



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 126 OF 2009

JANE WAMBUI NYATETU.....PLAINTIFF

VERSUS

TIMOTHY KARIIRI NGATA.....DEFENDANT

JUDGMENT

Introduction

The parties herein have settled on all issues in this suit save for that of costs. They agreed by consent to file written submissions on the outstanding issue of costs for judgment by the court. The context of the suit is that the Plaintiff filed the suit herein by way of a Plaint dated 25th February 2009 and filed on 24th March 2009, wherein she claimed that she was the registered owner of the parcel of land known as Land Reference Number Ruiru East Block 1 (Githunguri) T853 situated in Ruiru, (hereinafter referred to as the suit property), and that the Defendant had wrongfully entered the said property, built a dwelling house thereon and thereby trespassed on the same. She sought judgment against the Defendant as follows:

- a. A declaration that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of the suit property.
- b. A declaration that the Defendant, whether by himself or his servants or agents or otherwise howsoever, is wrongfully in occupation of the suit property and is accordingly a trespasser on the same.
- c. A declaration that the Defendant, whether by himself or his servants or agents or otherwise howsoever, is not entitled to remain on the suit property.
- d. A permanent injunction restraining the Defendant, whether by himself or his servants or agents or otherwise howsoever, from remaining on or continuing in occupation of the suit property.
- e. Vacant possession of the suit property.
- f. General damages for trespass.
- g. Costs of the suit together with interest thereon at such rate and for such period of time as this Court may deem fit to grant.
- h. Any such other or further relief as this Court may deem appropriate.

In response, the Defendant filed a Defence on 22nd July 2009 denying the averments in the Plaint, and claimed that he was registered proprietor of the suit property and had resided thereon, and that the parcel of land that the Plaintiff had bought was a neighbouring plot. As the hearing of the suit progressed the parties agreed to settle the matter out of court, and recorded a consent in Court signed by both parties on 28th October 2010 as follows:

“By consent plot number Ruiru/ Ruiru East Block 1 (Githunguri) T852 shall be registered in the

name of Jane Wambui Nyatetu.

The District Land Registrar, Thika shall comply herewith within 21 days of this order”

The consent as recorded in court did not address the issue of costs, and the Plaintiff subsequently filed an application by way of a Chamber Summons dated 15th July 2011, seeking for a review of the said consent to address the issue of the costs of processing the title documents for plot number Ruiru/Ruiru East Block 1 (Githunguri) T.852 in the Plaintiff’s name, and the costs of the suit. This Court in its determination of the said application directed as follows:

- a. The Defendant meets the costs of processing the transfer of, and registration of title to land parcel Number Ruiru/Ruiru East Block 1 (Githunguri) T852 to the Plaintiff.
- b. The costs of the suit sought of Kshs.138,734/= be determined at the conclusion of the suit.
- c. The costs of the said application be awarded to the Plaintiff.

The parties subsequently agreed to file their respective submissions on the issue of costs of the suit, and the Plaintiff’s Advocates, Kimani Richu & Associates Advocates, filed submissions dated 9th April 2014, while Macharia & Keega Advocates, the Defendant’s Advocates, filed submissions dated 8th July 2014.

The Plaintiff’s Submissions

The Plaintiff submitted that the Defendant encroached on her parcel of land and even built a house thereon, thus denying her the right of quiet enjoyment and vacant possession of her rightfully owned property, in addition to denying her loss of user of the said property. Further, that the Defendant later admitted that there was double registration of the suit property, his being the second registration, and which error in registration arose from the acts of a third party.

The Plaintiff submitted that she played no part in occasioning such irregularity, and that regardless of the faults in registration and illegal occupation on the suit property, she demonstrated her magnanimity and agreed to exchange her parcel of land with the adjacent parcel of land with the Defendant, and had the adjacent parcel number Ruiru/Ruiru East Block 1 (Githunguri) T 852 registered in her name thereby preventing considerable costs and loss being incurred by the Defendant.

The Plaintiff further submitted that she did issue a demand letter and notice of intention to sue to the Defendant who blatantly disregarded the same. She relied on the decision in **Cate O. Obare vs. Stephen M. Kula & 2 Others, Civil Appeal No. 63 of 2010** for the position that where a party has issued a demand letter and notice of intention to sue, the court does not normally deny them costs. It was her submissions that it is clear that she was ready and willing to amicably solve the dispute and avert any litigation proceedings.

Lastly, the Plaintiff submitted that it is a general rule that the successful party in a suit should be the one to be awarded costs, and that in the instant case, the dispute was resolved by a consent recorded in court on 28th October 2010, save for the issue costs. Thus, that there may be no clear definition of a “successful party” herein. However, that the court should consider the consent in relation to the pleadings filed in order to know the successful party.

