



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 35 OF 2015

EZZI TRADERS LIMITED..... APPELLANT

V E R S U S

SHANTILAL M. SAVANI

SURYA KANT M. SAVANI

MANU M. SAVANI

SHOBHNA M. SAVANI

JAI D. SAVANI

JASUMATI D. SAVANI

RAMANLAL M. SAVANI

MAYUR R. SHAGHAV

RAJEN C. SAVANI

T/A MOMBASA LAND DEVELOPMENT COMPANY. RESPONDENT

RULING

(Being an appeal from the Ruling and order of Hon. Mbichu Mboroki (Chairman) Business Rent Tribunal Case No. 12 of 2015 (Mombasa) made on 20th February 2015)

1. Appellant on 22nd June 2015 withdrew this appeal but opposed the respondent's prayer that the costs thereof be awarded to them. This Ruling addresses the submissions on who should bear the costs of this appeal.
2. Appellant was served on 7th August 2013 by the respondents landlord, with a notice to increase rent of its business premises situated on plot No. 18/XXXVIII/M.I. at Marikiti Area Mombasa. The appellant is a tenant on those premises. The appellant failed to file a reference to the Business Premises rent Tribunal (BPRT) as provided under Section 6 of the Landlord and Tenant (shops, Hotels and Catering Establishments) Act Cap 301.
3. Since for a period of time the BPRT was not operating for lack of a chairman, appellant obtained

- an interim injunction before the chief Magistrates court restraining the landlord from distressing for rent arrears in Mombasa CMCC No. 3475 of 2013. Those interim orders were not extended by that court when the court dismissed the application for interlocutory injunction.
4. Appellant obtained a similar injunction before the chairman of BPRT but the said chairman discharged the injunction when the appellant sought an adjournment. It is that discharge that led to the appellant filing this appeal.
 5. In filing this appeal the appellant obtained interim restraining orders stopping the respondent distressing for rent arrears. That application and this appeal were withdrawn by the appellant because by the time the application came up for inter partes hearing the BPRT had granted appellant leave to file a reference out of time against the intended rent increase.
 6. The guiding principle on issue of costs is in section 27 (1) of the Civil Procedure Act cap 21. It provides:

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 to give all necessary directions for the purposes aforesaid; and the fact that the court or judge had 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.

The learned author Stuart Sime in the book entitled ‘A Practical Approach to Civil Procedure’ in discussing the principle in section 27 has this to say:

“Case law under the old system (*Gupta v Klito* (1989) *The Times*, 23 November 1989) established that a successful party in normal circumstances was entitled to have an order for costs against the loser, with limited exceptions, such as cases where a successful claimant recovered no more than nominal damages, or where the successful party acted improperly or unreasonably (*Re Elgindata Ltd (No 2)* [1992]1 WLR 1207), or where the issue on which a party succeeded was raised for the first time by amendment at a very late stage (*Beoco ltd v Alfa Laval Co. Ltd* [1995] QB 137). *Re Elgindata Ltd (No 2)* has been one of the pre-CPR cases most frequently referred to in post-CPR cases. Different judges have placed greater or lesser reliance on the principle laid down in that case, but the general consensus is that those principles remain valid, although they should not be taken as binding the discretion of the court. The result is that the starting point when considering the question of costs is that the winner ought to recover costs from the unsuccessful party although there may be other factors which require some deviation from a simple application of that rule. Further, there are many cases where some detailed analysis is required to determine who has been ‘successful’, and to what extent.”

7. Appellant submitted that it was the successful party and should not therefore shoulder the costs of this appeal. Appellant equated the success in obtaining leave to file a reference out of time before BPRT as success in this appeal.
8. In my view it would be erroneous to so find. The successful party in this case is the respondent. The appellant, after all, admitted failure on its part to file for reference at BPRT within the period provided under section 6 as read with section 4 940 of cap 301. It is that failure that led to various injunction application and which culminated with this appeal. It follows that if the appellant had filed its reference within time this appeal would not having been filed. It is because of that finding that I find and I hold there is no basis of not following the general rule under section 27 of cap 21 which is that costs shall follow the event. The event in this case is the withdrawal of this appeal.
9. I therefore order that the costs of this appeal be paid by the appellant

DATED and DELIVERED at MOMBASA this 30TH day of JULY, 2015.

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

C/A Kavuku

For Applicant:

For Respondent:

Court

Ruling delivered in their presence/absence in open court.

MARY KASANGO

JUDGE