



**Fracht Kenya Limited v Gilfilian Air Conditioning Limited (Civil Appeal E208 of 2022)  
[2024] KEHC 16718 (KLR) (Commercial and Tax) (22 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 16718 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL APPEAL E208 OF 2022  
BM MUSYOKI, J  
NOVEMBER 22, 2024**

**BETWEEN**

**FRACHT KENYA LIMITED ..... APPELLANT**

**AND**

**GILFILIAN AIR CONDITIONING LIMITED ..... RESPONDENT**

*(Being an appeal from the whole judgment and decree of Honourable J.P. Omollo (Ms) (SRM) in Milimani Small Claims Courts commercial case number E5830 of 2022 dated 21-11-2022)*

**JUDGMENT**

1. The appellant has brought this appeal challenging the trial court’s decision to deny it the costs of the suit. Although the memorandum of appeal raises 5 grounds, the singular issue for determination in this appeal is whether the trial court was wrong in denying the appellant the costs of the claim.
2. The appellant filed a claim before the trial court claiming a sum of USD 8,240.25 being balance of agreed charges for clearing and forwarding services offered by the appellant to the respondent. The respondent was served with the claim documents and filed a response indicating that it had settled the claim and as such the suit was vexatious and malicious. When the matter came for mention on 19-10-2022, the parties consented to proceed by way of documents under Section 30 of the *Small Claims Court Act*. It turned out that the principal sum claimed was paid on 29-09-2024 and in the circumstances parties made submissions on costs of the suit only. In its judgment delivered on 21-11-2022, the trial court marked the matter as settled with each party to bear their own costs.
3. The core portion of the judgment which I find relevant to this appeal stated;  

‘Section 33 of the *Small Claims Court Act* provides that the court may award costs to the successful party in any proceedings and in any other case each party to bear their own costs.



In case of Stanley Kaunga Nkarichia v Meru Teachers College & Another (2016) eKLR it was held that costs follow the event for a successful party unless there is a justification to deny costs.

4. In this case the respondent was served with the demand letter, prior to filing the suit. The Respondent annexed RTGS application dated 29<sup>th</sup> September, 2022 where payment for the claimed amount was made 1 week prior to filing of the suit.
5. This matter was filed on 7-10-2022 and the first appearance in court was on 19<sup>th</sup> October, 2022. By the time of filing this suit the claimant had already been paid. Therefore, this suit was not litigated upon in court and hence there is no successful party. This suit is hence vexatious and a waste of the court's time. Based on the above reasons, I find that there is justification to deny costs which I hereby do. Therefore, the suit is marked as settled with each party to bear its own costs.'
6. What I gather from the above judgment is that the appellant was denied costs because according to the court, the suit was filed after the claim had been paid. According to the trial court, the respondent had paid the debt a week before the claim was filed. The obvious interpretation of the above cited part of the judgement is that had the trial court found that the claim was filed before the payment, it would have awarded costs.
7. It is trite law that costs are at the discretion of the court and an appellate court would be reluctant in interfering with discretionary orders of the trial court. It is also trite law that discretion of the court must be exercised judiciously which to me means that the court must apply its mind properly on facts and law before it and give reasons for the manner in which the discretion is exercised. If the discretionary decision goes against the grain of the factual issues before the court and the expected legal outcome, then the appellate court will be justified to upset the discretion of the trial court. In the often-quoted case of Mbogo & Another vs Shah (1968) EA 93 it was held that;

'An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration and in so doing arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong on the exercise of the discretion and that as a result, there has been injustice.'

8. In Mary Wairimu Muturi vs John Wakibi Murua (2020) eKLR the court held that;

"This court's discretionary powers as is often said must be exercised judiciously and not capriciously. The rationale behind the judicious exercise of discretionary powers was explained in Patriotic Guards Ltd v James Kipchirchir Sambu (2018) eKLR as follows;

'It is settled law that when a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.'



9. I have gone through the submissions of the appellant in comparison to the record of the trial court. The first communication of the court to the parties in the matter is dated 27-09-2022 and it states;

‘Kindly note that this matter was filed on 27-09-2022 at 11.34.30 am, and you are required to enter appearance and/or file defence within fifteen days after being served with the accompanying claim. Mention is slated for 10 Oct 2022 before HON. J.P. OMOLLO, to confirm service upon you.’

10. It is clear to me that the suit was not filed on 7-10-2022 as indicated by the honourable magistrate. The record of the court placed before me does not show any document was filed on 7-10-2022 and I cannot comprehend where the honourable magistrate got that date from.

11. I have also read the certificate of service by one Eric Onyancha dated 6<sup>th</sup> October 2022 which indicates that the statement of claim was served on 28-09-2022 at 9.04 am. Attached to the certificate is an email from the respondent which states that it had received the service of the court documents with shock as it had not refused to make payments. This email was also produced as one of the respondent’s documents in its list and bundle dated 19-10-2022.

12. It is clear to this court that the respondent paid the principal sum a day after service of the claim. I also note that two demand letters had been done before the suit was filed. One on 23-06-2022 and another on 22-07-2022. It is interesting that the respondent was able to pay USD 8,240.25 just a day after service yet, it had claimed lack of funds and did not reply to the demand letters. To me, the appellant was justified to seek action to recover after the respondent took upon itself to settle the debt as it wished without concurrence of the appellant.

13. In view of the above, I hold that the trial court did not exercise its discretion judiciously as it misdirected itself on the true position and timing of the filing of the claim. A party who files a meritorious case after giving due notice and in the process incur expences and costs in the process is legitimately expected to recover the said costs and expences unless there is a good reason advanced to justify denial of costs. In the circumstances of this case, I do not think that there was justification to deny the appellant costs of the claim.

14. The conclusion is that, this appeal is allowed and I make the following specific orders.

1. The appellant shall have the costs of the suit in the trial court.
2. The appellant is awarded the costs of this appeal as against the respondent.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF NOVEMBER 2024.**

**B.M. MUSYOKI**

**JUDGE OF THE HIGH COURT.**

Ruling delivered online in presence of:

Mr. Onyancha for the appellant; and

Mr. Omari for the respondent.

