



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J)

CIVIL APPEAL NO. 100 OF 2015

ROSEMARY NYAMBURA MBURU.....APPELLANT

-VERSUS-

LILIAN WAITHERA MBURU.....1ST RESPONDENT

DORCAS WANJIKU MBURU.....2ND RESPONDENT

(Being an appeal from the judgment and order of Hon. M. K. Mutegi of Senior Resident Magistrate, in SRMCC No. 75 of 2015 delivered on 29th August, 2015.)

JUDGMENT

1. This appeal is against only the award of costs in the lower court. In the suit in the lower court, the substantive issue concerned whether the Plaintiff/Appellant should be allowed to participate in the burial of Paul Mburu Karanja. She claimed that right as fourth wife of the deceased. On their part, the Defendants/Respondents, as 2nd and 3rd wives of the deceased, had allegedly excluded the Plaintiff/Appellant from all burial arrangements.
2. The trial magistrate, in an eighty page judgment, dismissed the plaintiff's case with costs to the defendants. The plaintiff's appeal against the judgment prays that the judgment "*be set aside with costs to the appellants.*"
3. When the matter came before me on 23rd September, 2019, the parties abandoned the appeal except as to the issue of costs. Parties filed written submissions on the issue of costs.
4. The appellant submits that the matter in the lower court went to full trial, resulting in dismissal with costs which were allegedly taxed in the amount of Kshs 82,285/=. Stay of execution was granted by Meoli J in a ruling dated 17th May, 2016, on condition that the appellant do deposit the amount of Kshs 40,000/= as security. The appellant's central concern now is whether the costs assessed in the lower court are correct or wrong. The appellant seeks that the amount deposited as security be treated as sufficient for party and party costs in the matter.
5. The Respondent submits that the subject of costs is not raised in the grounds of appeal nor in the prayers sought on appeal. The Respondent argues that in the amended plaint dated 19th June 2015, the plaintiff/appellant sought:
 - a) To be allowed to participate on the burial as a wife.
 - b) Temporary injunction stopping the burial of the deceased.
 - c) General damages, and
 - d) Any other relief.
6. I have perused the amended plaint of the appellant in the lower court and the memorandum of appeal. The plaint, as correctly submitted by the Respondents, did not seek any costs. Had any costs been awarded to them if they had been successful, that would have been purely at the behest and discretion of the trial court.
7. On their part, the Defendant/Respondent in their defence sought:-

- a) Dismissal of the plaintiff's suit.
- b) Costs of the suit.
- c) Costs incurred on the course of the suit.

8. In the memorandum of appeal herein the appellant prays for:

“a) Judgment herein be set aside with costs to the appellants.

b) A declaration that there was a presumption of marriage in favor of the Appellant that she was the wife of the deceased.”

The appellant is pursuing item (a) since item (b) was resolved and settled by consent of the parties.

9. I have carefully considered the submissions and documents availed. The prayer in this appeal is for the lower court's judgment to be set aside with costs to the appellant. The appellant did not however plead costs in the lower court, and as such the appeal would have been limited to setting aside judgment without effect on the costs, unless the discretion of the trial court could have been or was shown to have been exercised injudiciously. There has been no such proposition and no arguments made on that point.

10. I have also not seen any bill of costs or taxation/or assessment thereof, and so cannot make any comment on costs in the lower court in so far as concerns how they were arrived at. In any event, in this appeal there is no prayer seeking that the determination or assessment of costs in the lower court be reviewed nor is there any specific reasoned challenge of the same, nor submissions in respect thereof. All that is before me is a bare request for reconsideration of costs awarded.

11. This leaves this court in the precarious position where the only costs it can determine and or interfere with are the costs of the substantive appeal. Those are in the discretion of this court.

12. I have seen a decree dated 11th November, 2015 accompanied by a notice to execute, but there is no material availed to the court upon which any deliberation or consideration thereof can be undertaken.

13. In the result, the appeal against costs or seeking that this court interfere with an award of costs in the lower court is without basis and is hereby dismissed.

14. In the peculiar circumstances of this case, I make no order as to costs.

15. Orders accordingly.

Dated and Delivered at Naivasha this 24th Day of February, 2020

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Rosemary Nyambura Mburu - Appellant in person.
2. Mr. Mburu F. I. for the Respondents
3. Court Clerk - Quinter Ogutu