REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO. 51 OF 2008

JUSTUS SIMIYU MASINDE ……..……..............………………. APPELLANT

VERSUS

DOMITILLA ICHA MASINDE..……………........………..……RESPONDENT

RULING

JUSTUS SIMIYU MASINDE, the Appellant, instituted appeal on 23.10.2002 in this court against the ruling and orders made on 7.10.2008 by the Honourable Resident Magistrate, Mr. Kiema, in Milimani Commercial Court in maintenance Cause No.15 of 2007 in which the said trial magistrate issued prohibitory orders against the property known as L.R. Nairobi/Block 82/3618 and ordered sale of the said property.

On 9.2.2011, the Appellant filed Notice withdrawing the said appeal.

Although the Notice of Appeal was shown as having been served on Messrs W. G. Wambugu & Co. Advocates who are on record for the Respondent, Ms. Kanyua, Advocate, who appeared for W. G. Wambugu & Co. complained in court on 17.11.2011 that the Notice had not been served on the said firm.

On 17.11.2011, Mr. Mbigi Njuguna, the Advocate for the Appellant, informed the court that his client had applied to withdraw the Appeal whereupon costs were sought by Ms Kanyua on behalf of Messrs W. G. Wambugu & Co. Advocates. Parties left to court for determination the matter as to whether costs should be paid on the withdrawal of the Appeal. Had the Appellant served the appeal on the Respondent and if so had he filed and served other applications on the Respondent? In short, to what extent had the Respondent been required by the Appellant to address the appeal and interlocutory matters if any?

The record shows that the Appeal was served on the Respondent through her advocates on record. It also shows that the Notice of Motion dated 12.6.209 seeking stay was served on the Respondent on 12.6.2009 and further, that the Respondent filed a Replying Affidavit to the Motion on 24.6.2009. On 8.11.2010, the Appellant filed a Chamber Summons application dated 8.11.2010 seeking, inter alia, stay of the sale of the property referred to therein and the Respondent after service on her of that application filed a Replying Affidavit.

It was after these processes that the Appellant had a change of heart and filed Notice to withdraw the Appeal. Strangely, service of the Notice of the withdrawal is said not to have been served on the Respondent. But no matter. The issue for determination is whether the Appellant should bear the costs of the Respondent in the withdrawn appeal.

The court has wide discretion in determining payment of costs. **Section 27** of the Civil Procedure Act, Cap 21, states:

"S. 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."

S.27 (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

Section 100 of the Civil Procedure Act also gives the court general power to order costs.

The Section states:

S.100 "The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding."

It is axiomatic that costs should follow the event. Where a party who has instituted a matter is unsuccessful, such party should normally pay the costs. After all, a litigant who institutes a suit must realize that the party he sues will use time and expend resources in defending and if the claims made are dismissed for lack of merit or proof, it is only fair that the claimant recoups the Respondent. Any claimant in court proceedings must realize that judicial proceedings are serious matters involving as they do assertion of rights and pursuit of redress. They are not joking matters. A claimant in a suit who asserts that the Respondent has breached his (claimant's) rights and also seeks redress ought to be well aware that time and resources may be spent in defence of such claims. So why should a claimant who takes another party to court eschew payment of costs of such party when his claims are dismissed for lack of merit or proof? It would be unfair to deny costs to a party who has succeeded in a suit and by the same token, a party whose claims have been dismissed should likewise bear the costs of a Respondent who has succeeded in showing that there was no proof or valid claim against him. Circumstances may however exist or arise in which the court may not find it just to award costs to the successful party or against the unsuccessful party.

In the instant matter, the Appellant filed Appeal and several applications. He ought to have known that the Respondent would be exposed to expenditure in defending the matter. Indeed, parties had counsel and it is obvious they spent time and resources. There is no reason or rhythm why the Appellant should not bear the costs of the Respondent in the withdrawn Appeal.

For these reasons, I accordingly, order that the Appellant shall pay the costs of the Respondent in the withdrawn appeal.

Dated at Milimani Law Courts, Nairobi, this 16th day of February 2012.

G.B.M. KARIUKI, SC
JUDGE

COUNSEL APPEARING

Mr. Mbigi Njuguna of Mbigi Njuguna & Co. Advocates for the Appellant

Ms Kanyua of Messrs W.G. Wambugu & Co. Advocates for the Respondent

Ms Pamela Osodo - Court Clerk