



Kisyula v Kitaa (Civil Appeal 72 of 2019) [2022] KEHC 17084 (KLR) (30 June 2022) (Ruling)

Neutral citation: [2022] KEHC 17084 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 72 OF 2019
MN MWANGI, J
JUNE 30, 2022**

BETWEEN

BONIFACE MAKAU KISYULA APPELLANT

AND

KINGONDU KITAA RESPONDENT

RULING

1. The respondent's notice of motion dated March 9, 2021 is brought under the provisions of sections 3A, 3B and 27 of the *Civil Procedure Act* and order 51 rule 1 of the *Civil Procedure Rules*. The respondent seeks the following orders –
 - i. That the respondent be awarded party and party costs for this appeal; and
 - ii. That the costs of this application be provided for.
2. The application is premised on the grounds on the face of it and the affidavit sworn on March 9, 2021 by Kingondu Kitaa, the respondent herein. He averred that the court dismissed an appeal against him on the October 3, 2019 but there was no mention of the issue of costs although he had prayed for the same.
3. He averred that he tried to negotiate an out of court settlement in futility, and since costs follow the event and the appeal was dismissed in his favour, he is entitled to costs.
4. The respondent deposed that the award of costs is at the discretion of the court and in the interest of justice, he should be awarded costs since he was forced to instruct an advocate and pay legal fees so as to defend the appeal.
5. The application was opposed through a replying affidavit sworn on August 5, 2021 by Sammy Kamau Wanjiku, the appellant's insurer's Claim Manager in exercise of the insurer's rights of subrogation. He averred that on May 6, 2021 before Hon PJ Otieno, parties recorded a consent which was adopted as an order of the court, for stay of execution pending appeal on condition that the decretal amount plus



- costs would be deposited in a joint earning account within 30 days. He stated that the appellant was to file and serve a record of appeal within 30 days and in default of compliance with the two conditions, the appeal was to stand dismissed.
6. He averred that the appellant failed to file his record of appeal within 30 days making the default clause under the consent order to take effect, whereby the appeal stood dismissed. He stated that costs were never sought in the consent and that the appeal was never dismissed by the court.
 7. The application was canvassed by way of written submissions. The respondent's submissions were filed on September 24, 2021 by the law firm of Matata & Mwabonje Advocates, while the appellant's submissions were filed on October 7, 2021 by the law firm of Mogaka Omwenga & Mabeya Advocates.
 8. Mr Matata, learned Counsel for the respondent submitted that a consent was recorded and adopted as an order of the court to the effect that there was to be stay of execution of the decree of the lower court pending the appeal on condition that the decretal amount plus costs were to be deposited in a joint earning account within 30 days. He indicated that another condition was for the appellant to file and serve the record of appeal within 30 days and in default of compliance with the two conditions, the appeal was to stand dismissed. He submitted that the appellant failed to honour the conditions stipulated in the said consent resulting in the appeal being automatically dismissed. He cited the case of *Re Estate of Kiptoo Lagat (Deceased)* [2021] eKLR, where the court held that it would amount to an injustice on the citor if costs were denied where the citee failed to act diligently while being aware of the proceedings.
 9. He submitted that awarding costs is at the discretion of the court but in this case, the respondent was praying to be awarded costs in order to recoup the expenses incurred in defending the appeal that was eventually dismissed due to the inaction of the appellant. To buttress his submissions, he cited the case of *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another* [2016] eKLR, where the court held that it is well recognized that the principle that costs follow the event is not to penalize the losing party; but it is for compensating the successful party for the trouble taken in prosecuting or defending the case.
 10. Ms Kerubo, learned Counsel for the appellant submitted that in the consent that was adopted as an order of the court, no costs were awarded to the respondent. She contended that the consent should not to be interpreted to mean that the other party succeeded in the suit, as it means that both parties played a part in the final determination of the suit. In support of her submissions, she relied on the case of *Rufus Njuguna Miringi & another v Martha Muriithi & 2 others* [2012] eKLR.
 11. She also submitted that a consent order cannot be selectively enforced, since it is binding on the parties and an attempt to seek costs by the respondent amounts to a review which is not sustainable. She cited the Court of Appeal decision in *Flora N Wasike v Destimo Wamboko* [1988] eKLR, where the court stated it cannot interfere with a consent judgment except in such circumstances as would afford good grounds for varying a contract between the parties. She was of the view that the respondent was not entitled to costs as the appeal had not been admitted to hearing.

Analysis and Determination.

12. It is common ground that on May 6, 2019, the counsel for the parties recorded a consent and the same was adopted as an order of the court on the following terms:

“(i) There be stay of execution of judgment (*sic*) of the lower court dated March 21, 2019 be stayed (*sic*) pending the hearing and determination of this appeal on condition that:



- a. The appellant shall deposit the decretal sum plus costs of Kshs 925,040 into a joint interest earning account in the names of the advocates for the parties within 30 days from today;
- b. The appellant files and serves a record of appeal within 30 days from today; and
- c. In default to comply with any of the two conditions the appeal shall stand dismissed.” (emphasis added).

13. Even if costs had not been included in the above consent, the case of *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR is instructive as it addressed the issue of costs in an instance where parties had entered into a consent but had not made any mention of whether costs were payable and by which of the parties. The court held thus-

“But, it does not necessarily mean that, where parties have entered into consent to settle a proceeding, no costs should be awarded, or there is no successful party in the matter. The incidence of settlement by consent of the parties, to my mind, is just but a vital factor the court should consider, within the circumstances of each case, in deciding whether costs are payable or not. A consent recorded in settlement of a proceeding is not an automatic disentitlement of costs and I, would, therefore, hesitate profoundly to make any generalized propositions on the law that consent is an automatic disentitlement of costs without reference to the context of the particular case. There are obvious reasons I say so; the nature of settlement in the consent may determine the course of the event and, thus, the place of costs in the suit; parties may as well in the consent indicate that costs shall be borne by a particular party and I do not think that can be defeated on the argument that a settlement by consent of the parties means no party pays costs unless it is expressly stated or by implication inferred in the case.”

14. Having considered the above authority, which is persuasive to this court, it is my finding that since the consent provided for deposit of the decretal sum and costs, the respondents herein are entitled to their costs of the appeal. It does not matter that the appeal was not admitted to hearing. What is of significance is that the respondents instructed an advocate to defend the appeal and they incurred costs by so doing.
15. The appellant herein provoked the instant appeal, entered into a consent with the respondent on May 6, 2019, which afforded him a stay of execution of the judgment of trial court pending appeal. However, the appellant did not comply with the conditions of the consent recorded on May 6, 2019, and adopted as an order of the court. Consequently, after the elapse of 30 days from the date of the consent, the appeal stood automatically dismissed. From the foregoing, it can be discerned that the respondent herein was the successful party.
16. It is noteworthy that the consent entered into expressed that the deposit of Kshs 3,150,953.00 was not only for the decretal amount but included costs as well. The said consent has neither been set aside nor was it obtained by fraud, or collusion or misrepresentation. The consent is also not contrary the policy of the court. As such, the consent entered into on May 6, 2019 and adopted as orders of the court is binding on the parties herein. See *Hirani v Kassam* [1952] 19 EACA 131 at 134. The respondents shall therefore have the costs of the appeal and the costs of the instant application.

It is so ordered



DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 30TH DAY OF JUNE 2022.

Ruling delivered through Online Teams Platform.

NJOKI MWANGI

JUDGE

In the presence of-

Ms Kerubo for the appellant

No appearance for the respondent

Mr. Oliver Musundi – Court Assistant.

