



Gilani & 2 others v Kenya Railways Corporation & another (Environmental and Land Originating Summons 302 of 2018) [2024] KEELC 6996 (KLR) (24 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6996 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 302 OF 2018
FM NJOROGE, J
OCTOBER 24, 2024**

BETWEEN

**FAIZ ZAHIR GILANI 1ST PLAINTIFF
SHAMSHER GULAMHUSSEIN GILANI 2ND PLAINTIFF
ZAHIR GULAMHUSSEIN GILANI 3RD PLAINTIFF**

AND

**KENYA RAILWAYS CORPORATION 1ST DEFENDANT
CHIEF LAND REGISTRAR 2ND DEFENDANT**

RULING

1. Judgment was delivered in this case on 26/10/2023 dismissing the plaintiff's case and ordering the plaintiffs to pay costs. Now the plaintiffs have approached the court by way of an application dated 13/6/2024 seeking review of the order as to costs. The application is supported by the affidavit of Henry Opondo, counsel for the plaintiffs/applicants. The grounds upon which the application is premised are as follows: that there is an error on the face of the record regarding the order as to costs as it overlooks the prior agreement between the plaintiff and the 1st defendant regarding costs by which they had agreed to the preparation of a joint survey report resolving the issue of ownership and suggesting that each party should bear its own costs.
2. The application is opposed by the respondent who through the affidavit of his lawyer George Kirumba Mbiyu states that: contrary to the provisions of Order 45 rule (1) (b) the application has been brought after inordinate delay and without reasons being given for the delay; that no sufficient grounds have been advanced for the orders sought; that contrary to Order 45 CPR the decree sought to be reviewed has not been exhibited in the application; that as per provisions of Section 27 CPA costs follow the event; that there is no error on the face of the record and the applicants' proper recourse is an appeal



against the judgment; that the court arrived at the right conclusion regarding the costs as demonstrated by the judgment itself.

Analysis and determination

3. It is necessary to revisit the pleadings, proceedings and judgment in this matter to enable a just decision on the present application. The plaintiffs' case was that they were the registered owners of land parcel No. Nakuru Municipality Block 8/83. It was also the plaintiffs' case that when they went to fence the property, the 1st defendant stopped them from fencing it and so they filed the present suit. The 1st defendant's case on the other hand is that the suit property trespassed onto its railway reserve land.
4. By consent of the parties on 2/03/2020, it was agreed that each one of them would appoint a surveyor to go to the ground and establish the beacons of the suit property vis-a-vis the rail reserve. The joint report dated 2/06/2020 was filed and it made the following recommendations:
 1. A re-survey of that survey that created parcel No. 83 to respect the Kenya Railway Reserve;
 2. The boundary touching the railway property to be slightly adjusted to accommodate the railway property;
 3. The title for parcel 83 to be surrendered to the Land Registrar of area for re-survey;
 4. Kenya Railways advised to embark on survey and registrations of its properties to avoid encroachments.
5. On 02/03/2021 the parties entered into a consent that the joint survey report dated 2/06/2020 that was filed in court on 19/11/2020 be adopted and the plaintiffs were to have the details of land parcel No. Nakuru Municipality Block 8/83 corrected as per the report and a new title be generated. Despite the said court order, the details of the suit property were not corrected by the 2nd defendant. The 2nd defendant was joined to the suit but despite service, did not enter appearance. By consent the parties agreed that the directions that the matter ought to proceed by way of viva voce evidence be revoked and that the matter do proceed by way of the affidavit evidence on the record and written submissions. In the judgment the court went beyond the consent of the parties which in any event, did not address the costs of the entire suit; instead, it only addressed the costs of the survey exercise. The court was unable to compel the 2nd respondent to implement the consent between the plaintiff and the 1st respondent for reasons covered in extenso in the judgment.
6. The present application should fail for three main reasons: first, while the mode of meeting the costs of the survey exercise that would have otherwise settled the issue were consensually settled upon, there was no consent decipherable from the court record regarding the manner of settlement or apportionment of the overall costs of the suit. Consequently, there is no error on the face of the record.
7. Secondly, the court went beyond the consent of the parties and determined the matter in the manner it deemed just. The court took into consideration the fact that the 2nd defendant was not party to the consent yet he had been dragged into the proceedings. Further the court was of the view that the plaintiffs had oversimplified the manner the dispute ought to be resolved oblivious of the multi-stage process of obtaining title from the 2nd defendant, which involves even other offices in this our good republic. In the circumstances, even by the greatest stretch of imagination the parties' consent on the survey costs, even if it may in their view have settled the dispute, cannot be deemed to extend to cover costs of the suit.
8. The third reason is the application has been brought after long and inordinate delay. For reasons unknown to this court, while the judgment was delivered on 26/10/2023 the application was filed



exactly 8 months later on 4/6/2024. Not even the filing of the 1st defendant's bill of costs on 9/2/2024 could galvanize the plaintiffs/applicants to immediately lodge such an application as the present one for review. I agree with the 1st respondent that the application ought to fail owing to long and inexplicable delay.

9. The upshot of the foregoing is that I dismiss the application dated 13/6/2024 with costs to the 1st respondent only.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 24TH DAY OF OCTOBER 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

