



REPUBLIC OF KENYA



Windsail Quays Limited v Kikwetu Developments Limited & another (Civil Appeal E562 of 2019) [2023] KEHC 26771 (KLR) (Civ) (22 December 2023) (Judgment)

Neutral citation: [2023] KEHC 26771 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E562 OF 2019

DAS MAJANJA, J

DECEMBER 22, 2023

BETWEEN

WINDSAIL QUAYS LIMITED APPELLANT

AND

KIKWETU DEVELOPMENTS LIMITED 1ST RESPONDENT

HOME AFRIKA LIMITED 2ND RESPONDENT

(Being an appeal from the Ruling and Order of Hon. E. Nyaloti, CM dated 30th August 2019 at Nairobi Magistrates Court, Milimani in CMCC No. 3928 of 2016)

JUDGMENT

1. By an application dated 29.05.2019 made, *inter alia*, under section 80 and 99 of the [Civil Procedure Act](#) (Chapter 21 of the Laws of Kenya) and order 45 rule 1 of the [Civil Procedure Rules](#), the Appellant moved the court to review the ruling and order dated 22.03.2018. By that order, the court had allowed the Appellant's motion for judgment on admission. The court entered, "judgment in favour of the Plaintiff against the Defendant for Kshs. 4,650,000 with interest at court rates from the date of filing suit." The gravamen of the Appellant's application for review was that the court failed to pronounce itself on the issue of costs.
2. The trial magistrate considered the application for review and by the ruling dated 30.08.2023 delivered itself as follows, "The application dated the 29th May 2019 lacks merit and is a waste of judicial time. The application is dismissed with costs." This is the order that has precipitated this appeal.
3. In the Memorandum of Appeal dated 25.09.2019, the Appellant complained that the trial magistrate erred by failing to award costs, that the court failed to follow section 27 of the [Civil Procedure Act](#) on costs and the binding precedent of the Supreme Court in [Ledama Ole Kina v Samuel Kuntai Tunai &](#)



- [10 Others](#) [2015] eKLR. It assailed the trial magistrate for failing to give reasons for the decision. The Respondents supported the decision of the trial magistrate and contended that the Appellant did not make out a case for review and that in any case, the court exercised its discretion properly having regard to the circumstances of the case. Both parties filed written submissions which I have considered.
4. While the parties made detailed submissions on the matter, a cursory look at the record is sufficient to dispose of this appeal. It is clear that the trial magistrate erred in dismissing the application. First, the decision is devoid of reasons for the decision. Judges and Judicial officers must give reasons for their decisions. This is provided for in order 21 rule 4 of the [Civil Procedure Rules](#) which expressly provides that judgments, and in this case rulings, “shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.” This position was affirmed by the Court of Appeal in [Judicial Service Commission v Ndururi](#) KECA 365 (KLR). Without reasons, it cannot be said that a party was granted a fair hearing or in the event the matter ends up on appeal, the appellate court cannot determine whether the trial court exercised its discretion judiciously or otherwise acted arbitrarily.
 5. Second, the court disregarded the fact that in prayer 1 of the application the Appellant had sought a review of the ruling and order of 22.03.2017 on the ground that the court had failed to make a decision on costs. The prayer in respect of review of interest had already been abandoned. I would therefore allow the appeal on these grounds.
 6. Ordinarily in such an instance, the court ought to remand the matter back to the trial court for reconsideration of the application. Since the application subject of this appeal was filed in 2019 and considerable time has since passed and the issue at hand is a straight forward matter of costs, this is a proper matter for the court to assume original jurisdiction. Under section 78 of the [Civil Procedure Act](#), this court has the same power and may perform as nearly as may be the same duties conferred and imposed by the Act on the courts of original jurisdiction in respect of the suit instituted in those courts. Thus I will proceed to determine the application for review in line with the overriding objective in order to obviate further delay of the matter and increase in costs to the parties.
 7. The Subordinate Court entered judgment on admission for Kshs. 4,650,000.00 being the sum claimed in the plaint with interest thereon. Since the court entered judgment in the Appellant’s favour, there was nothing further to be determined in the suit except costs. The Appellant is correct to submit that costs follow the event in accordance with section 27 of the [Civil Procedure Act](#) and the court can only deny a successful party costs for good reason (see [Devram Daltani v Haridas Kalidas Danda](#) [1949] 16 EACA 35 and [Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others](#) [2014] eKLR). As I have stated earlier, it was the duty of the court to give reasons for the decision and if the court was minded to deny the Appellant costs of the suit and the application, it ought to have given reasons for reaching this conclusion. Since this was not done, the Appellant was clearly within his right to move the court for review to correct the error apparent on the face of the record within the meaning of Order 45 rule 1 of the [Civil Procedure Rules](#). An error on the face of the record must be self-evident which does not call for elaborate arguments to support it (see [Muyodi v Industrial and Commercial Development Corporation & Another](#) [2006] 1 EA 243). I hold that the failure to make a decision on costs in light of section 27 of the [Civil Procedure Rules](#) amounts to an error on the face of the record.
 8. As to whether it should be awarded costs, the Appellant cited [Ledama Ole Kina v Samuel Kuntai Tunai & 9 Others](#) [2015] eKLR, where the Supreme Court stated as follows:

(35) Since costs follow the cause, the onus of proof that the successful party ought to be deprived of costs, lies on the party making the claim in order to justify denial of costs to the winning party, it ought to be shown that, that the party was guilty of the conduct which



induced the filing of the action, and without such conduct, the cause would probably not have been lodged.

9. The Respondents urge that the order which was sought to be reviewed was in respect of judgment on admission. That they did not oppose the application as they were willing to settle the decretal amount. That prior to the filing of the application they also sought to resolve the suit. They contend that it would be unfair for the court to award costs to the Appellant since it cannot be inferred whether the trial court intended to award costs.
10. Based on the reasons given, I do not think the Respondents have discharged the burden required to deny the Appellant costs of the suit and the application. The Appellant filed suit seeking the decretal amount in June 2016. In response, the Respondent filed a statement of defence admitting the claim and seeking to pay the claim by installments. The Appellant then followed up with its application dated 06.09.2016 for judgment on admission. In their grounds of opposition, the Respondents admitted the amount claimed but disputed the interest at commercial rates.
11. The Respondents cannot claim that merely because it did not dispute the claim, the Appellant should not be entitled to costs. It was within their power to tender the amount claimed to obviate any further proceedings. The Appellant had to file suit and the application to recover its claim hence it cannot be denied costs. The admission would only serve to reduce the quantum of costs to be awarded by the court. I hold that the Appellant is entitled to costs of the suit and the application.
12. I therefore allow the appeal on the following terms:
 - a. The Ruling and Order dated 30.08.2019 is set aside and substituted with an order allowing the Appellant's application dated 29.05.2019 on terms that the order dated 22.03.2017 is reviewed to the extent that the Appellant is awarded costs of the application and the suit.
 - b. The Respondents shall bear the costs of the appeal assessed at Kshs. 30,000.00.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF DECEMBER 2023.

D. S. MAJANJA

JUDGE

Mr Onyancha instructed by MJD Associates Advocates for the Appellant.

Mr Kabaiku instructed by Wainaina Ireri and Company Advocates for the Respondents.

