



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 354 OF 2014

DANIEL GITHU MBOI.....1ST PLAINTIFF

PETER THIONGO GITHU.....2ND PLAINTIFF

ROSELYNE KIBOCHI THIONGO.....3RD PLAINTIFF

EMILY WANGUI MBOI.....4TH PLAINTIFF

- VERSUS -

KENYA ELECTRICITY TRANSMISSION CO. LTD....DEFENDANT

RULING

The plaintiffs brought this suit against the defendant on 21st March, 2014. The plaintiffs averred that they were the proprietors of all those parcels of land known as Kajiado/Olchoro Onyore/8559, 8560 and 6941("the suit properties). The plaintiffs averred that the defendant intended to acquire portions of the suit properties for the purposes of a way leave for its Suswa – Isinya 400 KV Electricity Transmission Line Project and had offered to pay them a total of Kshs. 1,771,707/= for the same as compensation. The plaintiffs averred that they rejected the defendant's offer for various reasons among them that the defendant did not tell them how it arrived at the amount that was offered. The plaintiffs averred that they could not accept any compensation less than Kshs.24,000,000/= for the portions of the suit property that the defendant intended to acquire which amount had to be paid in one lump sum before any activity by the defendant could commence on the suit properties. The plaintiffs sought judgment against the defendant for; a permanent injunction restraining the defendant from trespassing on and in any way adversely interfering with the suit properties, an order compelling the defendant to pay the plaintiffs reasonable compensation before it could install electricity transmission line across the suit properties and general damages.

Together with the plaint, the plaintiffs filed an application by way of Notice of Motion dated 21st March, 2014 seeking a temporary injunction to restrain the defendant from trespassing on and in any way adversely interfering with the suit properties pending the hearing and determination of the suit. The defendant appointed the firm of Nyandoro & Co. Advocates to act for it in the matter. The firm filed a notice of appointment of advocates on 31st March, 2014.

When the plaintiffs' application came up for hearing on 1st April, 2014, the advocate who appeared for the defendant asked for time to respond to the application. The said advocate informed the court that the defendant had not entered the suit properties and that the defendant had no objection to the status quo being maintained. The plaintiffs' advocate confirmed that position. The court gave parties time to file their pleadings and stood over the matter to 10th June, 2014 for further directions. In the meantime, the court ordered that the status quo be maintained which meant that the defendant was not to interfere with the suit properties until the mention date. When the matter came up again on 10th June, 2014, the court ordered by consent of the parties that the status quo order that was made on 1st April, 2014 was to remain in force pending the hearing and determination of the suit.

On 4th October, 2016, the parties informed the court that the defendant had re-routed its electricity transmission line and that the same was no longer going to pass through the suit properties. In view of this development, the plaintiffs agreed to withdraw the suit but subject to the defendant paying their costs of the suit. The defendant was not willing to pay the costs of the suit. Due to this stalemate on the issue of costs, the court marked the suit as withdrawn and left the issue of costs to be agreed upon by the parties failure to which the same to be determined by the court.

The parties did not agree on the issue of costs and on 1st October, 2019, the plaintiffs moved the court by way of a Notice of Motion application dated 1st October, 2019 seeking an order that the defendant does pay the plaintiffs' costs of the suit. This is the application which is the subject of this ruling. The application which is supported by the affidavit of the 1st plaintiff was brought on the ground that this suit

was triggered by the defendant's unlawful actions and as such the defendant should bear the costs occasioned thereby. The plaintiffs contended that they came to court when the defendant started constructing pillars on the suit properties for its electricity transmission line and that the suit was intended to stop that illegal action that was being undertaken without agreed, fair and reasonable compensation being paid for the suit properties. The plaintiffs averred that the defendant moved its construction materials from the suit properties and relocated their transmission line to the neighbouring parcels of land for which they paid compensation which was almost three times what it had offered to the plaintiffs. The plaintiffs averred that the 3rd plaintiff made several trips from the United Kingdom to Kenya to attend to the suit. The plaintiffs averred that they had incurred huge expenses to prosecute the suit and that it was in the interest of justice that their costs be met by the defendant.

