



**Khetia v Mohammed (Civil Appeal 95 of 2017)
[2022] KEHC 14102 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14102 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 95 OF 2017
RN NYAKUNDI, J
OCTOBER 21, 2022**

BETWEEN

HITESH BIKHULA KHETIA APPELLANT

AND

FATUMA JAMA MOHAMMED RESPONDENT

RULING

1. What is before this court is the Respondents' party and party bill of costs dated 9th December 2020. The bill of costs was taxed at kshs. 293,660/-. Vide a ruling delivered on 8th April 2020, the trial court dismissed the appeal with costs.

Applicant/respondent's Case

2. The respondent filed submissions on 10th May 2021. It was her case that the entire litigation in this matter is the result of the appeal. The court dismissed the appeal because of inaction by the appellant. The appeal has succeeded in favour of the applicant and thus she is entitled to costs. The respondent has brought her bill under the provisions of schedule 6 of the Advocates Remuneration Order 2014 and the said bill is drawn to scale and ought to be allowed as prosecuted. The other items in the bill of costs are not challenged and the respondent asked the court to award the unchallenged items as presented.
3. Further, that the appellant did drag the respondent to court in a manner of an appeal. The respondent expended time and labour in trying to move the appeal. The appellant neglected the appeal and in the process prejudiced the appellant who is now entitled to costs.

Respondent/appellant's Case

The Respondent Filed Submissions On 15th April 2021.



4. It is the respondents' case that The court allowed the Respondent's application dated 5th September, 2019 vide the ruling delivered on 8th April 2020 and that it is therefore vividly clear that costs were only awarded in relation to the application dated 5th September, 2019. Further, that there is no order for costs on the dismissed appeal to warrant the bill before the court.
5. The bill is without basis in view of the court's holding and therefore the same should be struck out with costs. However, the respondent submitted that had the Respondent properly drawn her bill on the application as ordered by the High Court, then the following submissions would suffice in the circumstances and/or the costs as tabulated hereunder would be awardable as costs on the application;
6. The Respondent is entitled to item 9 which is drawing the application dated 5th September, 2020 which should be taxed at KShs.1,100/=.
7. Drawing the bill of costs which is two folios should be taxed at KShs.360/=, attendance for taxation should be taxed at Kshs. 1,000/=.
The bill of costs should thus be taxed at kshs. 3,860/=.
8. The rest of the items do not relate to the application dated 5th September 2019. However, Section 77 of Advocates (Fees for Restoration to the Roll) Regulations 1962 provides;
 77. Where more than one-sixth taxed off
 - (1) if more than one-sixth of the total amount of a bill of costs, exclusive of court fees, be disallowed on taxation, the party presenting the bill for taxation may, in the discretion of the taxing officer, be disallowed the costs of such taxation.
 - (2) The decision of the taxing officer under this rule shall be final.”
9. In line with the provisions aforesaid the Respondent should not be awarded the costs for taxation of the bill of costs hence Kshs. 3,860/= minus Kshs. 1,000/= giving a grand total of kshs. 2,860/=.
10. The Respondent having failed to draw up a correct bill of costs on the application as ordered, and in the absence of any provision in law to amend a bill of costs, the bill before court must not see the light of the day and ought to be struck out.

Issues For Determination

- a. Whether the bill of costs should be for the entire appeal or for the application
- b. Whether the bill of costs should be allowed as drawn

Whether The Bill Of Costs Should Be For The Entire Appeal Or For The Application

11. A reading of the order of the court shows that the costs of the application were awarded to the applicant. This is in line with section 27 of the *Civil Procedure Act* which provides that costs follow the event. Section 27 provides;

“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”.

12. In *Devram Manji Daltani vs. Danda* [1949] 16 EACA 35 it was held that a successful litigant can only be deprived of his costs where his conduct has led to litigation, which might have been averted.
13. What is in contention is whether the costs of the appeal should also be due to the applicant. The premise of the claim that the costs for the entire appeal should be awarded to the respondent applicant is that by having the appeal dismissed it follows that the respondent was the successful party in the appeal.
14. In *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another* [2016] eKLR, the Court Outlined the conditions a court should adhere to in determining an award of Costs when it held as follows;

“To my mind, in determining the issue of costs, the court is entitled to look at inter alia (i) the conduct of the parties, (ii) the subject of litigation, (iii) the circumstances which led to the institution of the proceedings, (iv) the events which eventually led to their termination, (v) the stage at which the proceedings were terminated, (vi) the manner in which they were terminated, (vii) the relationship between the parties and (viii) the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of the Constitution. In other words the court may not only consider the conduct of the party in the actual litigation, but the matters which led to the litigation, the eventual termination thereof and the likely consequences of the order for costs.”

15. Justice Richard Kuloba in his book *Richard Kuloba, Judicial Hints on Civil Procedure, 2nd Edition, page 99*, states as follows: -

“The words “the event” mean the result of all the proceedings to the litigation. The event is the result of the entire litigation. It is clear however, that the word “event” is to be regarded as a collective noun and is to be read distinctively so that in fact it may mean the “events” of separate issues in an action. Thus the expression “the costs shall follow the event” means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it. An issue in this sense need not go to the whole cause of action, but includes any issue which has a direct and definite event in defeating the claim to judgement in the whole or in part”

16. The appellant brought the respondent to court and the appeal failed as a result of the appellants’ inaction. Keeping in mind that the appeal was dismissed for want of prosecution, it is evident that the appellant was indolent in the pursuit of justice. The respondent responded to the appeal and expended energy, time and labour as a result of the same. Given that the respondent is the successful party in the appeal, I find that the costs of the entire appeal are therefore awarded to the respondent. I note that the appellant has not challenged the items relating to the appeal and find no reason to tax off any amount from the bill of costs.
17. I therefore find that the bill of costs is awarded as drawn.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 21ST DAY OF OCTOBER, 2022.

.....



R. NYAKUNDI

JUDGE

(office@nyairoadvocates.co)

Coram: Hon. Justice R. Nyakundi

M/S Nyairo & CO. Adv for appellant

M/S Keter Nyolei & CO. Adv respondent

