



Chebet & another v Makokha & another (Suing as the legal representatives of the Estate of Sammy Wamalwa Seme) (Civil Appeal 75 of 2021) [2022] KEHC 16354 (KLR) (16 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16354 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 75 OF 2021
RN NYAKUNDI, J
DECEMBER 16, 2022**

BETWEEN

WILSON KAINO CHEBET 1ST APPELLANT

SHADRACK KIPROTICH 2ND APPELLANT

AND

BEATRICE NALIKA MAKOKHA 1ST RESPONDENT

SARA NJERI 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF SAMMY
WAMALWA SEME**

RULING

1. What is before this court is the clarification as to whether the appeal was dismissed and the appellant was awarded costs of the appeal. This court delivered its judgment on the appeal in October 12, 2022 whereby it dismissed the appeal in its entirety. The respondents then moved the court to clarify on the issue of costs as the same was not expressly stated in the judgment. The decision occasioning grievance has therefore to be construed on the general rule that costs follow the event.

That is what section 27 of the *Civil Procedure Act* states;

“(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.”

2. This means that the winning party is to be awarded costs to be paid by the losing party in a litigation. The identification of such a party is obtainable from the proceedings. The importance of this general rule was clearly stated in the persuasive case of *Veolla Water UK PLC -V- Fingal County Council* (2006) IEHC 240 in which the court held as follows; “that parties who are required to bring a case to court in order to secure their rights are, *prima facie*, entitled to the reasonable costs of maintaining the proceedings. Parties who successfully defend proceedings are, again *prima facie*, entitled to the costs to which they have been put in defending what, at the end of the day, the court has found to be unmeritorious proceedings. The court also gave guidance as to the principles that should be applied thus; in relation to complex litigation in the following text. It seems to me that having regard, in particular, to the very substantial sums of money that may be at stake when a court is considering how to award costs, it is incumbent on the court, at least in complex cases, to at least give consideration as to whether it is necessary to engage in a more detailed analysis of the precise circumstances giving rise to such costs having been incurred before awarding costs. Furthermore, it seems to me to be incumbent on the court to attempt to do justice to the parties by fashioning, where appropriate, orders of costs which do more than simply award costs to the winning side.”

It is more apparent from the set of factors above that the court in granting such orders on costs shall find in them foundation to exercise discretion as a critical threshold. In the case of the Kenyan circumstances and against the above background superior courts have profoundly spoken on this issue on award of costs that necessarily follows the event.

In the case of *Party of Independent Candidate of Kenya & another vs Mutula Kilonzo & 2 others* (2013) eKLR which cited with approval the words of Murray C J in *Levben Products vs Alexander Films (SA) (PTY) Ltd* 1957 (4) SA 225 (SR) at 227 that it stated:

“It is clear from authorities that the fundamental principle underling the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion ...But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

3. It is my considered view that having regard to the appeal which I presided over the respondents were successful for the dismissal order was in their favour. As to the overall costs of the proceedings they are entitled to the consequential award of the costs incurred. Accordingly, I exercise such discretion to rectify an error on the face of the record to award costs to the respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 16th DAY OF DECEMBER, 2022.

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R NYAKUNDI

JUDGE

In the presence of:



Matekwa for Mwinamo for the respondents

Coram: Hon. Justice R. Nyakundi

Mwinamo Lugonzo & CO. Adv

M/S Onyinkwa & CO. Adv

