



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

MILIMANI LAW COURTS

CIVIL APPEAL NO 619 OF 2019

PLATINUM ENERGY (EA) LIMITED.....1ST APPELLANT

MARTIN KINYUA.....2ND APPELLANT

ERNEST GITHINJI.....3RD APPELLANT

VERSUS

KHETIA DRAPERS LIMITED.....RESPONDENT

(Being an Appeal from the Ruling of Hon G.A. Mmasi (Mrs)(SPM) delivered in CMCC No 7801 of 2018 on 1st October 2019)

JUDGMENT

1. In her decision of 1st October 2019, the Learned Magistrate, Hon G.A. Mmasi Senior Principal Magistrate, dismissed the Appellants' Notice of Motion application dated 17th June 2019 in which the 1st Appellant had sought a review and/or variation by granting costs as had been sought in the application dated 5th February 2019 on the ground that she had dealt with all the reliefs sought in the same application and that she had the discretion to award costs.
2. Being dissatisfied by the said decision, on 28th October 2019, the 1st Appellant filed a Memorandum of Appeal of even date. It had relied on four (4) grounds of appeal. Pursuant to a consent that was recorded by the parties dated 20th July 2020 and adopted as an order of the court on 29th September 2020, the 1st Appellant's Notice of Motion application seeking leave to amend its Memorandum of Appeal to add the 2nd and 3rd Appellants herein as parties in the Appeal herein, the said Memorandum of Appeal was amended. The four (4) grounds of appeal were retained.
3. The Appellants submitted that when the Learned Magistrate allowed their Notice of Motion application dated 5th February 2019 striking out the 2nd and 3rd Appellants herein from the proceedings in the lower court, she did not pronounce herself on the issue of costs of the application.
4. It was their contention that the failure by the Learned Magistrate to pronounce on the issue of costs was a ground for review under Order 45 of the Civil Procedure Rules as it was evidence of a mistake or error apparent on the face of the record or for any other sufficient reason. They placed reliance on the case of **Shanzu Investments Limited vs Commissioner for Lands [1993] eKLR** in this regard.
5. They averred that they sought a review of the said orders vide their Notice of Motion application dated 17th June 2020 which was dismissed vide the Ruling of 1st October 2019 which was now the subject of the Appeal herein. They added that costs follow the event and consequently, a court should give reasons for not granting the same. They relied on the case of **The Kenya Anti-Corruption Commission vs Marshal East Africa Limited & Another [2019] eKLR** where the Court of Appeal reiterated the said principle.
6. On its part, the Respondent relied on the case of **Nasibwa Wakenya Moses vs University of Nairobi & Another [2019] eKLR** to buttress its argument that the Appellants had not demonstrated any of the prerequisites under Order 45 Rule 1 (1) of the Civil Procedure Rules for the granting of an order for review.
7. It argued that the appellate court should only interfere with the decision of a lower court if it was shown that the discretion had been exercised unjudicially (sic) or on the wrong principles. In this regard, it placed reliance on the case of **Supermarine Handling Services Ltd vs Kenya Revenue Authority [2010] eKLR**. It further relied on the case of **Nanji Datttani vs Haridas Kalidas Dawda (1949) EACA 35** where it was held that the decision to award costs to a successful litigant was left to the discretion of the court.

8. It was categorical that the Learned Magistrate properly exercised her discretion in not awarding costs to the AppellantS herein and that as was held in the case of **George Gikubu Mbuthia vs Small Enterprises Finance Ltd & 2 Others [2015] eKLR**, it was not always that a successful defendant was awarded costs and could in fact be deprived of costs if it was shown that his conduct either prior to or during the course of the suit, had led to litigation.

9. It therefore invited this court to find that the Learned Magistrate's decision not to award costs was correct and was brought about by the conduct of the 2nd and 3rd Appellants and thus dismiss the Appeal herein. It urged this court to award it costs as it played no part in necessitating the filing of the Appeal herein but rather it had been dragged to unending litigation by the Appellants resulting in delays in hearing of its suit in the lower court.

10. In her Ruling of 26th April 2019, the Learned Magistrate struck out the 2nd and 3rd Appellants herein from the suit that had been filed by the Respondent as they were not necessary parties therein. She did not award any costs. Subsequently, she dismissed with costs to the Respondent the Appellants' Notice of Motion application dated 17th June 2019 seeking review of her said Ruling as the same did not address the issue of costs.

