



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CIVIL APPEAL NO. 50 OF 2005**

**STANLEY MURUNGI M'IMANYARA.....APPELLANT**

**VERSUS**

**SAMUEL KAINGA NCEBERE.....RESPONDENT**

**J U D G M E N T**

***(Being an appeal from a ruling of the learned acting Principal Magistrate, Mr. J. N. Nyagah delivered on 2.6.2005 in Maua P.M.C.C. N. 59 of 2001)***

The Memorandum of Appeal in this appeal has the following grounds:

- 1. The learned Acting Principal Magistrate erred in law and fact by finding that the appellant should pay the respondent's costs in the MAUA P.M.CC NO. 59 OF 2001.***
- 2. The learned Acting Principal Magistrate erred in law and fact by failing to find that the respondent's costs of the suit in the MAUA P.M.C.C. NO.59 OF 2001, If any, ought to be borne by Mr. Ogoti Advocate personally as ordered by this court on 30.03.2005 in MERU H.C.C.A NO.64 of 2003.***
- 3. The learned Acting Principal Magistrate erred in law and fact by purporting to review this court's judgment dated 30.03.2005 and delivered in Meru HC.C.A. NO.64 of 2003 and therefore deny the appellant the costs of the suit in the MAUA P.M.C.C. NO. 59 of 2001.***
- 4. The learned Acting Principal Magistrate erred in fact and law by setting aside the court's ruling dated 14.10.2004 in the Maua P.M.C.C. NO. 59 OF 2001.***

The appellant prays that his appeal be allowed with costs in the following terms:

- a) The ruling/orders dated 02.0.6.2005 in the MAUA P.M.C.C. NO. 59 of 2001 be set aside and the respondent be ordered to pay the costs of the MAUA P.M.C.C. NO. 59 OF 2001 to the appellant.***
- b) In the alternative to the reliefs sought in prayer (a) herein above, the court do order Mr. Ogoti advocate to bear the respondent's costs in the MAUA P.M.C.C. No. 59 of 2001 as ordered by this court in MERU H.C.C.A. No.64 of 2003.***

The genesis of this appeal can be traced to Civil Case Number 59 of 2001 at Maua where Samuel Kainga Ncebere was the plaintiff. In this appeal, he is the respondent. Stanley Murungi M'Manyara was the defendant. In this appeal, he is the appellant. In the original suit the plaintiff claimed for a refund of the consideration paid to the defendant concerning a failed Land Sale Agreement dated 20.12.2000. He also sought a sum of Kshs.70,000/= as liquidated damages emanating and payable under the apposite agreement.

The plaintiff's claim was dismissed with costs by Hon. N. Kimani, Principal Magistrate, Maua land Courts.

The Plaintiff appealed and Hon. Justice D. A. Onyancha, J, delivered his judgment on 30.3.2004. the Honourable Judge opined as follows:

***“...It is my view that once the trial magistrate found as he did, that the sale agreement was irregular then he should also have found that any sums of money received by the respondent could not be kept by him since the same amounted to unjust enrichment. In this case the Respondent received Kshs.15,000/= under an irregular agreement. The agreement was not unlawful but only irregular and therefore unenforceable. There is no reason why he should keep the money while also keeping the land intended to be sold. Accordingly, the trial magistrate was not right to find that the appellant needed to file another suit to recover the sum of Kshs.15,000/= when in this suit he clearly sought for a refund of the same money paid to the respondent.***

***For the above reasons, I allow this appeal. I set aside the orders of the trial magistrate and enter judgment for the appellant for a sum of Kshs.15,000/=. The costs of the Appellant shall be paid by Mr. Elijah Ogoti, Advocate personally. It is so ordered.”***

The matter did not end there. The Hon. J. Nyaga, acting Principal Magistrate, delivered a ruling regarding costs on 2nd June, 2005. He concluded his ruling as follows:-

***“The respondent lost his case at the High Court. He cannot lose the case and then be entitled to the costs of the lower court. Mr. Ogoti, advocate, was only ordered to pay the plaintiff's cost of appeal at the High Court. The Lower Court's ruling of 14th October, 2004 is hereby set aside. The plaintiff's application dated 14th October, 2004 is allowed with costs to the applicant/plaintiff”.***

I have carefully examined the pleadings and the submissions filed by respective parties.

Reverting to the nitty gritty of this appeal, I find that the Hon. Justice Onyancha in his judgment in H.C.C.C. No. 64 of 2003 was unequivocal that he had set aside all the orders of the trial magistrate and instead had entered judgment for the appellant in the sum of Kshs.15,000/=. The orders set aside by the High Court included the order awarding costs to the defendant. The orders issued by the lower Court having been set aside in toto, it can not be claimed by any stretch of imagination that there remains any judgment that the respondent won in the lower court.

I do find that with the setting aside of the orders of the trial magistrate, by the High Court, the effect is that the present respondent won the case in the lower court and on appeal. Although the Learned Judge ordered that the respondent, by then the appellant, be paid his costs by Mr. Elijah Ogoti, for the present respondent, it has pellucidly been established from antiquity that in legal proceedings the party that wins a suit merits award of costs against the losing party. This practice can not be peremptorily overturned so that the loser costs are borne by a third party. This would have the effect of forsaking the winner in a lurch. In this case I find that it is proper that the appellant should be condemned to pay the costs of this appeal, costs regarding HCCC No. 64 of 2003 and costs in the lower court.

It is clear that the present respondent is the winner in all proceedings apposite to this matter. He is entitled to his costs. As the old adage opines, costs follow the event. And so it should be in this matter.

I decry one thing, though. This appeal involved a fairly simple matter of costs. It was filed in 2005. It should not have taken 10 years to be heard and determined. I berate the litigants for having been veritably indolent. I will not apportion blame between the appellant and the respondent. However, this appeal should have been heard and determined years ago.

This appeal is dismissed. Costs are awarded to the respondent.

It is so ordered.

**Delivered and signed in Open Court at Meru this 18th day of June 2015 in the presence of :**

Cc. Lilian/Daniel

Mokaya h/b Omari for appellant

Miss Mathenge h/b Kaimenyi for Respondent

**P. M. NJOROGE**

**JUDGE**