It was the Plaintiff’s argument in this regard that she may not have got the suit property herein back, but that she got vacant possession of a parcel of land equal in size and value as the original parcel registered in her name. Consequently, that she largely succeeded in her claim, and that in asking for costs she was not out to punish the Defendant but wanted to be compensated for the trouble she went through in filing the suit in court and the processes of registering a new title, hiring an advocate, and all other incidentals thereto.

The Defendant’s Submissions

The Defendant's submissions were that from the circumstances of the dispute herein and the conduct of the Defendant before and during the course of these proceedings, the Court should exercise its discretion in his favour and order each party to bear its own costs. The Defendant urged this Court to consider the fact that the double allocation of the suit property was occasioned by Githunguri Constituency Ranching Company Limited and the Thika District Registrar, which persons were not enjoined to this suit even after admitting the error and providing the solution to the same. Further, that the Defendant did not under any circumstances occasion the error and nevertheless sought out the Plaintiff and brought it to her attention that there was a double allocation problem, and met with all concerned officials to resolve the dispute.

The Defendant also submitted that he moved with haste to secure confirmation from Githunguri Constituency Ranching Company Limited and the Thika District Land Registrar that they could register the property known as Ruiru/Ruiru East Block 1 (Githunguri) T 852 in favour of the Plaintiff, and that this led to a consent being recorded to that effect and the matter did not proceed for full hearing. Lastly, that the Defendant, just like the Plaintiff, has retained an advocate to act for him in this matter and is responsible for settlement of his advocate's bill for services rendered.

The Determination

I have carefully considered the written submissions and authorities filed by the Plaintiffs and the Defendant. The issue before this court is which party or parties will pay the costs of this suit. Costs are in the discretion of the court, save that they will normally follow the event, unless the court or judge shall for good reason otherwise order. The applicable law is section 27 (1) of the Civil Procedure Act (Cap. 21) which states as follows:

“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.”

This Court is also guided by the decision of the Supreme Court in in Jasbir Singh Rai & 3 Others Vs. Tarlochan Singh Rai & 4 Others, S.C. Petition No. 4 of 2012 which was relied upon by both the Plaintiff and Defendant, wherein it was held as follows:

“It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails, but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor is setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice....”

The special circumstance in this suit is the settlement of the dispute between the parties following the consent by the parties entered on 28th October 2010 and adopted by this Court, save for the issue of costs. This Court in Thomas Gitau Njogu & 4 Others vs. Patrick Waruinge Muhindi & 2 Others, ELC NO. 272 of 2011, rendered itself thus in awarding costs where there had been a consent entered into by the parties:-

“It is also my view that it is not always given that in a consent there will be a successful and unsuccessful party. To determine the successful party in a consent order the court will need to examine the content and nature of the said consent in relation to the pleadings by the parties.”

The settlement in this suit worked out in both the Plaintiff's and the Defendants' favour, as each party got

a parcel of land therefrom. The consent cannot therefore be interpreted to mean that one or the other party has succeeded in the suit, and the successful determination of the dispute herein is attributable to both the Plaintiff and the Defendant.

Both parties made submissions on the respective conduct of the parties to this suit that entitled them to costs. The issue of a party's conduct affecting the award of costs in my opinion does not arise when parties have entered into a consent, as they are deemed to have accepted their respective conduct prior to the consent. In the circumstances, it would be just for the parties herein to bear their own costs of the proceedings, except for the costs previously ordered by the court to be met by a particular party.

Both the Plaintiff and Defendant in this regard confirm in their submissions that the documents for parcel number Ruiru/Ruiru East Block 1 (Githunguri) T 852 have been processed, and that the same are now duly registered in the Plaintiff's name. However, the Plaintiff claims that the Defendant refused and/or neglected to meet the costs for the same as per the court orders reproduced in the foregoing, and that the Plaintiff incurred all the costs thereof. The Defendant on the other hand claims that he paid all the attendant costs for the registration of the said property in favour of the Plaintiff. Neither of the parties however provided evidence of such payment.

Arising from the foregoing, I accordingly order that this suit be and is hereby marked as settled according to the terms of the consent entered into by the Plaintiff and Defendants and adopted by the Court on 28th October 2010, and that the parties to the suit herein shall bear their own costs of the suit, except for the following costs that shall be met by the Defendant:

- a. The costs of processing the transfer of, and registration of title to land parcel Number Ruiru/Ruiru East Block 1 (Githunguri) T852 to the Plaintiff.
- b. The costs of the Chamber Summons filed herein by the Plaintiff dated 15th July 2011.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____23rd____ day of ____September____, 2014.

P. NYAMWEYA

JUDGE