



REPUBLIC OF KENYA



**Peter & another v Kimeu (Suing on behalf of the Estate of Justus Kioko Mutisya)
(Civil Appeal 129 of 2018) [2023] KEHC 24476 (KLR) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24476 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 129 OF 2018
MW MUIGAI, J
OCTOBER 31, 2023**

BETWEEN

KIOKO PETER 1ST APPELLANT

DENNIS KAVUU MBONDO 2ND APPELLANT

AND

JOSEPHINE N'THENYA KIMEU RESPONDENT

SUING ON BEHALF OF THE ESTATE OF JUSTUS KIOKO MUTISYA

RULING

Notice of Motion

1. Vide a Notice of Motion dated and filed in court on 25th July, 2022 brought under Sections 1A, 1B and 3A of the [Civil Procedure Act](#) Cap 21 Laws of Kenya, and Article 159 of the [Constitution](#) of Kenya wherein the Applicants sought the following orders that:
 - a. That *ex parte* proceedings recorded on the 9th of June, 2022 in the absence of the Appellants be set aside.
 - b. The Respondent's Bill of Costs dated 13th June, 2022 be struck out with costs to the Appellants
 - c. Costs of the Application be in the cause.
2. The application was premised on the following grounds that:
 1. Judgment was delivered on 22nd November, 2022 wherein the court awarded to the Respondent half of the costs of the Cross Appeal.
 2. Thereafter, the Respondent drew their Bill of Costs dated 14th December, 2021 and it was duly taxed off and a Ruling delivered on the 6th April, 2022.



3. The Respondent thereafter recalled the file and in the absence of the Appellants, the judgment was amended to award the Respondent costs of the Appeal contrary to the rules of procedure.
4. The Respondent again drew another bill of cost dated 13th June,2022 and the same is set down for Ruling on the 27th July,2022.
5. The Plaintiff shall suffer no prejudice if this application is allowed.
6. The Appellants are ready and willing to abide by this court orders as it may deem just to grant.

Supporting Affidavit

3. The application was supported by Supporting Affidavit dated and file in court on 25th July,2022 sworn by Nyamwaya Innocent Mogaka in which he deponed that judgement was delivered on the 22nd November,2022 wherein the court awarded to the Respondent half of the cross Appeal (attached marked copy of the judgment).
4. He deposed that thereafter the Respondent drew their bill of costs dated 14th December,2021 (attached and marked copy of the bill costs dated 14th November,2021); that the said Bill of costs was placed before the tax master and it was duly taxed off and a ruling delivered on 6th April, 2022. (attached and marked copy of the ruling dated 6th April, 2022)
5. Deposing that the Respondent thereafter recalled the file in the absence of the Appellants the judgment was amended to award the Respondent costs of the appeal contrary to the rules of procedure.
6. The Applicants lamented further that the Respondent drew another Bill of Costs dated 13th June,2022 and the same was set down for ruling on the 27th July,2022. (attached and marked copy of the Respondent's bill of cost dated 13th June, 2022).
7. He deponed that upon the delivery of the judgment on the 22nd November,2021 and delivery of the ruling on 6th April,2022 the court was rendered *functus officio*.
8. Deposing that it is in the interest of justice that this honorable court grants an interim stay of proceedings in taxation of the Respondent's bill of costs dated 13th June,2022 proceedings pending the hearing and determination of the application herein. Further he deponed that honorable court holds in abeyance the ruling slated to be delivered on the 27th June,2022 pending hearing and determination of the application herein and further it is in the interest of justice that this honorable set aside ex parte proceedings recorded on the 9th June,2022 in the absence of the Appellants.

Replying Affidavit

9. By a Replying Affidavit dated and filed in court on 27th July,2022 sworn by Alex Mutua, advocate wherein the Applicants opposed the application herein and deposed that the matter was pending ruling on a bill of costs filed by the Respondent and which the Applicants Advocate participated fully by seeking time to file submissions to oppose the bill on 30/6/2022 as the Records shows.
10. It was deposed further that a ruling dated 27/7/2022 was granted in the presence of the counsel for the Applicant and up to date he has not filed his submissions and present application is afterthought.
11. Deposing that mention date was fixed for 12/5/2022 before the Honorable Judge and the Applicants counsel was served with a mention notice via email on 11/4/2022 (annexed copy of the mention notice and email).



12. He deponed further that on 12/5/2022, the honorable court corrected the judgment on its own motion under Section 100 of the Civil Procedure Act and awarded the Respondent costs of the Appeal and there was no opposition; further if the Applicant was aggrieved by the said order of 12/5/2022 the only option was to seek for review of the order but not to seek to strikeout the bill of costs which was lawfully filed.
13. The Applicants deponed that the present application is an abuse of the court process and should be dismissed with costs and the proceedings of 9/6/2022 were recorded in the presence of counsel of the Applicant as the record shows.
14. The matter was disposed by way of written submissions.
15. Both parties filed their written submissions in compliance with the court directions issued on 14/12/2022, and date for ruling was fixed by this court on 9/2/2023.

Court Ruling on the Notice of Motion Application

16. Court vide its ruling dated 25th May,2023 at paragraph 31 found that the application is one whom the Applicant is aggrieved that the proceedings of 12/5/2022 were in their absence and prejudicial to the Applicant. To ensure fair trial, court granted the following orders; (in verbatim)
 - a. In the end, the Notice of Motion Application dated 25.07.2022 is compromised.
 - b. The parties shall canvass the issue of costs interpartes either orally and/or with written submissions.
 - c. Each party shall have 14 days each to file and serve skeletal submissions on costs.
 - d. Any decree order resulting from the judgment of this court may proceed for execution BUT shall exclude costs as outlined at Paragraph 69 and the court order(s) of 12/5/2022.
 - e. Further mention for directions and/or compliance shall be on 15/06/2023.

