



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT NAROK**

**ELC APPEAL CASE NO. 22 OF 2019**

**MARK ADEMBA OKUMU.....APPELLANT**

**VERSUS**

**DANIEL OJIJO ODHIAMBO.....RESPONDENT**

**JUDGMENT**

1. By a judgment delivered on 29<sup>th</sup> November, 2018 in Narok CMELC No 76 of 2018, the trial court (Hon. H. Ng'ang'a, SRM) dismissed the Respondent's suit against the Appellant with costs being awarded to the Appellant. The Appellant's counterclaim was allowed as prayed with costs and judgment was therefore entered for the Appellant against the Respondent for the sum of Kshs. 600,000/- with interest from the date of the judgment. Further, the trial court also issued a declaration that the Respondent is entitled to the refund of the purchase price paid to the law firm of Otieno Omuga and Ouma Advocates, less the ten (10%) percent default penalty.

2. The record indicates that on 16<sup>th</sup> May, 2019, a decree was issued by the trial court pursuant to the aforesaid judgment. A certificate of costs dated 26<sup>th</sup> February, 2019 was also issued wherein costs were assessed at Kenya Shillings One Hundred Nine Thousand Nine Hundred Fifty-Five (Kshs. 109,955/-).

3. On 19<sup>th</sup> June, 2019, the Appellant filed a Notice of Motion application before the trial court wherein he sought the following orders:

**a) Spent;**

**b) Spent;**

**c) Spent;**

**d) That the Honourable Court be pleased to review and set aside the entire decree dated 16<sup>th</sup> May, 2019 together with all the steps taken consequent thereto;**

**e) That the Honourable Court be pleased to order assessment of the Defendant's costs of the suit and on the counterclaim as awarded in the judgment dated 29<sup>th</sup> November, 2018, and further to direct the issuance of fresh decrees that shall enumerate said full costs on BOTH the Plaintiff and counterclaim payable to the Defendant as provided in law;**

**f) That the Honourable Court be pleased to order that the Defendant shall deduct from the sums in his custody due to the Plaintiff the said assessed costs in addition to the judgment award of Kshs. 600,000/- with interest thereon from the date of judgment BEFORE remitting the net balance to the Plaintiff;**

**g) That this Honourable Court be pleased to issue such other orders and directions as befit the circumstances; and**

**h) That the costs of this application be provided for.**

4. Vide its ruling delivered on 3<sup>rd</sup> September, 2019, the trial court dismissed the Appellant's application. Aggrieved by the aforesaid ruling of the trial court, the Appellant filed the instant appeal vide a Memorandum of Appeal dated 17<sup>th</sup> September, 2019 wherein he raised the following six (6) grounds of appeal:

**(i) The learned magistrate erred in fact and law in finding that the impugned decree and certificate of costs was in consonance with the judgment of 29<sup>th</sup> November, 2018. In so doing, the learned magistrate failed to appreciate the pertinent defects on the face of the decree and the certificate of costs in breach of Order 21 Rule 7 of the Civil Procedure Rules;**

(ii) *The learned magistrate erred in fact and law in failing to accord due regard and attention to the material particulars of the aforesaid judgment of Honourable Ng'ang'a SRM of the 29<sup>th</sup> November, 2018, specifically the awards granted therein, being costs on the main suit and cost on the counterclaim, which were not taken into consideration in tabulating the certificate of costs and further ignored in the notice to show cause;*

(iii) *The learned magistrate erred in fact and law in finding that the notice to show cause taken out by the Respondent in pursuance to the execution of the impugned decree was proper and in consonance with the decree and judgment. In so reasoning, the learned magistrate neglected to appreciate the blatant, deliberate and undeniable omission of costs of both the suits and the counterclaim awarded to the Appellant in the judgment which ought to be set off from the amounts payable to the Respondent;*

(iv) *The learned magistrate erred in fact and in law in finding that the computation of costs was proper and in accordance with the law, by failing to consider the fact that the suit having been instituted in the Environment and Land Court created under Article 162 (b) of the Constitution, the costs applicable were that of the High Court and not the subordinate court;*

(v) *The learned magistrate misdirected himself in finding that the Respondent had already given KES 150,000/= to the firm of Otieno Omuga & Ouma Advocates as their costs, had he properly directed his mind to the facts and evidence on record he would have realized that this sum of money was as agreed by the party in the agreement for sale of the subject land to be costs of the vendors advocates in the conveyance regardless of whether the transaction succeeded or not and had nothing to do with the costs of the suit; and*

