



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC NO. 35 OF 2016

JOSEPH KIPRONO TOO.....PLAINTIFF/RESPONDENT

VERSUS

UNILEVER TEA KENYA LIMITED.....DEFENDANT/APPLICANT

RULING

1. Before me is a Notice of Motion dated the 24th August 2020 filed pursuant to the provisions of Article 159 of the Constitution, Section 1A, 1B, 3A & 27 of the Civil Procedure Act and Order 25 Rule 2(2) & 3 and Order 51 Rule 1 of the Civil Procedure Rules where the Applicant seeks that the court be pleased to award it-Unilever Tea Kenya Limited, the costs of the suit against the Respondent. The Applicant further seeks for cost of the Application.

2. The said application was supported by the grounds on its face and the Affidavit, sworn by Joseph Mitei, the Social Impact Director in Unilever Tea Kenya Limited, on the 24th August 2020.

3. Briefly the Applicant's case is to effect that the suit herein was instituted through an Originating Summons dated 8th June 2016 seeking amongst others, a declaration that the Respondent herein was entitled by adverse possession to LR No. 5467/1 and that the same be registered into his name.

4. That upon being served with the pleadings the Applicant had instructed the firm of Njoroge Regeru & Co Advocates to act on their behalf and file a response to the Originating Summons wherein the said firm filed a Replying Affidavit dated 20th July 2016 and a further affidavit dated 16th November 2016 pursuant to which Counsel attended court on several occasions.

5. Subsequently, the Applicant had been served with a Hearing Notice for 27th June 2019 wherein Counsel got up and prepared for the hearing including meeting with the witnesses and expanding a lot of time and effort. The hearing did not proceed but was postponed to 20th November 2019 on which day Counsel for the Respondents sought to withdraw the suit. Parties did not agree on the issue of the costs.

6. On 16th February 2020, the court marked the suit as withdrawn and directed that the issue on costs be addressed later. That the Applicant had incurred huge expenses in defending the suit and that had the Respondent served them with a demand notice, the dispute would have been resolved without filing suit hence incurring expenses. That the Applicant was therefore entitled to costs as sought.

7. The Application was opposed by the Respondent's Replying Affidavit dated the 5th November 2020 and their submissions to which it had been submitted that pursuant to the institution of the suit via an Originating Summons dated the 8th June 2016, on the 6th February 2020, the matter had been withdrawn wherein parties agreed that the issue of costs be determined later by the court, which gave rise to the present application.

8. The Respondent framed his issue for determination as to whether the court should condemn him to bear costs of the suit. He relied on the provisions of Section 27 of the Civil Procedure Act to submit that the award of costs was discretionary and the court could decline to order the payment of the cost.

9. That the suit was genuinely founded, was not vexatious or frivolous and that the Applicant was not entitled to orders sought taking into account the documents that had been filed in support of the suit. That the suit had been withdrawn due to the failure to obtain a copy of the register in time which was a technicality.

10. That he and his family could not afford to pay the costs to the Applicant if condemned to do so, as they were peasant farmers. That the court should not issue orders that could not be executed. That the section which was a subject of the suit had been erroneously annexed to their title but he had no claim whatsoever over the land.

11. The Respondent relied on the decided cases in **Party of Independent Candidate of Kenya vs Mutula Kilonzo & 2 Others [2013] eKLR** to seek that the application be dismissed.

Determination.

12. I have considered the application herein as well as the response. The law in relation to costs is found in Section 27 of the Civil Procedure Rules which provides 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.”

13. A careful reading of Section 27 of the Civil Procedure Rules indicates that it is considered trite law that costs follow the cause/event and the “event” means the result of all the proceedings incidental to the litigation. It is also not to be lost that the order as to costs as provided for under Section 27 of the Act remains at the discretion of the court. Since the award of costs is not cast in stone and courts have ultimate discretion, in so exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case.

14. In *organ Air Cargo Limited v Evrest Enterprises Limited [2014] eKLR* the court noted that

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the Civil Procedure Act is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

15. Indeed in the case of *Party of Independent Candidate of Kenya & another vs Mutula Kilonzo & 2 Others (2013) Eklr* which cited with approval the words of Murray C J in *Levben Products vs Alexander Films (SA) (PTY) Ltd 1957 (4) SA 225 (SR) at 227 held that:*

“It is clear from authorities that the fundamental principle underling the award of costs is two-fold. In the first place the award of costs is 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 have come to the conclusion arrived at...In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

16. The court must therefore ask itself what factors should be taken into consideration when determining the costs of suit. This issue was addressed by the learned judge in **Morgan Air Cargo Limited v Evrest Enterprises Limited [2014] eKLR** to include:

a. the conduct of the parties

b. the subject of litigation

c. the circumstances which led to the institution of the proceedings

d. the events which eventually led to their termination

e. the stage at which the proceedings were terminated

f. the manner in which they were terminated

g. the relationship between the parties and

h. The need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of the Constitution.

17. Indeed it cannot be lost that the Respondent herein filed suit via to an Originating Summons on 8th June 2016 seeking for adverse possession to the suit land where he had been in occupation for more than 60 years. Counsel for the Applicant entered appearance on 1st July 2016 wherein he filed a Replying Affidavit to the Originating Summons on 20th July 2016

18. The Respondent then went to sleep until the 6th of February 2019 when the matter was slated for mention for directions (there was no appearance for Counsel for the Applicant) Parties took directions that the matter would proceed by way of viva voice evidence and the matter was fixed for hearing on the 11th April 2019, but the matter did not take off. It is also to be noted that the Applicant's Counsel was absent.

19. On the 27th June 2019 when the matter came up for mention, Counsel for the Applicant was not present yet again, the court noted that although and parties had been directed to comply with the provisions of Order 11 of the Civil Procedure Rules, the Applicant was yet to comply. Parties were therefore given leave of 21 days to comply. There was no compliance up to the time this application was filed.

20. On 20th November 2019 Counsel for the Respondent sought time to explore an out of court settlement wherein on the 6th February 2020 he withdrew the suit against the Applicants and sought that there be no order as to costs.

21. I have looked at the pleadings herein filed by the Applicants and I note that apart from the present application, their Replying Affidavit to the Originating Summons was an 11(eleven) lined Replying affidavit which had no annexures attached. I have also noted that at no time did the Counsel for the Applicant personally appear in court when the matter had been set down for mention and further that at no time did the matter proceed for hearing.

22. I also find that the matter was genuinely founded and the same was not frivolous or vexatious. The withdrawal of the dispute was attributable to the inability of the Respondent to collect sufficient documentary evidence wherein both parties had accepted their respective conduct prior to the withdrawal of the suit. In the circumstances, it was only just for the parties to bear their own costs of the proceedings.

23. Since each party contributed, by their conduct to the filing of this suit, I order that each party shall bear its cost. The application dated the 24th August 2020 is dismissed with no costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 9TH DAY OF DECEMBER 2021

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE



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