Court Record

17. From the record, the Respondent filed their skeletal submissions on cost of appeal on 14th June, 2023. On the hand the Applicants did not file their skeletal submissions on cost of Appeal neither were they present in court when the date for the ruling was sought by the Respondent's Counsel on 11/7/2023. It is in court file that a ruling notice was served upon the Applicant's counsel by the counsel for Respondent.
18. Court issued directions on 11/7/2023 that applicants can file their written submissions through Deputy Registrar Machakos High Court, and a ruling date was fixed to be on 31/7/2023.

Submissions

19. The Respondent complied with the orders of 25th May,2023 and filed their submissions on 14th June,2023 while the Applicants failed to do so even at the time of writing this ruling.

Respondent's Submissions

20. The Respondents in their submissions dated and filed in court on 14th June,2023 in which Mr. Mutua, counsel for the Respondent submitted that on 22/11/2021 this Honorable delivered its judgment on a memorandum of appeal filed in court on October, 2018. In Paragraph 69 of the judgement the court made the following findings: -



- i. Appeal is dismissed
 - ii. Cross appeal has succeeded in full with half costs.
21. Counsel contended that from the judgment of the court it was clear that the court was silent on the award of costs of the appeal. Contending that the Respondent being aggrieved on failure to award costs moved the court under Sections 99 and 100 of the [Civil Procedure Act](#) and also as directed by court in its ruling dated 15/6/2023.
 22. Counsel placed reliance on Sections 99 and 100 of the [Civil Procedure Act](#) and averred that the court is not being asked to change the substance of the judgment but to address itself on costs of the appeal.
 23. It was submitted that the Respondent was successful in the matter since the appeal was dismissed, it an event that attracts costs. Opining that Sections 99 and 100 of the [Civil Procedure Act](#) gives the court powers to amend and correct its record. Counsel urged the court to correct its record and address itself on costs.
 24. Counsel urged the court to correct its judgment and award costs of the appeal to the Respondent and determine the extent of the costs payable.

Determination/Analysis

25. The issue before Court is based on one convoluted process which in summary is as follows;
 - a. This Court delivered judgment on 22/11/2021 and on Costs stated in paragraph 69 as follows;

The appeal is dismissed and cross appeal has succeeded in full. In the premises, the Court will award ½ of the costs of the cross appeal to the Respondent. The Appellants will pay full costs of the Trial Court.
 - b. The Court record confirms that Bill of Costs was taxed by Taxing Officer on 6/4/2022
 - c. On 12/5/2022, Advocate A K Mutua addressed the Court as follows;

This is a concluded matter by this Court. Am seeking directions with regard to Costs as stipulated in Paragraph 69 of the Judgment. If the appeal was dismissed, the costs were not included it is an appeal of 2018.
 - d. The Court indicated as follows;

The judgment of 22/11/2021 is amended /corrected to include the costs that the appeal was dismissed with costs as costs follow the event. The amendment under Section 99& 100 [CPA](#) at Paragraph 69 to include costs.
 - e. On 14/11/2022, Counsel for Respondent filed Application of 25/7/2022 and informed the Court that the matter proceeded on 12/5/2022 in his absence despite being served. Parties filed written submissions to the application.
 - f. By Ruling delivered on 25/5/2023, both parties were to address the issue of Costs now granting the applicant fair hearing to be heard interpartes on the issue of Costs. Each party was to file written submissions on costs and any execution would exclude the costs.
 - g. The Respondent did not file any further submissions despite the Court granting the same opportunity on 11/7/2023 to file submissions through DR MHC.



Costs

26. Section 27 of the [Civil Procedure Act](#) which 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 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.

In the instant matter before the High Court was;

- a. An Appeal against quantum
 - b. A cross appeal on quantum
27. This Court dismissed the appeal and upheld the Cross Appeal. Ideally applying Section 27 of [CPA](#), the appeal was dismissed with costs to the Respondents and the Cross Appeal upheld with costs to the Appellants therein. In the Appeal, the Appellants would pay Respondents Costs and in Cross Appeal the Respondents would pay the Appellants Costs.
28. The reason, the Court ½ cost to Respondents is because they the appeal was dismissed and won the Cross Appeal and are to be paid costs by Appellants on the appeal and costs on their Cross Appeal.
29. Instead of Appellants paying full Costs on dismissal of the Appeal to the Respondents and Respondents being paid full costs on winning the Appeal, the Court's discretion was exercised at ½ costs of Cross Appeal to Respondent and Appellants full costs of Trial Court instead of paying the Respondents on appeal and in the Trial Court.

Disposition

30. The Court proceedings of 12/5/2022 are hereby expunged from the Record as Costs were duly catered for in the Judgment and thereafter the Bill of Costs was taxed accordingly.

**RULING DELIVERED DATED SIGNED IN OPEN COURT IN MACHAKOS ON 31/10/2023.
(VIRTUAL/PHYSICAL CONFERENCE)**

M.W. MUIGAI

JUDGE

In the presence of:

No Appearance - for the Appellant

No Appearance - for the Respondent

Patrict - Court Assistant

