



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CIVIL APPEAL NO.E004 OF 2021

COUNTY GOVERNMENT OF TANA RIVER

GAFI HIRIBAE.....APPELLANTS

VERSUS

HUSSEIN FUMO HIRIBAE.....RESPONDENT

(Being an appeal from the Ruling of the Hon.E.Kadima - SRM delivered on

the 6th day of May, 2021 in Garsen Principal Magistrates' Court in Cmcc No. 83 of 2020)

CORAM: Hon. Justice R. Nyakundi

Osur & Associates Advocates for the Appellants

John Bwire & Associates Advocates

Wambua Kilonzo Advocates for the Respondent

RULING

Though premised as a motion in this case the competing factor is on the ruling entered in favour of the Respondent on throwaway costs. It is recognized that the applicant who is also an intended appellant appears to be aggrieved with the decision and requires stay of execution so as to reflect on the issues that are in contention in the said appeal. When the parties appeared before me in seeking leave to argue the application on the merits, I did prompt them in that regard to consider the merit in the intended appeal. With respect to the question of the application I consider it as compromised as to the terms upon which the matter is being determined.

Before this Court is a Notice of Motion filed in court on 19.5.2021 by the applicant, initially the defendant in PMcc case No. 85 of 2020 expressed to be brought section 1(A), 1(B), 3(A) and 95 of the Civil Procedure Act, order 42 Rule (6) 3 and under Article 22 and 159 of the Constitution seeking the following substantive orders;-

- 1. That pending the hearing and determination of the application inter-partes or further orders of the court this Honourable Court be pleased to grant to the 1st Defendant/Applicant an interim stay of proceedings against implementation of the ruling and orders delivered on 6th May, 2021.***
- 2. That this honourable court be pleased to vary and or set aside the stringent conditions set out in the ruling dated 6th May, 2021.***
- 3. That the series of files sequential to this matter before the same court namely GARSEN PMCC Numbers 84,85,86,87,88,89,90,91,92,93,94,95,96,97,98,99,100,101,102,103,104,105,106,107,108,109,110,111,112,113,114,115,116,117,118 and 119 of 2020 where the order was decreed to Apply.***
- 4. That all the listed files in paragraph 4 above be transmitted to this Honourable court for record purposes and for determination of this Appeal as a series.***
- 5. That pending the hearing and determination of the intended appeal, the Honourable Court be pleased to issue an order of stay of execution of the consequential order on thrown away costs at a Kshs.150, 000/- as set by Honourable E.Kadima delivered on***

the 6th May, 2021.

Looking at this motion and the purpose of the whole object as expressed in the various grounds alluded to in its body and affidavit is to get the order on throw away costs to be varied and set aside. The background of this motion is to finally deal with the issues raised in the intended appeal on whether the respondent was entitled to the amount of throw away costs as assessed by the learned trial magistrate.

If I were to deal with the motion, grounds on the face of it and the affidavits of both parties this court will be forced to litigate by installments first under order 42 rule 6 of the Civil Procedure Rules on stay of execution and subsequent directions on the intended appeal. My approach to call for submissions on the interlocutory ruling is for all intents and purposes to give effect to the overriding objective. Without prejudice to Order 46 Rule 6 of the Civil Procedure Rules I urged both counsels to maintain status quo of the subject matter pending the determination of this appeal. This power is exercisable in this case by invoking section 1 (a) and (b) of the Civil Procedure Act on overriding objective which states:-

“The Court is to facilitate the just, expeditious, proportionate and affordable resolutions of the civil disputes governed by the Act.”

The approach of the Court is a matter of applying common sense and the balance of convenience which are dependent upon all the circumstances of the case. The essential question is whether there is a risk of injustice to one or other or both parties can be stifled if allowed to go through procedural law on filing, admission and hearing of the appeal from an interlocutory order. It is not contested that the consideration of the issues in the primary suit are yet to be adjudicated upon as between the intended appellant and the respondents. Why should there be administrative exercise on appeals and the cost associated with it which on the face of the impugned ruling and its legality, correctness, justness and regularity can be disposed of at the earliest opportunity.

It is against this background both counsels argued on the significant parts of the Court’s ruling on throwaway costs.

In support of the issues raised in the intended appeal learned counsels submitted that the throwaway costs were devoid of any logical justification and no reasons were given for the award of punitive and exorbitant contrary to the provisions of the Advocates Remuneration Order. Learned counsel observed that the secured order for costs by the Respondent violates the letter and spirit of section 1(a) and 1(b) on overriding objective. He placed reliance on ***Caltex Oil Limited V Evanson Wanjihia Civil Appl. Number 190 of 2009[UR 131/2009] and Sheila Wambui Muturi V Peter Macharia Muiuru [2021] eKLR.***

The great weight of learned counsel submissions indicates that the underlying reasons to assess the throw away costs are not very clear from the Ruling of the trial court. That in dealing with the nature of the issues before you there was an excess on exercise of the vested jurisdiction rendering the decision voidable.

