



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC CASE NUMBER 1 OF 2019

JANE GHATI MWITA.....PLAINTIFF

VERSUS

ROBERT MATINDE MORONGE.....DEFENDANT

JUDGMENT

1. This judgment concerns only the claim for costs of the instant suit.

2. Notably, on 24th February 2020, the parties through their respective counsel compromised the suit, to a great extent, by way of a consent which reads, inter alia:

- a) “The defendant to transfer a portion of Title No. **Bukira/Buhirimonono/5252** approximately 2.2 acres in area to the plaintiff instead of three (3) acres as stated in sale of land agreement signed on 14/4/2004.
- b) The plaintiff to meet the cost of survey and transfer of the portion in No. 1 hereinabove as the defendant undertakes to execute the relevant instruments accordingly.
- c) Parties to deal with issue of costs by way of written submissions to dispose of the suit

3. It is noteworthy that on 9th July 2019, 7th October 2019 and 10th February 2020, the parties requested for time to settle their dispute out of court and report to the court. Accordingly, this court allowed their request in consonant with Article 159(2)(c) of the Constitution of Kenya and section 20 of the Environment and Land Court Act, 2015 (2011) which resulted in the said consent.

4. The plaintiff, Jane Ghati Mwita is represented by the firm of Abisai and Company Advocates.

5. The defendant, Robert Matinde Moronge is represented by the firm of J. O Kisera and Company Advocates.

6. On 13th March 2019, directions were given by the court with regard to the pleadings and hearing of the suit. Before the same could be heard, the parties entered into the consent as shown in paragraph 2 hereinabove.

7. The plaintiff mounted the present suit by way of an originating summons dated 16th December 2018 and filed in court on 16th January 2019 pursuant to Sections 7 and 38 of the Limitation of Actions Act Chapter 22 Laws of Kenya, Section 1A, 1B of the Civil Procedure Act Chapter 21 Laws of Kenya and Order 37 Rules 7 and 14 of the Civil Procedure Rules, 2010. She is claiming to have acquired the suit land by way of adverse possession for determination of the issues as follows:

- a) The Honourable court be pleased to declare that the plaintiff and any other person claiming under her by way of adverse possession acquired title to LR NO. **BUKIRA/BUHIRIMONONO/226** (**hereinafter referred to as the suit property**).
- b) This Honourable court be pleased to order for the suit property to be registered in the plaintiff’s name.
- c) The defendant herein be ordered and/or directed to execute and/or sign all the necessary transfer instruments to facilitate the transfer and registration of the suit property, in the name of the plaintiff in default, the Deputy Registrar of this Honourable court be granted liberty to execute the transfer instruments in favour of the plaintiff herein.
- d) This court be pleased to order the defendant to bear costs.
- e) This court do make an order as to interest on costs.

f) This court do make any other order deemed expedient in the circumstances.

8. The originating summons is anchored on grounds 1 to 12 set out on its face. The same is further supported by the plaintiff's 18-paragraphed supporting affidavit sworn on even date and copies of documents marked as "JGM-1 to 2(a) and (b)" namely a certified true copy of the register of the suit property and photographs revealing her possession of the suit land.

9. Further to this court's orders and directions given on 24th December 2020, learned counsel for the plaintiff filed submissions on 3rd July 2020. Counsel gave brief facts of the case and framed an issue for determination namely whether the plaintiff is entitled to the costs of the suit and analysed the said issue in favour of the plaintiff herein.

10. To buttress the said submissions, counsel relied on the following authorities;

a) The High Court of Kenya decision in *Cecilia Karuru Ngayu v Barclays Bank of Kenya and another (2016)eKLR*, to the effect that the general rule that costs should be awarded to the successful party, should not be departed from without the exercise of good grounds for doing so.

b) *Judicial Hints on Civil Procedure 2nd Edition page 99 by Justice (Retired) Richard Kuloba*, that 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."

11. As already observed herein, the court gave directions in respect of the pleadings and hearing of this suit. Indeed, this court granted the defendant a latitude to respond to the plaintiff's claim for costs as stipulated under **Articles 48 and 50(1) of the Constitution(supra)**, but failed to file submissions in this suit.

