



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 91 OF 2017**

**ESTHER BUCHERE MAKI.....APPELLANT**

**-VERSUS-**

**SOUTH NYANZA SUGAR CO. LTD.....RESPONDENT**

*(Being an appeal from the judgment and decree by Hon. R. Odenyo, Senior Principal Magistrate in Migori Chief Resident Magistrate's Civil Suit No. 240 of 2015 delivered on 11/09/2017)*

**JUDGMENT**

1. The only issue for determination in this appeal is whether the trial court erred in not granting the Appellant herein, **Esther Buchere Maki**, costs in **Migori Chief Magistrate's Court Civil Suit No. 240 of 2015** (hereinafter referred to as '**the suit**').
2. The suit was premised on a Growers Cane Farming and Supply Contract dated 04/05/2006 (hereinafter referred to as '**the Contract**') between the Appellant and the Respondent herein where the Appellant was to grow and sell to the Respondent sugarcane at the Appellant's parcel of land Plot No. 46H Field No. 59 Account No. XXXX in Moheto Sub-Location within Migori County. The Contract was for a period of five years or until one plant crop and two ratoon crops of the sugarcane were harvested from the subject parcel of land whichever event occurred first and the contract commenced on 08/08/2005.
3. The suit was heard, and the trial court rendered its judgment and allowed the claim but declined to award costs for want of production of a formal demand notice.
4. The Appellant in praying that the appeal be allowed, and appropriate compensation be awarded proposed three grounds in the Memorandum of Appeal dated 29/09/2017 and filed in Court on 03/10/2017 which all grounds were on the issue of costs.
5. I have perused the record from the Sugar Arbitration Tribunal and in the suit as well as before this Court. I have noted that at the time of filing the claim before the Tribunal, the Appellant filed a List of Documents dated 30/11/2012 wherein she listed the Demand Notice as one of the documents she was relying on to prove the claim. When the claim was eventually transferred to the lower court the Appellant filed a Statement and another List of Documents wherein she again listed the Demand Notice as one of the documents she relied on in the suit. The List of Documents was dated 30/11/2015 and was evenly filed.
6. **Order 4 Rule 6** of the **Civil Procedure Rules, 2010** provides for reliefs in a suit. It states that: -  
  
***'Every plaintiff shall state specifically the relief which the plaintiff claims, either specifically or in the alternative, and it shall not be necessary to ask for costs, interest or general or other relief which may always be given as the court deems just, whether or not it could have been asked for or granted when the suit was filed; and this rule shall apply also to a defence or counterclaim.'***
7. From the reading of the foregone provision a Plaintiff is not necessarily supposed to plead and pray for such reliefs which are at the discretion of a court and which a court may grant as it deems just. Such reliefs include costs of the suit, interest, among others. **Section 27(1)** of the **Civil Procedure Act, Cap. 21** of the Laws of Kenya has the following to say about 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. Costs are therefore at the discretion of the court. However, unless for good reason, costs usually follow the event. The reason the trial court declined to award costs was that the Appellant did not produce the demand letter as an exhibit. A look at the Demand Letter on record shows that the same was served and duly received by *inter alia* the Respondent well before the claim and the suit came to life. The suit was vehemently opposed, and the Respondent filed a Statement of Defence. Parties also fully participated in the hearing until judgment was rendered.

9. An appellate Court will not ordinarily interfere with the exercise of discretion by a trial Court unless it is shown that the exercise was based on no evidence at all, or on a misapprehension of facts or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga – versus- Kiruga & Another (1988) KLR 348**.

10. The trial court found that the Respondent was in breach of the contract. There was no cross-appeal on any issue by the Respondent. As the parties vigorously participated in the matter until judgment and in view of the breach on the part of the Respondent, I find the reason given by the trial court to decline the grant of the costs as a matter of course not a good one in the circumstances of the suit. The learned magistrate did not address himself to the provisions of **Civil Procedure Rules, 2010** and the **Civil Procedure Act** on the issue of costs and had he done so I am sure he would not have declined to award the costs on the ground of the demand notice. I therefore, with respect to the learned magistrate, find that the discretion was not exercised judiciously, and I must, hesitantly though, interfere with the exercise of such discretion and set-aside the order declining costs to the Appellant.

11. Following the foregoing discourse, the upshot of this appeal is that: -

- a) **The appeal hereby succeeds and the finding of the learned magistrate declining to grant costs of the suit to the Appellant be and is hereby set aside accordingly;**
- b) **Further Judgment is hereby entered for the Appellant as against the Respondent for costs of the suit;**
- c) **The Appellant shall also have the costs of the appeal.**

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 08<sup>th</sup> day of August 2018.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open court and in the presence of: -**

**Mr. Kerario Marwa** Counsel instructed by the firm of Messrs. Kerario Marwa & Co. Advocates for the Appellant.

**Messrs. Moronge & Company Advocates** for the Respondent.

**Evelyne Nyauke** – Court Assistant