



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 46 OF 2017

IGNATIUS MUSUNGU OBARA.....1ST PLAINTIFF

RUTH CHILA KWALANDA.....2ND PLAINTIFF

VERSUS

MAXIMILLA ATIENO LUCHACHA.....DEFENDANT

RULING

1. The issue for determination before me is one of Costs. The two Plaintiffs in the case – **IGNATIUS MUSUNGU OBARA** and **RUTH CHILA KALWANDA** – sued the Defendant – **MAXIMILA ATIENO LUCHACHA** – alleging, *inter alia*, that she had entered into their land parcel No. BUKHAYO/KISOKO/6042 – and ploughed it with a view to planting some crops. The Plaintiff sought a permanent injunction against the Defendant, costs of the suit and/or other just relief.

2. Contemporaneously with the suit was also filed an application, which was a motion on notice, seeking, *inter alia*, temporary restraining orders. The Defendant defended both the suit and the application.

3. Later on, it transpired that the Plaintiffs had filed the suit on the mistaken premise that they owned the land and that the Defendant was using it. It later turned out that the Plaintiffs were victims of an elaborate con game leading to loss of a tidy sum of money. The Plaintiffs realized the futility of pursuing this case and withdrew it on 8/11/2017. The Defendant asked for costs but the Plaintiff was only willing to pay half costs. And because there was no agreement on the issue, the court asked both sides to file submissions.

4. The Plaintiffs' submissions were filed on 21/11/2017. The thrust of the submissions seems geared towards obtaining sympathy. The fact that the Plaintiffs were conned was emphasized. The Defendant on the other hand filed submissions on 23/11/2017. The Defendant's approach was decidedly legal. According to the Defendant, the Plaintiff was to blame for everything. It was pointed out that had the Plaintiffs served a demand notice on the Defendant before instituting the suit, a response would have been made to make them re-think their stand. It was pointed out too that even after the Defendant filed her pleadings, the Plaintiffs insisted on proceeding with the suit.

5. The appeal for sympathy does not endear itself to the Defendant. It was observed that the Plaintiffs can have recourse to those who misled them. For guidance, the Defendant availed a ruling in the case of **CECILIA KARURU NGAYU Vs BARCLAYS BANK OF KENYA & Another: HCC No. 17/2014, NYERI**. It is a well-researched ruling that extensively points out the law on costs. And the overall point made is that costs are at the discretion of the court and should always follow the event unless for good reason the court decides to rule otherwise.

6. I have considered the rival submissions. This is a court of law, not of sympathy. The law is as stated by the Defendant. Costs always follow the event. The Plaintiffs dragged the Defendant to court. To defend the suit, the Defendant expended time, energy, expertise and money. And when the Plaintiffs realized that their case was founded on quicksand, they withdrew it. A question arises: who will pay the costs incurred by the Defendant? And the answer is simple: only the Plaintiffs can pay the costs incurred. They are duty-bound to do so because of needlessly dragging the Defendant to court.

7. The court cannot be told to hold otherwise on grounds of sympathy. If the Plaintiffs wanted sympathy, they should have approached the Defendant directly or through counsel to get it from her. The court should not be seen to be trading the Defendant's entitlement to costs for sympathy. I therefore order that the Defendant gets her costs in full. She cannot be made to suffer for the Plaintiffs' mistake.

Dated, signed and delivered at Busia this 23rd day of July, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

1st Plaintiff:

2nd Plaintiff:

Defendant:

Counsel of Plaintiffs.....

Counsel of Defendant.....