12. I have duly considered the pleadings and the submissions on record. Bearing in mind the Court of Appeal decision in *Galaxy Paints Co. Ltd v Falcon Grounds Ltd (2000)2 EA 385*, the only issue for determination is whether the plaintiff is entitled to costs of this suit as I hereby approve the issue in the plaintiff's submissions accordingly.

13. Costs of a suit are governed by the proviso to **Section 27(1) of the Civil Procedure Act Chapter 21 Laws of Kenya** which I need not reproduce herein. Basically, the same follow the event within the discretion of the court.

14. In the **Judicial Hints on Civil Procedure book** (supra) at page 94, the learned author observed that the object of ordering a party to pay costs is to;

"...reimburse the successful party for amounts expended on the case.....a means by which a successful litigant is recouped for the expenses to which he has put in fighting..."

15. In *Cecilia Ngayu case (supra)*, I endorse the decision of Mativo J, where he held, inter alia;

"Considering the entire chain of events from filing this suit up to the time the parties left the issue to the court to determine, the numerous court attendances cited above I find no reason to deny the second defendant costs and in exercise of my discretion in a manner that meets the interests of justice for both parties in the circumstances of this case..."

16. *The Judicial Hints on Civil Procedure and Cecilia Ngayu case(supra)* are both persuasive authorities. Therefore, I can either depart from or endorse them; see *Re Hebtulla Properties Ltd (1976-80)1KLR 1195 at 1208*, where it was held;

"...That is all I can say about those cases and I don't intend to and will not consider them. They are distinguishable."

17. In the present case, I consider the entire facts and the remedies sought. The circumstances of it are similar to the reasoning in *Judicial Hints on Civil Procedure and Cecilia Ngayu case (supra)*. Thus, I find no reason of departing from them and proceed to approve the same accordingly.

18. The plaintiff contends that she has suffered financial burden courtesy of the defendant in prosecuting the suit to the point where a consent was entered into to avoid further wrangles. That she deserves costs incurred in the instant suit. So, has the plaintiff on the whole succeeded in the suit.

19. By the consent noted at paragraph 2 hereinabove and the submissions, the plaintiff's claim considerably succeeds. Considering the entire case and the obtaining circumstances, the plaintiff's claim is not challenged and he has discharged the burden of proof against the defendant required in civil cases; see the Court of Appeal decision in *Kirugi and another-vs-Kabiya and 3 others (1987) KLR 347*.

20. In the case of *Samwel Kamau Macharia and another-vs-Kenya Commercial Bank and 2 others (2012) eKLR*, the Supreme Court of Kenya ordered each party to bear their own costs of the suit; see also the Court of Appeal decision in *Kamau-vs-Mungate and another (2006)1KLR 150 at 160*.

21. In the case of *Rai v Rai (2014) eKLR*, the Supreme Court of Kenya held that the basic rule that costs follow the event is not an invariable rule. That indeed, the ultimate factor on award or non-award of costs, is the judicial discretion.

22. The Halsbury's Laws of England 4th Edition Revised (2010) Volume 10 states that:

“...The court has an absolute and unfettered discretion to award or not to award them(costs). This discretion must be exercised judicially.”

23. To that end, since the plaintiff has succeeded in his claim to the extent of 2.2 acres as per the consent in lieu of three (3) acres as sought in the originating summons, the final orders on costs of the suit are as follows:-

a) Judgment be and is hereby entered for the plaintiff against the defendant in terms of consent revealed at paragraph 2(a) and (b) hereinabove.

b) The plaintiff to have two thirds (2/3) of the costs of the instant suit.

24. It is so ordered.

Delivered, Signed and Dated at Migori in open Court and through email pursuant to,inter alia, Articles 7 (3) (b),159 (2) (b) and (d) of the Constitution of Kenya, 2010, Section 3A of Civil Procedure Act chapter 21 Laws of Kenya and Sections 3 and 19 of the Environment and Land Court Act, 2015 (2011) due to the Corona Virus pandemic challenge, this 17th day of SEPTEMBER, 2020.

G.M.A ONGONDO

JUDGE

In presence of:-

Both parties – Absent

Court Assistant – Tom Maurice