The plaintiffs' application was opposed by the defendant through a replying affidavit sworn by its advocate Yabesh Kambi Nyandoro on 23rd April, 2020. In the affidavit, the defendant's said advocate stated that the defendant entered into negotiations with the plaintiffs with a view to acquiring the suit properties for the purposes of a way leave for the construction of its electricity transmission line. He stated that the defendant offered to pay to the plaintiffs Kshs. 1,063,024.20 as compensation for the suit properties which offer was improved to Kshs. 1,771,707.00. He stated that after the defendant made the said offer to the plaintiffs, the plaintiffs were given time to consult on the same. He stated that instead of responding to the offer that was improved as aforesaid after a meeting that was held between the parties, the plaintiffs decided to file this suit. He stated that the compensation demanded by the plaintiffs was unreasonably high and way above the market price and could not be paid by the defendant. He stated that the plaintiffs refused the defendant's offer even after it was improved further to Kshs. 3,400,000/- after another meeting that was held on 26th April, 2014. He stated that in view of the urgency that was involved in the execution of the project, the defendant decided to make a costly but necessary decision to re-route the electricity transmission line away from the suit properties to other parcels of land whose owners were justly compensated.

The defendant's said advocate stated that both parties incurred expenses and that the plaintiffs were responsible for the costs that they incurred having refused to accept the offer of compensation that was made to them by the defendant. He stated that the plaintiffs' application was an abuse of the process of the court and urged the court not to compel the defendant to pay the plaintiffs' costs since the defendant had incurred additional costs in re-routing the electricity transmission line.

When the plaintiffs' application came up for hearing on 28th July, 2020, the parties relied on their affidavits in support of and in opposition to the application and left the matter to court for determination. I have considered the application together with the affidavit filed in support thereof. I have also considered the replying affidavit filed in opposition to the application. In the text, Judicial Hints On Civil Procedure, 2nd Edition the author has stated as follows at page 100 on costs:

“The Law on costs as it is understood by the courts in Kenya, is this, that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part- no omission or neglect, and no vexatious or oppressive conduct attributable to him which would induce the court to deprive him of his costs – the court has no discretion and cannot take away the plaintiff's right to cost. If the defendant however innocently, has infringed a legal right of the plaintiff, the plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course.

In Farah Awad Gullet v CMC Motors Group Limited [2018] eKLR, the court stated as follows:

“As for costs, it was correctly submitted by the respondent that the discretion of the court to grant or withhold costs is enshrined in section 27 of the Civil Procedure Act. It provides inter alia as follows:

Sec.27(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 who 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.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

In the Party of Independent Candidates of Kenya versus Mutula Kilonzo & 2 others, HC EP No. 6 of 2013, the High Court had this to say on the issue of costs:-

“It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs is a matter in which the trial judge is given discretion But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, is a rule which should not be departed from without the demonstration of good grounds for doing so.”

The court stated further in that case as follows:

“The trial judge's failure to take into consideration the factors that triggered the litigation and the fact that it is the respondent which substantially contributed towards the causation of those factors in our view resulted in an injustice to the

appellant with regard to the issue of costs. We therefore find sufficient justification for us to interfere with the trial courts order on costs.”

From the record, the defendant did not file a defence to the plaintiffs’ claim neither did it respond to the application for interlocutory injunction. I have perused the plaint, the witness statement and the affidavit in support of the application for interlocutory injunction. There is no allegation that as at the time the plaintiffs came to court, the defendant had entered into the suit properties or had threatened to enter before the negotiations on compensation had been completed. The impression I have got from all the material placed before the court by the plaintiffs is that as at the time the plaintiffs bought the present suit, the defendant had made to them an offer for compensation that they found unacceptable. There is no evidence that after the plaintiffs rejected the offer that was made to them by the defendant, the defendant proceeded to enter the suit properties. As I mentioned earlier in this ruling, when the parties appeared in court on 1st April, 2014, the defendant’s advocate informed the court that the defendant had not entered the suit properties and that assertion was confirmed by the plaintiffs’ advocate. That explains why the court ordered that that status quo be maintained.

This suit was withdrawn by consent because after the parties failed to agree on compensation, the defendant re-routed its electricity transmission line away from the suit properties to other parcels of land. The substratum of the suit was therefore lost. I find no basis for condemning the defendant to pay the costs of this suit to the plaintiffs. I am of the view that the plaintiffs came to court prematurely. As I have stated above, there is no evidence that the defendant had committed any wrongful act against the plaintiffs as at the time the suit was filed. I am not convinced that giving an offer for compensation that was not justified according to the plaintiffs was a wrong that would justify the filing of a suit.

For the foregoing reasons, I find no merit in the plaintiffs’ Notice of Motion application dated 1st October, 2019. The application is dismissed with each party bearing its own costs.

Delivered and Signed at Nairobi this 26th day of November 2020

S. OKONG’O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Kurauka for the Plaintiffs

N/A for the Defendant

Ms. C. Nyokabi-Court Assistant