



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL NO. 86 OF 2012

BETWEEN

SILIPA OCHIENG MOLO.....1ST APPELLANT

JOSEPHINE ODONGO OBAT.....2ND APPELLANT

PETER OCHOLA OMUOR.....3RD APPELLANT

DAVID MOLO MUOR4TH APPELLANT

MOLO NUDI5TH APPELLANT

AND

JACOB OCHINO OGUNDO 1ST RESPONDENT

GEORGE ARTHUR OLANG'O2ND RESPONDENT

JOSEPH OUKO OGUNDO3RD RESPONDENT

JAMES EDWIN ONYUKA4TH RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.D. Wangechi, RM dated 8th June 2012 at the Principal Magistrates Court at Bondo in Civil Case No. 20 of 2012)

JUDGMENT

1. In the subordinate court, the respondents filed suit against the appellants alleging that they had trespassed on their land; UYOMA/KATWENGA/828. They prayed for a permanent injunction and an order of eviction. The appellants denied the allegations that they had trespassed the property and averred that they were entitled to the land. The appellants also raised a preliminary objection that the matter was land case and that the court lacked jurisdiction because of the express provisions of **Article 162(2)(b)** of the Constitution that provide for a court of equal status of the High Court to have exclusive jurisdiction over environment and the use and occupation of, and title to, land.

2. The gravamen of this appeal is that although the trial magistrate determined the preliminary objection in the appellants' favour, she struck out the suit, "with each party bearing its own costs." In the

memorandum of appeal dated 3rd July 2012, the appellants complained that the learned trial magistrate failed to award costs without giving any reasons or explaining why the appellants were denied costs. The appellants further contended that trial magistrate failed to appreciate the provisions of **section 27(1)** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which conferred upon the trial magistrate discretion to award costs.

3. In addition to the memorandum of appeal, Mr Ragot, counsel for the appellant, submitted that the trial magistrate failed to follow the general principle that costs follow event unless there are good reason to justify denial of costs to a successful litigant and since the appellants were successful, they were entitled to costs.

4. Although the respondents were represented, their counsel undertook to file written submissions before the writing of this judgment but did not do so.

5. The issue of costs in civil proceedings is dealt with by **section 27(1)** of the **Civil Procedure Act** which states as follows: -

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 shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court 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 direct.

6. This provision has been the subject of judicial pronouncement by the courts. They have emphasized the general principle that costs are a matter of discretion for the court, which discretion must be exercised judicially, and that a successful party should not be deprived of costs unless there are good reasons to be explained (see *Osapil v Kaddu* [2000]EA 187 and *Karanja v Kabugi and Another* [1976-1985]EA 165). In the case of *Supermarine Handling Services Ltd v Kenya Revenue Authority Civil Appeal No. 85 of 2006* [2010]eKLR, the Court of Appeal observed that:

Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance... Thus, 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. It will also interfere where the reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the rule ... In the instant case the learned Judge gave no reasons whatsoever for his decision to deprive the successful plaintiff of its costs and yet it was not shown that the defendant had been guilty of some misconduct which led to litigation. In the court's view the learned Judge's order was wrong and for the foregoing reasons, the plaintiff's appeal succeeds as to the award of interest and costs on the principal sum awarded.

7. From the dicta, I have set out, the trial magistrate had to give reasons to deprive the appellants, as a successful party, of costs. Since she failed to do so, this court, as an appellate court, is entitled to intervene as the discretion was not properly exercised (see also *Mbogo v Shah* [1968] EA 93).

8. I allow the appeal to the extent that I set aside the order requiring each party to bear their own costs and substitute it with an order that the respondents do bear the appellants costs.

9. The respondents shall bear the costs of this appeal which are assessed at Kshs. 20,000/-.

DATED and DELIVERED at KISUMU this 20th day of December 2016.

D.S. MAJANJA

JUDGE

Mr Ragot instructed by Otieno Ragot and Company Advocates for the appellant.

Ms Olang'o instructed by Wasuna and Company Advocates for the respondent.