



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CIVIL SUIT NO 170 OF 2004**

**HARDEEP SINGH .....PLAINTIFF**

**VERSUS**

**CMC MOTORS GROUP LIMITED.....DEFENDANT**

**RULING**

1. This suit was filed by Hadeep Singh on 6<sup>th</sup> July 2004 against the CMS Motors Group Limited the defendant. The plaintiff's claim is that the defendant is liable to compensate him to the tune of Ksh 6,626,259 being the loss he incurred when his car which was repaired by the defendant caught fire and was entirely destroyed.
2. The claim was defended and denied by the defendant.
3. Before me is the defendant's Notice of Motion dated 6<sup>th</sup> February 2014. By that application the defendant seeks the dismissal of this suit for want of prosecution. The plaintiff did not oppose that prayer for dismissal. He however sought that the costs of the suit be borne by each party.
4. The plaintiff based his prayer on costs on the grounds that the suit had been filed at the instance of his insurance under the principle of subrogation for recovery of damages against the defendant.
5. The defendant argued that it would be unfair for it to be ordered to pay its own costs of the suit after it had been brought to court. Defendant therefore sought that it be awarded courts.

**ANALYSIS AND DETERMINATION.**

6. There are two issues that I need to determine. Firstly it is whether this was an action brought under the principle of subrogation. If the answer to that issue is positive what are the ramification to the award of costs. Secondly it is who should pay the costs of the suit.
7. On the first issue I find that this is not a suit brought under subrogation claim. This is clear from the plaintiff. The plaintiff pleaded that his car was damaged following its repair by the defendant but did not plead that he had been compensated by his insurers. If indeed this suit had gone on for hearing it would have failed on that ground alone. On that I rely on the case **Nkosi v Mbatha ( AR20/10) ZAKZPHC 38 ( 6 July 2010)** which was a decision of Kwazulu – Natal High Court Viz:

***“However, the plaintiff said it for the first time under cross-examination that she was proceeding against the defendant on behalf of the insurer for the recovery of the costs of repairs the insurer paid to her. It does not appear from the plaintiff's pleadings that she was so suing. I am of the***

*view that a subrogation claim is something which must clearly be proved and specifically pleaded. Nor had any mention been made in the plaintiff's pleadings that her motor vehicle was insured and that after the collision the insurer fully indemnified the plaintiff for the loss she had suffered. Nor did the plaintiff plead that the amount to be recovered from the defendant would be paid over to the insurer. The object of pleading is to define the issues between the parties and the parties must be kept strictly to their pleas where any departure could cause prejudice. See Robinson –v- Randfontein Estates GM Co. Ltd 1925 AD 173 at 178 as per Rose-Innes CJ. The party is therefore not allowed to direct that attention of the other party to one issue and at the trial attempt to canvas another. Nyandeni v natal Motor Industries Ltd 197 (2) SA 274 (D)”*

8. It follows that since nothing in the pleadings supports the plaintiff's claim that this was a subrogation claim the plaintiff cannot seek to escape the award of costs on that ground. But I go further and say that even if the claim was under the principle of subrogation the plaintiff would not escape the award of costs to be made against. His remedy, if such an order of costs was made, would be to seek reimbursement from his insurer.

9. In determining the second issue I shall refer to the provision of Section 27 (1) of the Civil procedure Act Cap 21 which 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 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.*

10. The above section clearly shows that an award of costs is at the discretion of the court but the court in exercising that discretion is to be guided by the general rule that costs follow the event. That term, cost follow the event was considered by Justice F. Gikonyo in the case

*Dipchem East Africa Limited v Karutturi Limited (In Receivership) (2015) e KLR* where he stated thus:

*“I hereby state that, I do not wish to reinvent the wheel. The phraseology, “costs follow the event” has been sufficiently explained by courts as well as eminent writers. Perhaps I should merely re-state the law and make my decision on the circumstances of the case. See the literary work by Kuloba J (as he then was), Judicial Hints of Civil Procedure 2<sup>nd</sup> edition at page 99 that :*

*“The words “the event” mean the result of all the proceedings to the litigation. The event is the result of entire litigation. It is clear however, that the word ‘event’ is to be regarded as a collective noun and is to be read distinctively so that in fact it may mean the ‘events’ of separate issues in an action. Thus the expression “the costs shall follow the event” means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it. An issue in this sense need not go to the whole cause of action, but includes any issue which has a direct and definite event in defeating the claim to judgment in the whole or in part.”*

11. The learned author Stuart Sime in the book ‘A Practical Approach to Civil Procedure’ had this to say in regard to award of costs:

*“Case law under the old system (Guptav 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) I WLR 1207), or where the issue on which a party succeeded was raised for the first time by amendment at a very late stage ( Beoceo 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 principles 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 required 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.”*

12. Considering the provision of Section 27 (1) of Cap 21 and the facts of this case I can find no reason to depart from the general principle. I make the following orders:

(a) This suit is hereby dismissed for want of prosecution.

(b) The plaintiff shall pay defendant’s costs of the suit and costs of the Notice of Motion dated 6<sup>th</sup> February 2014.

Dated and delivered at Mombasa this 30<sup>th</sup> day of July 2015.

**MARY KASANGO**

**JUDGE**

30.7.2015

Coram

Before Justice Mary Kasango

C/Assistant – Kavuku

For Plaintiff:

For Defendant:

**Court**

The Ruling delivered in their presence/absence in open court.

**MARY KASANGO**

**JUDGE**