



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 37 OF 2016**

**JULIUS IRUNGU WAIRIA.....APPELLANT**

**VERSUS**

**LILIAN KAGWIRIA.....RESPONDENT**

**JUDGMENT**

1. This is an appeal arising out of part of the judgment of Honourable Onesmus K. Towet, SRM in Nyeri CMCC No.63 of 2015; the appellant herein being sued for damages arising out of an accident that occurred on 13<sup>th</sup> October, 2014.

2. After a full hearing, judgment was awarded by the trial court in favour of the appellant; the trial Court however ordered that each party to bear its own costs.

3. The appellant being dissatisfied with the trial Court's decision on costs filed this appeal and seeking to have it set aside; the appellant listed four (4) grounds of appeal in his Memorandum of Appeal dated the 8<sup>th</sup> June, 2016 which grounds are as summarized hereunder;

- (i) The trial Court erred in law for not awarding costs of the suit to the appellant;
- (ii) The trial Court did not give reasons for not awarding the appellant costs of the suit.

4. The appellant prayed that the appeal be allowed with costs.

**ISSUES FOR DETERMINATION**

5. After reading the written submissions filed by Counsels for both parties together with the annexed authorities, the issues found and framed for determination are as listed hereunder;

- (i) Whether the appellant is entitled to costs of the suit?
- (ii) Whether the trial Court erred in failing to give reasons for not awarding the appellant the costs of the suit?

**ANALYSIS**

6. The issues for determination as so intertwined that they shall be analyzed together. In determining this Appeal this court is guided by the provisions of Section 27 of the Civil Procedure Act, Chapter 21 Laws of Kenya, which provides as follows with regard to costs:-

“ 27. (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 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 mine).

7. This court is also guided by the citations given in the case of **Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR**, by Mativo J while deciding on whether or not to award costs to a party; hereunder is a reproduction of some excerpts from the judgement.

“...I find useful guidance in the following passage from the Halsbury’s Laws of England;

*“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”.*

.....Writing on the same subject Mr. Justice (Retired) Kuloba stated:-

*“Costs are {awarded at} the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise...”*

..... this court cited the decision in the *Party of Independent Candidate of Kenya vs Mutula Kilonzo & 2 others*, where the court citing two leading decisions on the subject held *inter alia* that:-

*“It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is a matter in which the trial Judge is given discretion. ....But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”*

.....However, the only consideration is the “event” as was held in the Supreme Court of Uganda in *Impressaing Fortunato Federice vs Nabwire* where the court stated:-

*“The effect of section 27 of the Civil Procedure Act is that the Judge or court dealing with the issue of costs in any suit, action, cause or matter has absolute discretion to determine by whom and to what extent such costs are to be paid; of course like all judicial discretions, the discretion on costs must be exercised judiciously and how a court or judge exercises such discretion depends on the facts of each case. If there were mathematical formula, it would no longer be discretion... while it is true that ordinarily, costs should follow the event unless for some good reason the court orders otherwise, the principles to be applied are- (i) under section 27 (1) of the Civil Procedure Act, costs should follow the event unless the court orders otherwise. This provision gives the judge discretion in awarding costs but that discretion has to be exercised judicially. (ii), A successful party can be denied costs if it is proved that but for his conduct the action would not have been brought... It is trite law that where judgement is given on the basis of consent of parties, a court may not inquire into what motivated the parties to consent or to admit liability.....”*

8. From the forgoing texts and cases, it is clear that:

- (i) The Court has unfettered discretion to award costs;
- (ii) Costs follow the event;
- (iii) The Court should give reasons where it does not award costs.

9. The trial Court in this matter did not award costs to the appellant and further failed to give reasons for doing so; upon perusal of the Record of Appeal and in particular the proceedings of the trial it is noted that there was no reason not to award the appellant the costs of the trial; the appellant was the successful party; the ‘event’ in this matter was that the suit was decided in favour of the appellant therefore he was entitled to costs.

10. The grounds of appeal are found to be meritorious and are hereby allowed.

#### **FINDINGS AND DETERMINATION**

11. It is for the above reasons this court finds that this appeal has merit and it is hereby allowed;

12. The trial Court is found to have erred in failing to give reasons for not awarding the appellant the costs of the suit;

13. The appellant is entitled to costs of the suit;

14. The respondent is found not to blame for the trial courts shortcomings; therefore each party to bear their own costs of this appeal;

**Dated, Signed and Delivered at Nyeri this 27<sup>th</sup> day of September, 2018**

**HON.A.MSHILA**

**JUDGE**