11. The Learned Magistrate stated that she pronounced herself on all the reliefs in the application and that she had the discretion not to award costs and hence her failure to award the same was not an error apparent on the face of the court. She also stated that the Appellants did not demonstrate that there was discovery of new and important matter or evidence which after exercise of due diligence was not within the knowledge or could not be produced by the Appellants at the time the decree was passed or the order was made.

12. Section 27 of the Civil Procedure Act Cap 21 (Laws of Kenya) provides as follows:-

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 (emphasis court).

13. It was evident from the Ruling of 26th April 2019 that the 2nd and 3rd Appellants had been dragged in the matter. They successfully argued their application and they were struck out as they were not necessary parties to the suit herein. The court agreed with the Learned Magistrate and the Respondent herein that she had the discretion to award or not to award costs to the Appellants herein. However, she was required to pronounce herself on the same.

14. Unlike Section 26 (2) of the Civil Procedure Act that states that **"Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum"**, Section 27 (1) of the Civil Procedure Act does not give an allowance to provide for when the order or decree is silent in respect of the costs to be awarded. It does appear to this court that at all given times the court must pronounce itself on the issue of costs.

15. Notably, Section 78 of the Civil Procedure Act provides that:-

Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—

- a. to determine a case finally;**
- b. to remand a case;**
- c. to frame issues and refer them for trial;**
- d. to take additional evidence or to require the evidence to be taken;**
- e. to order a new trial.**

16. Ordinarily, this court would not have found it prudent to determine how the costs of the said application of 17th June 2019 ought to have been awarded as it was solely within the discretion of the Learned Magistrate. However, as this court had already been transferred to a different station and would not be available to give its further determination by the time the file herein was returned to the High Court Milimani Law Court Civil Division, it found it prudent to determine the matter finally as envisaged in Section 78 (a) of the Civil Procedure Act.

17. In the absence of any good reason for the Learned Magistrate to have departed from the general rule that costs follow the event as she found that the 2nd and 3rd Appellants were not necessary parties in the lower court matter, it was this court's considered view that the application of 5th February 2019 ought to have been allowed with costs to the 2nd and 3rd Appellants as provided for in Section 27(1) of the Civil Procedure Act.

18. This court agreed with the Appellants that failure by the Learned Magistrate to pronounce herself on the issue of costs, that is, whether

there was going to be no order as to costs or whether each party was to bear its own costs and/or whether the application was allowed with costs in the cause, was sufficient reason within the meaning ascribed in Order 45 Rule 1(1) of the Civil Procedure Rules for her to have reviewed her ruling of 26th April 2019.

19. Notably, an order, decree or judgment can only be reviewed the conditions set out in Order 45 Rule 1(1) of the Civil Procedure Rules have been met. The same provides that:-

“Any person considering himself aggrieved—

a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

20. The Learned Magistrate having failed to recognise that there was sufficient reason to review the order, this court came to the firm conclusion that the Appellants ably demonstrated that her failure to pronounce herself on the issue of costs was not an issue of discretion as she and the Respondent herein had averred but rather it was a matter of her proceeding on the wrong principles of law as there was an error and mistake apparent on the face of the record, and which this court ought to interfere.

DISPOSITION

21. For the foregoing reasons, the upshot of this court’s decision was that the Appellants’ Appeal that was lodged on 28th October 2019 was merited and the same is hereby allowed. The effect of this judgment is that the court hereby directs that the disposition of the Ruling of the Learned Magistrate delivered on 26th April 2019 be and is hereby set aside, vacated and reviewed to read as follows:-

“The upshot of the foregoing is that the 2nd and 3rd Defendants are not necessary parties in this suit hence they are struck out from the suit. The said application is hereby allowed with costs to the 2nd and 3rd Defendants herein.”

22. However, as it was the Learned Magistrate who failed to pronounce herself on the issue of costs of the application dated 5th February 2019, this court will not condemn the Respondent to bear the costs of this Appeal. Each party will therefore bear its own costs of this Appeal.

23. It is so ordered.

DATED and DELIVERED at NAIROBI this 25th day of November 2020

J. KAMAU

JUDGE