(vi) *The learned magistrate erred in law and in fact in failing to find that the Appellant was entitled to set off from the money (KES 6,000,000/=) given to the firm of Otieno Omuga & Ouma Advocates, the costs of both the main suit and counterclaim, and KES 600,000/= being 10% default penalty plus interest from the date of judgment as awarded in the judgment before remitting the net balance to the Respondent.*

5. The Appellant therefore proposed to ask this Honourable Court for the following orders:

*a) This appeal be allowed as prayed and the ruling of the Chief Magistrates Court at Narok (Hon. G.N. Wakahiu) dated 3<sup>rd</sup> September, 2019 in ELC Case No 76 of 2018 be set aside;*

*b) This Honourable Court be pleased to enter a ruling in the Appellant's favour as prayed in the application dated 18<sup>th</sup> June, 2019;*

*c) This Honourable Court be pleased to issue such other orders and directions as befits the circumstances, and*

*d) The costs of this appeal, together with the costs of the proceedings in the lower court be awarded to the Appellant.*

6. On 21<sup>st</sup> September, 2020, parties agreed to canvass the appeal by way of written submissions. The Appellant filed his written submissions on 27<sup>th</sup> November, 2020, while the Respondent filed his on 30<sup>th</sup> November, 2020.

7. In his submissions, the Appellant contended that the lower court did not give due regard to the terms of the judgment hence the failure and or refusal to review and set aside the impugned decree which was in conflict with the judgment. The Appellant submitted that in spite being awarded costs of the plaint plus interest from the date of judgment as well as costs of the counterclaim, the certificate of costs purportedly made pursuant to the decree issued in the case omitted a material part of the judgment by only capturing costs of the counterclaim as opposed to the costs of the plaint and counterclaim awarded in the judgment.

8. According to the Appellant, the taxing officer correctly assessed the costs of the counterclaim at Kshs. 109,955/- which he submitted that he was not contesting the said assessment. The Appellant submitted that he was contesting the omission of costs of the plaint and interest from the date of judgment which he stated had not been provided for even though the same was awarded by the trial court in its judgment.

9. It was further submitted by the Appellant that he was not challenging the discretion of the taxing officer in the assessment of costs, but that he was challenging omission of costs of the plaint awarded in the judgment. The Appellant further submitted that a plaint and counterclaim are two separate claims which stand independent of each other.

10. The court was also told that the taxing officer erred in assessing costs at the Subordinate Court rate when he ought to have used the High Court rate given that the case was first filed before the ELC established under Article 162(b) of the Constitution. The Appellant also submitted that the learned magistrate misdirected himself in finding that the Respondent had already given KES 150,000/= to the firm of Otieno Omuga & Ouma Advocates as their costs, had he properly directed his mind to the facts and evidence on record he would have realized that this sum of money was agreed upon by parties in the agreement for sale of the subject land informing this appeal as COST FOR THE VENDOR'S ADVOCATE in the conveyance regardless of whether the transaction succeeded or not and had nothing to do with the costs awarded in the ELC suit No. 76 of 2018 vide the judgment of 29<sup>th</sup> November, 2018.

11. The Appellant therefore prayed that his appeal be allowed. Reliance was placed on the cases of *Pancras T. Swai vs Kenya Breweries Limited [2014]eKLR*, *In Sarder Mohamed vs Charan Singh Nand Sing & Another (1959)E.A. 793, Kenyariri & Associates Advocates vs Salama Beach Hotel Limited & 4 Others, Kangwimi Kangethe & Co Advocates vs Nairobi Mamba Village [2015]eKLR*, *William Nember Obora & 73 Others Vs Rift Valley Railways (Kenya) Limited [2018]eKLR*, and the case of *Civil Appeal No 28 of 2016, Law Society of Kenya vs Malindi Law Society*.

12. The Respondent submitted that the costs owing to the Appellant had been properly assessed. To the Respondent, the impugned decree took into account the prayers in the counterclaim, hence, the Respondent contended that the decree was in consonance with the terms of the judgment.

