



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 124 OF 2017.

KENYA UNIVERSITIES STAFF UNION.....1ST APPELLANT

WILLIAM OBWAR.....2ND APPELLANT

FLORENCE SHITANDA.....3RD APPELLANT

ANTONY NYAKONI.....4TH APPELLANT

ANN KIRIKA.....5TH APPELLANT

SAMWEL KAPTICH.....6TH APPELLANT

AZIHEMBA J. MBAL.....7TH APPELLANT

LUMUMBA NDEGAH.....8TH APPELLANT

VERSUS

PAUL ODHIAMBO GAYA.....1ST RESPONDENT

WELLINGTON NAMAI KUSUMU.....2ND RESPONDENT

(Being an appeal from the ruling of Hon. H.O Barasa, Principal Magistrate in Eldoret CMCC 136 OF 2015 delivered on the 18th day of September, 2017, at Eldoret).

JUDGMENT

1. The appellants being dissatisfied with the ruling of Honourable H.O Barasa, Principal Magistrate, delivered in Eldoret Chief Magistrate's Court Civil Case No. 133 of 2016 on 18th September, 2017, hereby appeals to the High Court on the following grounds:-

i. THAT the Learned trial Magistrate erred in law in holding that, if the trial Magistrate wanted to award costs, he should have expressly stated so in his ruling whereas, the law is clear at Section 27 of the Civil Procedure Act that, costs follow event and only require express statement where the court diverts from general rule.

ii. THAT the Learned trial Magistrate erred in law and in fact in ignoring and failing to consider the binding authorities cited and provided by the Respondents in the grounds of opposition and their joint submissions.

iii. THAT the Learned trial Magistrate erred in law and in fact in failing to find that if the court did not intend to give costs, it was expressly required to expressly state so in its ruling giving sufficient reasons for so ordering.

iv. THAT the Learned trial Magistrate erred in law and in fact in failing to link his observation that, many times courts have ruled that parties should bear their own costs even in cases where there is a successful party, to the requirement by the law for a court to state expressly where it diverts from the general principle that costs follow events.

v. THAT the Learned trial Magistrate erred in law and in fact in making an assumption that the trial magistrate signed the certificate of costs inadvertently, whereas there was nothing to show the same.

vi. THAT the Learned trial Magistrate erred in law and in fact in failing to construe the trial magistrate's ruling in a manner that gives effect to the law particularly Section 27 of the Civil Procedure Act.

vii. THAT the Learned trial Magistrate erred in law and in fact in failing to find that the application filed on 17th May, 2017 raising an objection on the taxation of the bill of costs, was statute barred having been raised outside the 14 days period provided by the law and having been brought more than a year after the assessment of costs which was done on 5th May, 2016.

viii. THAT the Learned trial Magistrate erred in law in failing to hold that the Respondent was guilty of laches having delayed unreasonably and failing to challenge the cost of taxation within 14 days period as it the law, and further in failing to take judicial notice of the equitable doctrine that the law does not aid the indolent.

2. It was agreed that the appeal be canvassed by way of written submissions. The appellants submitted that the respondents were the plaintiff's in the lower court who filed a suit against the appellants.

3. The appellants filed a defence and also filed a notice of preliminary objection. A ruling in respect of the preliminary objection was delivered in favor of the appellant. Costs were assessed and a decree issued.

4. When the appellant attempted to execute, the respondents moved the court vide an application dated 17th May, 2017 seeking to set aside the taxed bill of costs. The trial magistrate did set aside the costs a fact which provoked this appeal.

5. It is not disputed that the ruling was silent on costs, but the contention is that it does not mean that the successful candidate is not entitled to costs. That, in the event that costs are not awarded, **Section 27 of the Civil Procedure Act** provides that reasons for denying the same should be put in writing.

6. The applicant points out that the bill of costs was taxed on 5/5/2016 and a certificate of costs was signed on the same day where the respondents objected to only two items. The court is urged to take note that the application to set aside the costs was filed almost one year after the costs had been taxed. It is contended that the correct procedure for a party who is aggrieved on the issue of costs was not followed as neither a letter to the taxing master asking for reasons for the decision nor a reference to the High Court was filed.

7. The trial magistrate is thus faulted for setting aside the taxed costs and the applicants pray that the court quashes the findings of the trial magistrate and reinstate the taxed costs.

8. The respondents submitted that in setting aside the bill of costs, the trial court did not make any order as to costs. That since the award on costs is discretionary, it cannot be presumed. The silence of courts on costs cannot be presumed to mean that there was an award of costs, or the contrary. That the aggrieved party ought to seek the clarification or rectification by filing an application for review of the orders on costs under Order 45 of the Civil Procedure Rules, 2010, before requesting for the deputy registrar to tax the bill or costs.

9. It is argued that the trial court, after hearing both parties set aside orders of taxation for costs, and in so doing did not err by pronouncing itself on the Respondent's application and rendering the decision. That the provisions of **Section 11 of the Advocates Remuneration Order** in so far as they provide for the procedure for references were not applicable in the Respondent's circumstances in which they were seeking for review/setting aside the order of taxation of costs.

10. The main issue for determination is whether the trial magistrate erred in not awarding costs. It is trite law that this Court is slow to interfere with the exercise of discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice: see **Mbogo v Shah [1968] 1 EA 93**.

11. **Section 27 of the Civil Procedure Act** grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) of the Civil Procedure Act provides as follows:-

12. ***“(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.”***

13. The appellate court will not interfere with the exercise of discretion by trial court on costs, except

(1) where the discretion was not exercised judicially or was exercised on wrong principles, or

(2) where the trial court gives no reasons for the decision and the appellate court is satisfied that the decision was wrong; or

(3) where reasons are given, the Appellant court considers those reasons not to constitute “good reason” within the meaning of section 27 of the Civil Procedure Act.

14. In the case of **Supermarine Handling Services Ltd v Kenya Revenue Authority [2010] eKLR** the Court stated that:

“... where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the appellate court will interfere if it is satisfied that the order is wrong.”

15. Was the reason given good reason in the sense of the law as to support departure from the general rule on costs? Or was the discretion exercised on wrong principles or capriciously?

16. Looking at the facts and circumstances of this case, when the plaintiffs who are now the appellants moved the court through a notice of motion application dated 17/5/2017 seeking orders for review, varying and/or setting aside the assessment of bill costs dated 5/5/2016. The defendants who are now the Respondents raised a preliminary objection on the issue of jurisdiction to struck out the plaintiff suit, which was upheld and the costs were not awarded to any of the parties.

The trial court subsequently signed a certificate of costs and it is not clear whether or not the signing of costs was out of inadvertence.

17. Where a trial court has exercised its discretion in costs, an appellate court should not interfere unless the discretion has been exercised injudiciously or on wrong principles.

Where it gives no reason for its discretion, the appellate court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the act.

18. In this case, the trial magistrate having decided the suit in favor of the defendant/appellant departed from the rule that costs shall follow the event and did not award costs of the suit to the Appellant. Despite this departure from the rule, no reason was given by the trial magistrate. There was therefore no basis for depriving the successful defendant/respondents their costs in the absence of good reason particularly because they had expressly made a prayer for costs in their preliminary objection and the court was obliged to make an order on the same. The appeal is merited and is allowed. The orders by the trial court on the issue of costs be and are hereby quashed and set aside, and costs in the matter are reinstated and awarded to the appellants. The respondents shall also bear the costs of this appeal

Delivered and dated this 17th day of December, 2019 at Eldoret.

H.A. OMONDI

JUDGE

In the presence of:-

Mr. Maina for the Respondents

No appearance for Appellants

C/Assistant - Komen