The respondent counsel vehemently opposed the appeal both in his affidavit and oral submissions in court in rebuttal to the submissions filed by the applicant counsel. These affidavits and submissions are quite firm on their respective contentions based on that belief as to the appropriate orders to be granted by the court having taken into account all those issues, it all boils down to the one central concern on the part of the applicant whether the award of Kshs.150, 000/= throw away costs is tenable in law.

Determination

The powers of the court in dealing with issues of this nature is to do justice to the parties based on the following principles. In the case of ***Ibrahim Ahmed V Halima Guteti High Court at Mwanza Number 128 of 1967) 1968 THCD*** in which the court held *inter alia*:-

“The question for a court on appeal is whether the decision below is reasonable and can be rationally supported if so the lower court should be affirmed. The appeal judge may not in effect try the case de novo, and decide for the party he thinks should win.....”

Going by the principles in ***Idi Ayub Omani Shabani V City Council of Nairobi [1985]1KAR 681*** the court while dealing with appeals on general terms covering award of damages by the lower court had this to say:-

“An appeal court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low”

To answer the question it is the duty of this court to review the evidence as it stands against the impugned order of the trial court (***See Peters V Sunday Post Ltd [1958] EA 429.*** Normally, in matter of costs the discretion given is very wide though underpinned under section 27 of the Civil Procedure Act. A rule in which the provisions states that:-

“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 powers to determine by whom and out of what property and to what extent such costs are to be paid.”

It is eminently desirable the material objects of these principles apply ***Mutatis Mutandis*** in evaluating the reasonableness and correctness of award of throw away costs subject matter of this appeal.

Significantly on appeal any such award of costs should not be interfered with unless it’s proved by the appellant existence of misdirections or application of wrong principles resulting in an erroneous decision. Whereas right to access justice under Article 48 of the constitution

insulates parties to a litigation for any exercise of discretion which impairs the attainment of that right, it's imperative therefore that the costs so allowed by the court be proportionate to what is at stake.

The legal foundation for fair and proportionate award of costs is as espoused in the case of *R V Rosemary Wairimu Munene, Exparte Applicant V Ihururu Dairy Farmers Co-operative Society JR No. 6 of 2014* where the court recognized that;

“in exercising discretion under section 27 of the Civil Procedure Act the objective should not be sued to penalize the losing party, neither it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

In my view the award of costs either in the classification defined in section 27 as those that follow the event or throwaway costs as it's in the case herein, the uniting factor is closely linked to adjudicative procedures before courts by a litigating party. These procedures can consume time, energy and money. This award of costs may be one route to improve due diligence and efficiency in our legal system as whole. The Court further in *Scherer V Counting Instruments Ltd[1986] IWL 615 the English Court of Appeal* set out the principles for the award of costs which are in essence not far distanced from our local jurisprudence. They are;-

- a) The normal rule is that cost follows the even. The party who turns out to have unjustifiably either brought another party before the court, or given another party cause to have recourse to the Court to obtain his rights is required to compensate that other party in costs; but***
- b) The judge has an unlimited discretion to make what orders as to costs he considers that the justice of the case requires.***
- c) Consequently, a successful party has a reasonable expectation of obtaining an order for his costs to be paid by the opposing party, but has no right to such an order, for it depends upon the exercise of the Court's discretion.***
- d) This discretion is not one to be exercised arbitrarily, it must be exercised judicially, that is to say, in accordance with established principles and in relation to the facts of the case.***
- e) The discretion cannot be well exercised unless there are relevant grounds for its exercise, for its exercise without grounds cannot be a proper exercise of the judges' function.***
- f) The grounds must be connected with the case. This may extend to any matter relating to litigation, but no further. In relation to interim application, “the case” is restricted to the application, and does not extend to the whole of the proceedings.***
- g) If a party invokes the jurisdiction of the court to grant him some discretionary relief and establish the basic ground therefor, but the relief sought is denied in the exercise of discretion the opposing party may properly be ordered to pay his costs. But where the party who invokes the Court's jurisdiction wholly fails to establish one or more of the ingredients necessary to entitle him to the relief claimed, whether discretionary or not, it is difficult to envisage a ground on which the opposition party could properly be ordered to pay his costs.***

