



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL APPEAL NO. 32 OF 2019**

**DIAMOND TRUST BANK KENYA LIMITED.....APPELLANT**

**VERSUS**

**SANLAM GENERAL INSURANCE LIMITED.....1<sup>ST</sup> RESPONDENT**

**ROYAL HISHAM KENYA LIMITED.....2<sup>ND</sup> RESPONDENT**

**(Being an Appeal from the Ruling and order of the Chief Magistrate's Court of Kenya at Mombasa dated and delivered on the 4<sup>th</sup> February 2019 by Hon. E Muchoki in Mombasa CMCCC No. 1227 of 2018)**

**RULING**

1. By its Notice of Motion dated the 16/6/2020 and filed the same day, the 2<sup>nd</sup> Respondent makes a prayer that the court be pleased to clarify as to how and by whom the costs of the Appeal should be paid and if the 2<sup>nd</sup> Respondent is also entitled to such costs. That prayer has been provoked by the judgment delivered on the 8/5/2020 by which the court in coming to its conclusion found that the originating summons was improperly taken on a matter not intended even though the same could be returned and was returnable before a magistrate's court.
2. The reasons advanced on the face of the application and in the affidavit in support were that; having been brought into the appeal without its consent, the 2<sup>nd</sup> respondent did not oppose the appeal and had from the onset supported the dismissal of the suit and lastly that there having been no clarity as to who between the respondents should pay the costs of the appeal it was upon the court to make a clarification.
3. In opposing the application the 1<sup>st</sup> Respondent in the appeal, took the position that the court is *functus officio* in the file and in matter of the costs even though it was added that the Applicant/2<sup>nd</sup> respondent had raised a reservation with the draft decree at the stage of approval.
4. The other position taken is that the application was defective for being an affront to Order 21 Rule 8(4) and was equally not one capable of pursuit pursuant to Section 60 of the Act. It was then contested that the 2<sup>nd</sup> respondent had always been on the side of the appellant at trial it being pointed out that it in fact objected to striking out of the third party notice and was satisfied with the decision by the trial court by not challenging it by way of an appeal. In the end, it was urged that the appellant having been brought into the litigation by the 2<sup>nd</sup> respondent and the appeal having ended in favour of the appellant, the 2<sup>nd</sup> respondent was bound to meet its fair share of the costs so ordered.
5. Even though there was evidence of service of the application and the hearing notice upon the 1<sup>st</sup> Respondents who had opposed it, by filing the said Replying Affidavit, there was no representation on the hearing date and the matter proceeded with only the applicant making presentations. To this court even without such presentation, the court is bound to look at the merits of the same having regard to all the papers filed.

**Analysis and determination**

6. The application seeks a straight forward answer to the question as to what order was made regarding costs and touching upon the 2<sup>nd</sup> Respondent. The simple answer to that questions is '**none whatsoever**'.
7. The starting point is Section 26 of the Act which provides:

**Costs**

**(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.**

8. That provision is clear that it is at the discretion of the court to order payment of costs and by whom including out of what property and the only fetter to that very wide discretion is the fact that costs shall follow the event and a successful party can only be denied costs for special reasons to be recorded by the court.
9. On the face of that provision and a reading of the judgment sought to be clarified, it is clear to me that there is a genuine case and need for the clarification to be made. The clarification should not however be seen to revisit the decision awarding the costs to the successful party but must be limited to the question of whether both or only one of the respondents is obligated to pay the costs. That is a matter that only this court ought to settle and it thus cannot be right to assert that the court has become *functus officio*.
10. However, if the court was to consider awarding the costs to the 2<sup>nd</sup> respondent that would amount to re-visiting the entire decision on costs and it would thus be clearly *functus officio* unless the approach would take the form of review for appropriate reasons. Here no review has been sought only clarification has been.
11. I will therefore limit myself to the question of the effect of the order on costs on the 2<sup>nd</sup> respondent and observe that here the 2<sup>nd</sup> respondent, having not filed the appeal, cannot be said to have succeeded even if he supported the appellant's position. He remains a respondent, even though a passive one. He thus, as a passive respondent, cannot be deemed to have lost so as to bear the costs of the litigation.
12. In those circumstances, the order that recommends itself to me is that the 2<sup>nd</sup> respondent shall bear own costs as the 1<sup>st</sup> respondent bears the costs incurred by the appellant in the appeal.
13. That is the only clarification I can make and I decline to award any costs to the 2<sup>nd</sup> respondent/applicant.
14. On costs of the application, it is directed that each party shall bear own costs.

**Dated, signed and delivered on line this 21<sup>st</sup> day of October 2020.**

**P J O OTIENO**

**JUDGE**