



**Njoroge v Kamau (Civil Appeal 236 of 2023)
[2024] KEHC 10415 (KLR) (23 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10415 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 236 OF 2023
FN MUCHEMI, J
AUGUST 23, 2024**

BETWEEN

MARION WANJIKU NJOROGE APPELLANT

AND

PETER MAINA KAMAU RESPONDENT

*(Being a partial Appeal from the Judgment of Hon. W. Ngumi (SPM)
delivered on 15th May 2023 in Gatundu SPMCC No. E273 of 2021)*

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Gatundu Senior Principal Magistrate in SPMCC No. E273 of 2021 in which the court declined to award costs of the 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 by filing her submissions on 9th May 2024. The respondent on the other hand had not filed his submissions by the time of writing this judgment despite being given an extension of time to file his submissions.

Appellant's Submissions

4. 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.

5. The appellant submits that the proceedings show that the respondent's advocates participated in the pre trial 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.
6. 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.
7. 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 considering an irrelevant legal provision namely Paragraph 53 of the Advocates Remuneration Order to deny costs. The appellant further argues that the case proceeded for hearing and parties called witnesses who were cross examined and therefore the application of paragraph 53 became irrelevant to the case as the appellant's claim was not liquidated. Further, the amount payable to the appellant was not known prior judgment and the defendant could not have paid any amount prior to the filing or hearing of the suit. The appellant submits that the defendant denied the claim and the case was fully heard and final judgment rendered. The defendant did not settle the case before the first hearing but it is the court that determined the amount payable to the appellant at the conclusion of the case.
8. The appellant argues that paragraph 53 did not apply as the issue of service of the demand letter was overtaken by the event of the hearing. Thus the appellant argues that the trial court relied on a reason that was not founded on the applicable law and misinterpreted the application of paragraph 53. To support her contentions, the appellant relies on the cases of Joseph Muchiri Mbugua vs Gatimu Ndirangu [2019] eKLR; Stanley Kaunga Nkarichia vs Meru Teachers College & Another [2016] eKLR and Esther Buchere Maki vs South Nyanza Sugar Co. Ltd [2018] eKLR.
9. The appellant submits that no evidence was adduced that she conducted herself in a manner that precluded her from an award of costs and therefore she is entitled to costs.

Issue for determination

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

The Law

11. 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.”



12. 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.

13. 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

14. 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.

15. 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.

16. 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.

17. 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.

18. The matter in the trial court arose from a road traffic accident between the appellant as a pedestrian and motor vehicle registration number KAN 368R along Nembu Mitikenda Road. The respondent was served with summons and entered appearance and filed his defence together with his list of documents and witnesses. matter proceeded for pre-trial conference and the matter was certified ready for hearing with leave granted to the respondent to file the medical report after the appellant underwent a second medical examination. The matter proceeded for hearing and although the respondent did not call any witnesses, his advocates participated in the hearing by cross examining the appellant. The defence counsel on two instances requested and was granted more time to file his submissions and the trial court rendered its judgment on 15th May 2023. Defence counsel attended the judgment and asked for 30 days stay of execution. Therefore, from the record, it is evident that the respondent defended his matter to the very end.
19. Judgment was entered in favour of the appellant at the sum of Kshs. 1,083,000/-. The nature of the claim by the appellant was a personal injury claim which was not quantifiable at the onset and proceeded for assessment of damages.
20. The trial court relied on paragraph 53 of the Advocates Remuneration Order to decline the award of costs on the basis that the appellant did not serve the respondent with the intention to sue. Paragraph 53 of the Advocates Remuneration Order provides:-

If the plaintiff in any action has not given the defendant notice of his intention to sue, and the defendant pays the amount claimed or found due at or before the first hearing, no advocate's costs shall be allowed except on a special order of the judge or magistrate.
21. The above provision relates to liquidated claims whereby a defendant can pay a plaintiff any money before or during the trial to avoid the suit. The general rule is that costs follow the event. The trial court in relying on paragraph 53 of the Remuneration Order and finding that the appellant was not entitled to costs as she did not serve the respondent with a demand notice was erroneous in law and in fact.
22. The trial court in finding so failed to consider that the respondent defended his suit until the very end and that the appellant was the successful party in the suit. As such, the trial court did not exercise her discretion judiciously and this is a case where this honourable court is justified to interfere with the trial court's discretion. The court finds that the appellant is entitled to costs of the lower court and sets aside the orders of the court below declining to award costs.
23. I find this appeal successful and allow it accordingly.
24. That appellant is awarded the costs of the suit Gatundu SPMCC No.273 of 2021 and the costs of this appeal.
25. It is hereby so ordered

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

F. MUCHEMI

JUDGE