In the instant appeal, it is not denied from the record a claim on liability and damages was filed by several claimants against the appellant in an accident which occurred on or about 30.12.2019 along Gawesa-Kitere road. The claimants are alleged to have been travelling on board motor vehicle registration No.CG04205A when the 2nd appellant so negligently drove, managed and or controlled the aforesaid motor-vehicle that the same lost control and overturned whereof the claimants sustained several injuries as particularized in their respective plaints. What happened thereafter was for summons being served upon the appellants who failed to defend the suit In **Pmcc 83,84,85,86,87,88,89,90,91,92,94,95,96,97,98,99,101,102,103,104,105,106,107,108,109,110,111,112,112,114,115,116,117, and 119 of 2020.**

The appellants having failed to take necessary steps to participate in the court process within such a time as the honourable court decreed, the trial proceeded as scheduled. The court was therefore right to have proceeded to determine the issues in conformity with procedure law.

Looking at these claims and the defences presented before the trial court the Exparte judgement was set aside and in all circumstances conditions upon terms of throwaway costs of 150,000/- to compensate the respondent in all incidentals incurred during the prosecution of the suit.

Justice Kuloba in his book, *Judicial Hints on Civil Procedure 2nd Edition* illustrate the pivotal role played by the provision in section 27 of the Civil Procedure Act and the purposeful interpretation of the phrase

“The event” this is 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 registered as a collective noun and is to be read distinctively so that in face it may mean the events of separate issues.”

In an action thus the expression, the cases 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.

In my strong view the respondent being awarded throwaway costs are to cater for substantial indemnity costs to reflect time that was wasted and would be duplicated when the trial is rescheduled. Requests for Exparte judgements in a trial occurs on the fault of one party not taking full responsibility in the case management directions and imperative provisions on timelines in the Civil Procedure Act and Rules.

Considering this matter in its entirety as mentioned in the affidavits by the appellant, it is improper to impeach the integrity of the court process that culminated in the adjudication of the thirty four claims before the trial court. It has been shown that the court in setting aside the Exparte judgements insisted on award of throwaway costs to compensate the respondent for the effort put in and expenses incurred which turned out to be wasted, because of the blameworthy of the appellant.

I reiterate that the considerations here on Exparte judgement may have arisen as a result of some improper act or omission on the part of the appellant or any such legal representative or any employee tasked with such representation in the defence of the pending suits at Garsen Law Courts. In light of any such act or omissions occurring and thereafter it's established within the court's discretion, there is need for throw away costs to be awarded to the Respondent any such discretion unless wrongly exercised should not be interfered with an appeal.

For example, if a summons to the claim are duly served and the defendant fails to enter appearance or file defence, the court is at liberty to proceed with the entry of judgement and fix the case for formal proof. As a result, if the plaintiff happens to hire a legal representative or call witnesses or on his own behalf there are costs and other incidentals in preparation for the hearing which formally must take place. All such costs that fall due in absence of the other party having been served with summons does not diligently fall through the court proceedings shall be liable unless there are compelling reasons to excuse an award of costs.

In the present case subject matter of this appeal, the respondents costs were awarded on a scale dependent to the facts and the evidence availed to the trial court. This is no dispute that the respondent were entitled to be reimbursed for such expenses or costs underpinned in the thirty four suits being weighted and now pending at that court. The decision of how much weight to accord to the relevant factors to assess the throw away costs is the hallmark of the discretionary power of the trial magistrate.

In my judgement I have found no error, mistake or misdirection in the impugned order to call for interference considered worthy to vitiate the costs in relation to the issues raised at that other trial. It is trite that the general rule accompanying the exercise of court's discretion is to look at the cost and the indemnity principle. In short to that question the courts in quo in relation to the contested cost was judicially exercised. All in all the canon that the costs follow the event under section 27 of the Civil Procedure Act is *Mutatis Mutandis* applicable to the class of costs defined as throwaway costs. It was therefore appropriate for the trial court to depart from the general provision on costs to award throw away costs. The merits of the dispute in the court below when inquired into by this court shows that the order made in that dispute on throwaway costs was properly made. The volume of the evidence dealt with by counsel and the court should not obscure that indemnity which purely fall within the court's jurisdiction. In my view the appellants raised the issue due to the screaming nature of the quantum assessed at Kshs.150, 000/= without necessarily taking into account the broad spectrum of the litigation. I would therefore decline the appeal with no orders as to costs.

DATED, SIGNED AND DELIVERED VIA EMAIL AT MALINDI THIS 23RD DAY OF JUNE, 2021.

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R. NYAKUNDI

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

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