceeded to mark the suit as withdrawn, while the issue of costs was to be determined by the court hence this ruling. In that regard, parties were directed to file their submissions on the issue of costs.
4. The court gave strict timelines as to the filing of the submissions. The Defendant was to file his submissions within 21 days (by 19/11/2019) failure to which the defence claim on costs shall stand as forfeited. On the other hand, the plaintiffs were to file theirs within 21 days thereafter (By 12/12/2019), failure to which such submissions would be disregarded. The Defendant filed his submissions timely on 12/11/2019. The plaintiff's side filed their submissions late on 13/12/2019. With the strict conditions set and without leave being granted to file the submissions, this court is left with no alternative other than to disregard the submissions of the plaintiffs.

Analysis and Determination

5. I have dully considered the averments made by the parties and their submissions. The only issue for determination is ***Whether or not the Defendant should be awarded costs of the suit.***

6. **Section 27 of the Civil Procedure Act** provides as follows;

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order”.

7. **Order 25 Rule 3 of the Civil Procedure Rules** also provides as follows;

“Upon request in writing by any defendant the registrar shall sign judgment for the costs of a suit which has been wholly discontinued, and any defendant may apply at the hearing for the costs of any part of the claim against him which has been withdrawn”.

8. The provisions of **Order 25 Rule 3** deals with instances where there is a withdrawal, discontinuance and adjustments of suits. I do note

that even in the instance where a consent has been filed a party can still pursue an award of costs. On this point, **Gikonyo J In Little Africa Kenya Limited v Andrew Mwitii Jason [2014] eKLR** held that;

“Whereas a compromise to a suit by way of consent suppresses all the issues which were in contention, it does not necessarily mean that, where the parties have entered into consent to settle a proceedings no costs should be awarded....”

9. In **Ethics and Anti-Corruption Commission v Nderitu Wachira & 2 others [2016] eKLR** the Court cited the Ugandan Case of **Impressa Ing Fortunato Federice vs Nabwire** where it was held as follows;

“The effect of section 27 of the Civil Procedure Act is that the Judge or court dealing with the issue of costs in any suit, action, cause or matter has absolute discretion to determine by whom and to what extent such costs are to be paid; of course like all judicial discretions, the discretion on costs must be exercised judiciously and how a court or judge exercises such discretion depends on the facts of each case. If there were mathematical formula, it would no longer be discretion... while it is true that ordinarily, costs should follow the event unless for some good reason the court orders otherwise, the principles to be applied are- (i) under section 27 (1) of the Civil Procedure Act, costs should follow the event unless the court orders otherwise. This provision gives the judge discretion in awarding costs but that discretion has to be exercised judicially. (ii), A successful party can be denied costs if it is proved that but for his conduct the action would not have been brought... It is trite law that where judgement is given on the basis of consent of parties, a court may not inquire into what motivated the parties to consent or to admit liability.....”

10. In **Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR** the Court Outlined the conditions a court should adhere to in determining an award of Costs when it held as follows;

“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.[11] 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.”

11. I have considered the period this matter has been in court, the conduct of the parties as well as the matters which led to litigation. In particular, the court has considered the circumstances under which the defendant was brought on board this suit. The defendant had to make an application to set aside interlocutory judgment which appears to have been entered long before the filing of the suit. The suit was then withdrawn at the behest of the plaintiff, on 28th October 2019 after some of the plaintiffs’ witnesses had testified. It is therefore apparent that defendant actively took part in the prosecution of the matter by instituting the application to set aside the interlocutory judgment, defending the suit thereof vide a replying affidavit and cross-examining the witnesses. I also do note that there are instances where the plaintiffs have already been condemned to pay costs; i.e, vide the court’s ruling of 18.4.2018, plaintiffs were to meet the costs of the application to set aside the interlocutory judgment, as well as on 11/7/2019, when plaintiffs sought for an adjournment.

12. In conclusion, I proceed to award the defendant costs of the suit. A bill of costs is to be filed and taxed by the taxing master of this Court. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 20TH DAY OF MAY, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this ruling was given to the parties at the conclusion of the hearing and by a fresh notice by the Deputy Registrar. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the ***Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE