



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CIVIL APPEAL NO. 50 OF 2011**

**BETWEEN**

**GILBERT GITONGA NGATIA ..... APPELLANT**

**AND**

**PAUL GICHURU KAIRU ..... RESPONDENT**

*(An appeal from the Ruling of District Magistrate C.M. Wekesa*

*dated 13th May 2011 in Nyeri CMCC No.22 of 2011)*

**JUDGMENT**

By a plaint dated 14th February 2011 the Respondent Paul Gichuru Kairu sued the Appellant for the sum of Kshs.39,000/= being the sum of money paid to the appellant through M-pesa in respect of the supply of 6'x9' building stones.

By a statement of defence dated 18th March 2011 the Appellant admitted receipt of Kshs.39,000/= from the Respondent but stated that the exercise could not be undertaken by reason of the letter from the Respondent's Advocate dated 7th February 2011 and further stated that he had pledged to pay by 30th March 2011 and therefrom the suit was misguided.

By a Notice of Motion dated 15th April 2011 the Respondent sought orders:-

- *That the honourable court may be pleased to award full costs of the suit to the same appellant having paid the principal sum claimed in the plaint.*

The application was supported by the annexed affidavit of the respondent in which he deponed that on 4th February 2011 he caused a demand letter to be issued to the appellant and on 14th February 2011 after the expiry of the period given in the said demand letter filed the suit herein whose reply he received on 22nd February 2011.

That on 3rd March 2011 the appellant filed a memorandum of appearance on 23rd March 2011 and paid the principal sum on Kshs.39,999/= without paying the cost thereon.

In response to the said application the appellant filed grounds of opposition and stated that there was no judgment on record to warrant application for cost.

The said application was argued before Hon. M. Wekesa then DMII Prof. who allowed the application in the following terms:-

**“I find that the normal circumstance cost must follow the events. I find the application to be meritorious and allow the same i.e prayer 1 & 2.”**

Being dissatisfied by the said decision the appellant filed the appeal and raised the following grounds of appeal:-

- a. *The learned trial magistrate completely misdirected herself on the law thereby arriving at the wrong decision.*
- b. *The learned trial magistrate erred in law in failing to note that no cost on a suit can be awarded without judgment thereby condemning the defendant unheard.*

#### SUBMISSIONS

It was submitted by the applicant that cost follows an event – the event being a determination by a court on a certain issue. It was submitted that there was no judgment before the lower court and therefore no cost could have been awarded.

On behalf of the respondent it was submitted that the appellant filed a defence of admission and the respondent filed a formal application for cost which was argued interpartes on 13th May 2011 which was allowed. It was submitted that the argument that there was no judgment or formal decree was too simplistic.

#### ISSUES

The following issues have been identified for determination:-

- a. *Was there a formal judgment upon which the said court could have ordered costs?*
- b. *What order should this court make?*

From the record of proceedings herein the appellant filed a statement of admission and from the court record the respondent did not apply for judgment on admission.

As at the time when the respondent filed the application for costs there was no formal judgment on record and there has not been any judgment entered by the lower court in this matter.

There being no judgment on record, the trial court was therefore in error in holding that cost follows the event and would therefore agree with the submissions by the appellant that cost could not be ruled upon before judgment was entered the fact that the appellant paid the decretal sum notwithstanding.

I therefore find and hold that the Respondent was not entitled to cost as at the time the same was awarded since there was no judgment on determination on record by the court and would therefore allow the appeal herein and set aside the ruling by M. Wekesa and subsequent decision and order arising thereon with cost to the appellant.

In the interest of justice, the respondent is at liberty to apply for judgment on admission before the trial court.

**Signed and dated this    day of    2014**

**J. WAKIAGA**

**JUDGE.**

**Delivered by Justice J. Ngaah on behalf of Justice Wakiaga this    18th    day of  
December 2014**

**J. NGAAH**

**JUDGE.**

----- for Appellant

----- for Respondent