13. According to the Respondent, there is no error in the record to warrant a review and/or varying of the decree dated 16<sup>th</sup> May, 2019. Further, the Respondent submitted that costs were properly assessed and that the Appellant ought to have moved to the High Court if he was aggrieved by the assessment of costs.

14. It was also said that the instant appeal was filed purely to delay refund of the purchase price to the Respondent. The Respondent therefore prayed that the appeal be dismissed with costs.

15. Upon consideration of the materials presented in respect of the Appeal herein, the court is of the opinion that the following are the substantive issues for determination:

*i) Whether the decree issued on 16<sup>th</sup> May, 2019 was in agreement with the judgment delivered on 29<sup>th</sup> November, 2018 in Narok CMELC No. 76 of 2018;*

*ii) Whether the certificate of costs dated 26<sup>th</sup> February, 2019 was in agreement with the judgment delivered on 29<sup>th</sup> November, 2018 in Narok CMELC No. 76 of 2018 and the decree issued pursuant thereto on 16<sup>th</sup> May, 2019;*

*iii) Whether the decree issued on 16<sup>th</sup> May, 2019 and the certificate of costs dated 26<sup>th</sup> February, 2019 should be set aside; and*

*iv) Whether the appeal is merited under the circumstances.*

16. As a first appellate court, this court's role is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own conclusions about it. This duty was well stated in *Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123* in the following terms:

*“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally*

19. Turning to the judgment of the trial court delivered on delivered on 29<sup>th</sup> November, 2018, the record indicates that that the court made the following orders in its aforesaid judgment:

*a) The Plaintiff's suit is dismissed with costs to the Defendant;*

*b) The Defendant's counterclaim is allowed as prayed with cost and judgment entered for the defendant's counterclaim against the plaintiff for the sum of Kshs. 600,000/- with interest from the date of judgment; and*

*c) A declaration is issued that the plaintiff is entitled to refund of the purchase price paid to the firm of Otieno Omuga & Ouma Advocates, less 10% of default penalty as was formerly agreed by the parties in the agreement.*

20. A decree pursuant to the said judgment was subsequently issued on 16<sup>th</sup> May, 2019 wherein the orders extracted were enumerated as follows:

*a) THAT the plaintiff suit is hereby dismissed with costs to the defendant;*

*b) THAT the defendant's counterclaim is allowed as prayed with costs and judgment is entered for the defendant against the plaintiff for the sum of Kshs. 600,000/= with interest from the date of the judgment; and*

*c) THAT a declaration is hereby issued that the plaintiff is entitled for the refund of the purchase price paid to the law firm of Otieno Omuga and Ouma Advocates, less the 10% default penalty.*

21. Looking at the orders issued by the trial court in its judgment delivered on 29<sup>th</sup> November, 2018 as well as the orders extracted from that judgment and provided for in the decree issued on 16<sup>th</sup> May, 2019, it is the opinion of this court that the orders in the decree are in agreement with the orders made in the judgment. Upon a studied evaluation of the decree issued on 16<sup>th</sup> May, 2019 and the judgment delivered on 29<sup>th</sup> November, 2018, I am not persuaded by the Appellant's argument.

22. Given my finding that the decree issued on 16<sup>th</sup> May, 2019 is substantially in agreement with the judgment delivered on 29<sup>th</sup> November, 2018, I will therefore answer the instant issue for consideration in the affirmative.

**(II) WHETHER THE CERTIFICATE OF COSTS DATED 26<sup>TH</sup> FEBRUARY, 2019 WAS IN AGREEMENT WITH THE JUDGMENT DELIVERED ON 29<sup>TH</sup> NOVEMBER, 2018 IN NAROK CMELC NO. 76 OF 2018 AND THE DECREE ISSUED PURSUANT THERETO ON 16<sup>TH</sup> MAY, 2019:**

23. On this limb, it was contended by the Appellant that he was contesting the omission of costs of the plaint and interest from the date of judgment which he stated had not been provided for even though the same was awarded by the trial court in its judgment. According to the Appellant, the taxing officer only assessed and provided costs for the counterclaim but left out costs of the plaint and interest from the date of judgment which was awarded in the judgment and decree of the trial court.

24. I have examined the certificate of costs dated 26<sup>th</sup> February, 2019, and it is apparent that the taxing officer only assessed costs of the counterclaim but left out costs of the plaint and interest from the date of judgment which was awarded in the judgment and decree of the trial court. Nowhere in the certificate of costs did the taxing officer make provision for costs of the plaint and interest from the date of judgment.

