



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 632 OF 2017

NELLY KALIA KILONZO.....1ST APPELLANT

HARRIZON MATIVO.....2ND APPELLANT

CECILIA NDUNG'E.....3RD APPELLANT

FELIX MAUTA.....4TH APPELLANT

-VERSUS-

CIC GENERAL INSURANCE LIMITED.....1ST RESPONDENT

EQUITY INSURANCE AGENCY LIMITED.....2ND RESPONDENT

RULING

1. The 2nd respondent filed the application dated 20th March, 2017 before the trial court, seeking to have its name struck out of the suit on grounds that it was non-suited. Upon hearing the parties, the trial court allowed the application vide its ruling delivered on 17th October, 2017 and also awarded costs of the application to the 2nd respondent.

2. The above ruling precipitated the appeal which was filed by the appellants before the High Court, seeking to have the ruling set aside. The High Court, upon hearing the appeal, allowed it by setting aside the ruling of the trial court and substituting it with an order dismissing the 2nd respondent's application of 20th March, 2017, by way of its judgment delivered on 20th January, 2020. The High Court also awarded costs of the appeal to the appellants. Thereafter, the appellants filed the party and party Bill of Costs dated 7th February, 2020 against the 2nd respondent. When the Bill of Costs came up for hearing before the taxing master, the advocate for the 2nd respondent contended that the Bill of Costs ought to be taxed as against both respondents, which prompted the matter being placed before this court.

3. Following the directions of this court, the parties filed and exchanged written submissions on the issue of costs.

4. I have considered the rival submissions on record plus the authorities cited. It is clear that the sole issue for determination has to do with who should bear the costs of the appeal between the two (2) respondents.

5. On their part, the appellants urge this court to order that the costs of the appeal be borne by the 2nd respondent since the 1st respondent did not participate in the hearing of the appeal and the orders sought and made on appeal have no adverse impact on the latter. The appellants have cited inter alia, the case of **Republic v Rosemary Wairimu Munene, Ex-Parte Applicant v Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review application No. 6 of 2014** where the court held thus:

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event.....It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

6. The 1st respondent submits that since it did not participate in the appeal which was essentially between the appellants and the 2nd respondent, the latter cannot now purport to have the costs of the appeal borne by itself and the 1st respondent. Reference was made *inter alia*, to the judicial authority of **Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR** in which the court reasoned that in determining the issue of costs, the following factors are to be considered:

“the conduct of the parties; the subject of litigation; the circumstances which led to the institution of the proceedings; the events which eventually led to their termination; the stage at which the proceedings were terminated; the manner in which they were terminated; the relationship between the parties and the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of the Constitution.”

7. In response, the 2nd respondent argues that since the 1st respondent was equally sued in the appeal and in fact participated therein, both respondents ought to bear the costs of the said appeal. The 2nd respondent further argues that to order it to solely bear the costs of the appeal will result in financial suffering and injustice.

8. Upon perusal of the record, I established that the application dated 20th March, 2017 which gave rise to the ruling delivered on 17th October, 2017 and consequently, the appeal with the High Court, was essentially between the appellants and the 2nd respondent, with the latter claiming that it had been improperly joined as a party to the suit. The record also shows that whereas the advocate for the 1st respondent attended court for the hearing of both the application and the appeal, the 1st respondent did not file any documents or play any active role in both instances. From the judgment on appeal, I note that the issue of who ought to bear the costs of the appeal was not addressed.

9. In that case, **Section 27(1)** of the **Civil Procedure Act Cap. 21 Laws of Kenya** which was cited by the parties herein provides that the issue on costs of all suits (and appeals) lies with the discretion of the courts and that such costs shall follow the event. It is therefore clear that it is upon the courts to determine who ought to bear the costs incidental to suits, applications and appeals. This legal position was reaffirmed by the court in the case of **Republic v Rosemary Wairimu Munene, Ex-Parte Applicant v Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review application No. 6 of 2014** as seen hereinabove and which case was similarly referred to by the parties.

10. Upon considering the foregoing circumstances, I am not convinced by the argument of the 2nd respondent that the costs ought to be borne by both respondents; I am inclined to agree with the positions taken by the appellants and the 1st respondent.

11. I am therefore of the view that it would be in the interest of justice and a proper exercise my discretion to order and direct that the costs of the appeal in this instance be hereby borne solely by the 2nd respondent. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF JULY, 2021.

A. MBOGHOLI MSAGHA

JUDGE

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 29TH DAY OF JULY 2021.

J. K. SERGON

JUDGE

In the presence of:

Mr. Ray Aboge . for the Appellant

No appearance for the 1st respondent

No appearance for the 2nd respondent