



REPUBLIC OF KENYA



KENYA LAW
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**Mburu v Komba (Civil Appeal 220 of 2023)
[2024] KEHC 10447 (KLR) (23 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10447 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 220 OF 2023
FN MUCHEMI, J
AUGUST 23, 2024**

BETWEEN

ALICE NJERI MBURU APPELLANT

AND

EMMANUEL MAINA KOMBA RESPONDENT

*(Being an Appeal from the Judgment of Hon. W. Ngumi (SPM)
delivered on 15th May 2023 in Gatundu SPMCC No. E057 of 2022)*

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Gatundu Senior Principal Magistrate in SPMCC No. E057 of 2022 in which the court failed to award costs following the appellant's successful suit.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 3 grounds of appeal summarized as follows:-
 - a. The learned trial magistrate proceeded on the wrong principles when declining to award costs of the suit to the appellant.
3. Directions were issued that the appeal be canvassed by way of written submissions and from the record only the appellant complied on 9th May 2024. The

Appellant's Submissions

4. The appellant submits that from the judgment of the court below, the learned magistrate made no mention of the prayer for costs of the suit. As such, the appellant argues that failure to mention the award on costs means that she cannot claim costs from the respondents for the successful litigation in the trial court.



5. The appellant further submits that the failure to consider the prayer for costs of the suit was erroneous and no reasons were advanced as to why the appellant should not have the costs of the suit.
6. The appellant submits that her claim arose from a road traffic accident from which she suffered personal injuries and therefore her claim was one that required the court to assess damages. The respondent was served with summons and entered appearance and filed his defence whereby he denied the claim.
7. The appellant submits that the proceedings show that the respondent's advocates participated in the pretrial proceedings, during which they requested her to undergo a medical examination by their doctor. The appellant further submits that the proceedings prove that the case went for full trial and thus the case was contentious as defined under the *Advocates Act*.
8. The appellant submits that as a successful party to the suit, she ought to have been awarded costs and denying her costs places her at a disadvantage as she will solely bear her advocates costs from her own resources. According to the appellant, she prayed for costs of the suit, and the case being a contentious non liquidated claim, she was entitled to reimbursement of the costs of the suit.
9. The appellant relies on Section 27 of the *Civil Procedure Act* and submits that costs follow the event. The appellant argues that the trial magistrate exercised her discretion erroneously and unfairly by failing to award costs and give reasons for the same.
10. The appellant argues that Paragraph 53 of the Advocates Remuneration Order which requires service of a demand letter prior to filing of a suit was not applicable in the instant matter, because the respondent did not settle the case prior to the first hearing. The appellant submits that her case was a personal injury claim and therefore not liquidated thus the respondent was not in a position to pay any amount prior to filing or hearing of the suit.
11. Relying on the cases of Joseph Muchiri Mbugua vs Gatimu Ndirangu [2019] eKLR; Stanley Kaunga Nkarichia vs Meru Teachers College & Another [2016] eKLR; Esther Buchere Maki vs South Nyanza Sugar Co. Ltd [2018] eKLR and submits that failure to issue a demand letter is not a justification to deny a party costs. Furthermore costs are at the discretion of the court and costs follow the event unless for good reason the court declines to award costs.

Issue for determination

12. The main issue for determination is whether the appeal has merit.

The Law

13. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

14. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated that:-



An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

15. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-
 - a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
 - c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the appeal has merit.

16. It is trite law that the issue of costs is a discretionary one that is awarded to a successful party. Furthermore, this discretion must be exercised judiciously and a party cannot be denied costs unless it can be shown that they acted unreasonably.

17. Section 27(1) of the *Civil Procedure Act* provides:-

(1) 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 purpose 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 for good reasons otherwise order.

18. Section 27 of the Act is clear that it lies in the discretion of the court to award costs in a suit. This discretion must be exercised judiciously. It is trite law that where the court denies costs to a party who is successful in a suit, reasons for such decision must be clearly stated.

19. In the case of *Supermarine Handling Services Ltd vs Kenya Revenue Authority Civil Appeal No. 85 of 2006* the Court of Appeal stated:-

Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the Judge to decide, and the Court of Appeal will not interfere with his discretion in that instance.

20. The matter in the court below arose from a road traffic accident between the appellant as a passenger in motor vehicle registration number KCV 093S along Thika Mang'u flyover and motor vehicle registration number KCV 857H. The matter proceeded for hearing found the respondent and the



court rendered its judgment on 15th May 2023. The court found the respondent liable 100% and awarded the appellant general damages in the sum of Kshs. 100,000/- and special damages at Kshs. 3,000/-. The trial court further awarded interest at court rates on both the general and special damages.

21. Notably, the learned magistrate was silent on the issue of costs. No reasons were given by the court for not awarding costs although the appellant was the successful party in the suit. In that regard, it is my considered view that the failure by the learned trial magistrate to give reasons for not awarding costs or rather being silent about the issue of costs despite the successful suit, lays a good basis for this court to interfere with the discretion of the learned trial magistrate.
22. From the foregoing, I reach a finding that the appellant was entitled to costs of the suit.
23. The appellant is hereby awarded the costs of Gatundu SPMCC No.E057 of 2022.
24. This appeal is therefore successful and it is allowed with costs to the appellant.
25. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 23RD DAY OF AUGUST 2024.

F. MUCHEMI

JUDGE