25. There was no basis upon which the costs of the plaint and interest from the date of judgment was left out by the taxing officer. It ought to be clear that there is a clear distinction between a counterclaim and a Plaintiff's case/ suit. The holding of the court in *Kibona vs. Tanscan Timber Co. Ltd Mbeya HCCC No. 8 of 1999 [1995-1998] 1 EA 121*, quoted in approval in the case of *Personal Representative of the Estate of Ernest Daudi (Deceased) v Simon Nganga Mbugua & 2 others; Monarch Insurance Company Ltd (Interested Party) [2018]eKLR* is of particular relevance especially where the court held that:

**“A counterclaim is a case in its own right, completely different from the plaintiff's case and it will fall or succeed on its own merits; it is a form of cross suit in which the parties transpose roles, whereby the defendant becomes the plaintiff and the plaintiff the defendant although they retain their titles as shown in the plaint and since a counterclaim is a suit distinct from the plaintiff's suit, it must be headed by the term “Counter Claim” in bold capital letters which implies that although it is contained in a written statement of defence it is also a suit to which a written statement of defence is required.”**

26. In light of the above, I agree with the Appellant, and it is my finding that the certificate of costs dated 26<sup>th</sup> February, 2019 is not in agreement with the judgment delivered on 29<sup>th</sup> November, 2018 and the decree issued pursuant thereto on 16<sup>th</sup> May, 2019.

27. The other contention raised by the Appellant on the issue of costs was that the taxing officer erred in assessing costs at the Subordinate Court rate when he ought to have used the High Court rate given that the case was first filed before the ELC established under Article 162(b) of the Constitution. I find this argument untenable for the reason that although the suit was initially filed at the ELC the same was transferred to the Chief Magistrate's Court where it was heard and disposed of. Costs were issued by the Subordinate Court, hence, the assessment of costs was correctly done at the subordinate court rate. I, therefore, find no merit in the Appellant's argument on this limb of the appeal.

**(III) WHETHER THE DECREE ISSUED ON 16<sup>TH</sup> MAY, 2019 AND THE CERTIFICATE OF COSTS DATED 26<sup>TH</sup> FEBRUARY, 2019 SHOULD BE SET ASIDE:**

28. On this issue, I agree with the Appellant to the extent that the Subordinate Court erred by finding that the certificate of costs dated 26<sup>th</sup> February, 2019 was in agreement with the judgment delivered on 29<sup>th</sup> November, 2018 and the decree issued pursuant thereto on 16<sup>th</sup> May, 2019.

29. Having already found that the certificate of costs dated 26<sup>th</sup> February, 2019 is not in agreement with the judgment delivered on 29<sup>th</sup> November, 2018 and the decree issued pursuant thereto on 16<sup>th</sup> May, 2019, it would then follow that the aforesaid certificate of costs ought to be set aside. I would however decline to set aside the decree issued on 16<sup>th</sup> May, 2019 since I am of the view that the same is substantially in agreement with the judgment delivered on 29<sup>th</sup> November, 2018.

**(IV) WHETHER THE APPEAL IS MERITED UNDER THE CIRCUMSTANCES.**

30. The upshot of the foregoing is that I find that the appeal has merit, and in the circumstances I make the following orders:

*a) That the certificate of costs dated 26<sup>th</sup> February, 2019 is hereby set aside;*

*b) That an order is hereby issued remitting the lower court's file back to the taxing officer for fresh assessment of the Appellant's costs of the suit and costs of the counterclaim as awarded in the judgment dated 29<sup>th</sup> November, 2018, and fresh certificate of costs be issued enumerating said full costs on BOTH the Plaintiff and counterclaim payable to the Appellant;*

*c) That it is hereby ordered that the Appellant shall deduct from the sums in his custody due to the Respondent the said assessed costs in addition to the judgment award of Kshs. 600,000/- with interest thereon from the date of judgment BEFORE remitting the net balance to the Respondent; and*

*d) The Appellant shall have the costs of this appeal.*

SIGNED, DATED AND DELIVERED AT NAROK VIA EMAIL THIS 25<sup>TH</sup> DAY OF JANUARY, 2022.

MBOGO C.G,

JUDGE

25/1/2022

IN THE PRESENCE OF:

CA: T.Chuma