



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 413 OF 2011

SITAIN J. SHIVJI.....1ST PLAINTIFF

TAHERA SIBTAIN SHIVJI.....2ND PLAINTIFF

VERSUS

TELKOM (K) LIMITED.....DEFENDANT

ERICSSON KENYA LIMITED.....1ST THIRD PARTY

ELIZABETH WARUCHU.....2ND THIRD PARTY

RULING

The plaintiff brought this suit against the defendant on 15th August, 2011 seeking a mandatory injunction compelling the defendant to stop immediate encroachment on L.R No. 3858/37 (“the suit property”) and to remove all structures erected on the said property within 14 days and in default the plaintiff to be at liberty to remove the same at the defendant’s expense. The plaintiff also sought general damages for trespass and special damages.

The plaintiff averred that the defendant had leased a property known as L.R No. 3858/36 (“Plot No. 3858/36”) for the purposes of putting up a telecommunication mast for Mobile Telephone Network and that in the course of carrying out construction of the said mast, the defendant trespassed on the suit property.

The defendant filed a statement of defence on 3rd October, 2011 denying the plaintiff’s claim. The defendant averred that the construction works the plaintiff was complaining about were carried out by an independent contractor for whose actions the defendant was not liable. The defendant denied that it was liable for the trespass if any on the suit property.

Together with the plaint, the defendant filed an application by way of Notice of Motion dated 11th August, 2011 seeking an interlocutory mandatory injunction against the defendant. The application was heard and dismissed on 27th November, 2012. On 26th September, 2012 the defendant was granted leave to serve a third party notice upon Ericsson Kenya Limited, the 1st third party herein. In its 3rd party notice dated 23rd May, 2012 filed on 14th June, 2012, the defendant contended that the 1st third party was liable for the acts of trespass the plaintiff was complaining about in that, the construction works that were said to have encroached on the suit property were undertaken by the 1st third party as an independent contractor. The defendant averred that under the contract that it entered into with the 1st third party, it was entitled to be indemnified by the 1st third party in respect of the plaintiff’s claim.

On 30th October, 2013, this suit was consolidated with ELC No. 33 of 2011, Elizabeth Waruchu v Sitain J. Shivji & another. Elizabeth Waruchu was thereafter added to this suit as 2nd third party. The 2nd third party was joined in this suit at the instance of the 1st third party. The 1st third party contended that the construction works in respect of which indemnity had been claimed against it by the defendant was carried out on the basis of the information that was provided to it by the 2nd third party who was the owner of the Plot No. 3858/36. The 1st third party averred that it is the 2nd third party who showed it the beacons for Plot No. 3858/36. The 1st third party averred that it was entitled to indemnity from the 2nd third party in respect of the 1st third party’s claim. The 2nd third party filed her statement of defence on 18th February, 2015 denying the plaintiff’s claim and the indemnity sought against her by the 1st third party. I have not seen the defence by the 1st third party on record.

The suit was fixed for hearing on 15th March, 2016. On that day, the plaintiff’s advocate informed the court that she had received information that the offensive wall that was the genesis of the suit had been removed and sought time to confirm the position on the ground. The advocate for the defendant confirmed that the wall had indeed been removed in 2013. The court adjourned the matter and fixed it for mention on 30th May, 2016 to enable the plaintiff’s advocate to confirm whether the said wall had been removed. When the matter came up

on 30th May, 2016 for mention, the plaintiff's advocate confirmed that the trespass on the suit property ceased in 2013 and as such the suit had been overtaken by events. That position was confirmed by the advocates for the defendant and the third parties. The matter was given another mention date to give parties time to discuss a possible settlement. When the matter came up for mention on 4th April, 2017, the plaintiff's advocate informed the court that the plaintiff wished to withdraw the suit with costs to be paid by the defendant. The defendant's advocate did not object to the withdrawal of the suit but opposed an order for costs against the defendant. The 2nd third party did not oppose the withdrawal of the suit. The court marked the suit as withdrawn and directed the plaintiff and the defendant to agree on the issue of costs failure to which the same to be determined by the court.

The plaintiff and the defendant did not agree on the issue of costs and chose to address the court on the same on 7th November, 2017. The plaintiff's advocate submitted that the plaintiff was entitled to the costs of the suit. The plaintiff's advocate submitted that when the plaintiff brought the suit, the defendant had put up a mast on the suit property which mast the defendant only removed after the suit was filed. In their response, the defendant's advocate submitted that the 1st third party that it had engaged to install the mast in question was an independent contractor and as such was the one liable to pay to the plaintiff the costs of the suit.

I have considered the plaintiff's and the defendant's submissions on the issue of costs. The general rule is that, costs should follow the event. In this case the suit was not heard and as such there was no winner and loser. The suit did not involve only the defendant and the plaintiff. There were two (2) third parties who were added to the suit. As at the time the suit was marked as withdrawn, the court had not given direction on how the liability as between the plaintiff and the defendant and as between the defendant and the 1st third party and between the 1st third party and the 2nd third party was to be determined. No evidence was led on the issue of liability. In the circumstances, the court is not seized of sufficient material on the basis of which it can apportion liability for costs between the parties. For the foregoing reasons, the order that commends itself to me is for each party to bear its own costs of the suit and it is so ordered.

Dated and delivered at Nairobi this 28th day of June 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiffs

Mr. Kariuki for the Defendant

No appearance or the Third party

No appearance for the 2nd Third Party

Catherine Court Assistant