



**Nakhanu v Mumias Sugar Co. Ltd & another (Civil Appeal
63 of 2019) [2022] KEHC 10639 (KLR) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 10639 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL 63 OF 2019**

SN RIECHI, J

MAY 31, 2022

BETWEEN

CALISTUS JUMA NAKHANU APPLICANT

AND

MUMIAS SUGAR CO. LTD 1ST RESPONDENT

ISAAC SUMBA SHEUNDA 2ND RESPONDENT

*(Being an appeal from the Judgement and Decree of Hon. G.P. Omondi,
S.R.M in Bungoma C.M.C.C. No. 358/2014 delivered on 3/7/2019)*

RULING

1. This court delivered its judgement in this matter on May 26, 2021. Subsequently, the appellant filed his application dated May 21, 2021 seeking the court's directions on the issue of costs in the lower court together with costs of the instant application.
2. The same is supported by the affidavit of Edwin Kweyu, the applicant's counsel sworn on June 21, 2021 where he depones that since the court was silent on costs in the lower court, the respondents are not willing to pay such costs. Counsel acknowledges that the issue of costs is discretionary to the court, no pronouncement was made considering that as a general rule, costs follow the event thus the instant application.
3. The respondents did not file any response to the application. The court gave directions for the disposal of the application by way of written submissions. Both parties filed.
4. The applicant submits that the appellant having been the successful party in the appeal, he is entitled to costs in the lower court under section 27(1) of cap 21. He relies on the authority in Michael Kipchumba v Channan Agricultural Contractors [2019] eKLR.



5. On the respondents' part, it is submitted that the trial court having dismissed the applicant's suit with costs means the respondents were successful thus the trial court's finding was proper.
6. Counsel submits that the appeal having partially succeeded shows that no party was out outrightly successful. Reliance has been placed on the authorities in *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another* [2015] eKLR and *Peter Muriuku Ngure v Equity Bank (K) Ltd* [2018] eKLR.
7. The issue of costs is provided for under section 27 of the *Civil Procedure Act* which states;

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.
8. These provisions were elaborated by Gitari, J in *Southern Star Sacco Limited v Vanancio Ntwiga* [2021] eKLR where the learned judge stated;

“The exercise of discretion ought to consider when deciding whether to interfere or otherwise with the award of costs made by the trial court judiciously and not on whims or caprice. The rule is that costs must follow the event and can only be disregarded where the court has a good reason and has stated that good reason in her ruling or judgment. A successful party is entitled to the fruits of his labour. And one of these fruits is the costs of prosecuting the suit. The rule of the game is that an award of costs follows the event, and a successful litigant will be awarded costs so as to recoup the costs he has undergone in the course of the litigation.”
8. It is common ground the appellant/applicant's suit in the subordinate court was dismissed with costs to the defendants (now respondents). On appeal, this court set aside the trial court's finding and apportioned liability at 50% each. Each party was ordered to bear its own costs of the appeal. There was no mention of the costs in the subordinate court.
9. In *James Koskei Chirchir v Chairman Board of Governors Eldoret Polytechnic* [2011] eKLR, the Court of Appeal (Bosire, Waki and Onyango Otieno, JJA) awarded costs to the appellant in the trial court notwithstanding the fact that the appeal was successful.
10. Having considered the application and the submissions together with the authorities, the following orders do issue.
 1. The respondents shall have costs in the trial court.
 2. Each party to bear its own costs of the appeal and the instant application.

DATED AT BUNGOMA THIS 31ST DAY OF MAY, 2021

SN RIECHI

JUDGE

