



REPUBLIC OF KENYA

High Court at Nakuru

Civil Appeal 129 of 2000

BEATRICE NYAMBURA NGURE APPELLANT

VERSUS

AMOS THUKU 1ST RESPONDENT

JOSEPH KIMANI 2ND RESPONDENT

RULING

The only issue left for determination is one of costs; who will bear the costs before the Tribunals and of the appeal?

The respondents herein commenced a complaint before the Nyandarua District Land Dispute Tribunal in 1999. The dispute was heard and determined on 5th November 1999. The appellant was aggrieved by the award and appealed to the Provincial Land Disputes Appeals Committee. The Committee heard the appeal and confirmed the decision of the District Tribunal.

The appellant then lodged an appeal to this court against the decision of the Provincial Land Disputes Tribunal. When the matter came for hearing on 12th July 2011, the parties to the appeal recorded a consent to set aside the decision of the District and Provincial Land Disputes Tribunals, on the ground that the tribunal had no jurisdiction to hear and determine the dispute. The parties could not agree on the issue of costs and thus the purpose of this ruling.

The appellant prays to be awarded costs on the basis that:

- 1. she is the successful party;**
- 2. the proceedings and legal issues were diverse and voluminous and**
- 3. the subject matter was of great importance.**

The respondents submitted that each party should bear their own costs on the basis of:

- 1. the conduct of both the appellant and respondents; and**
- 2. the relationship of the parties.**

It was the respondents contention that both parties contributed to the mess and secondly, that they are close family members seeking to enforce their ancestral rights.

The law that governs the award of costs is **Section 27** of the **Civil Procedure Act**. It provides that:

“subject to such conditions and limitation 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 reasons otherwise order.”

The position on award of costs in Kenya seems to be the same as at Common Law. In the case of **Ritter v Godfrey [1920] 2 KB 47; [1918-19] All ER 714** Lord Sterndale MR said:

“... there is such a settled practice in the courts that in the absence of special circumstances a successful litigant should receive his costs, that it is necessary to show some ground for exercising a discretion by refusing an order which would give them to him. The discretion must be judicially exercised, and therefore there must be some grounds for its exercise, for a discretion on no grounds cannot be judicial.”

In a later case of **The Republic vs Nairobi Business Premises Rent Tribunal and others exparte Karasha [1979] KLR 149** Simpson J enunciated that:

“the general rule is that costs follow the event as between the Applicant and the party who improperly procured the impugned order unless there are special circumstances that make it proper for an exception to be made...”

In **Judicial Hints on Civil Procedure** by **R. Kuloba** at page 99 par. 152, the author defines what the ‘event’ is:-

“the event is the result of the entire litigation...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..”

I have now considered the grounds advanced by the parties under the following headings:

- 1. conduct of the parties;**
- 2. success of the appellant; and**
- 3. relationship of the parties.**

Conduct of the parties.

In the instant case, it is the conduct of the respondents of commencing a complaint before the District Lands Disputes Tribunal and dragging the appellant there against her will that brought about this case. If the respondents had not commenced the complaint before the tribunal, then this situation would not have occurred. After the appellant was aggrieved by the decision of the tribunal, she rightfully appealed to the Provincial Appeals Tribunal under **Section 8 (1) Lands Disputes Tribunal Act**. The appellant can not be faulted for appealing to the Appeals Tribunal because the respondents had invoked that mechanisms to resolve the disputes and the appellant had a right of appeal under **Section 8 (1) of the Land Disputes Tribunal Act**. I further note that the issue of jurisdiction was first raised by the appellant in the memorandum of appeal dated 11th February 2000 which resulted in the parties recording a consent order. I have no doubt therefore that the conduct of the appellant did not contribute or induce the commencement of the case at the tribunal.

Success of the Appellant

The question here is whether the Appellant's success is due to lack of jurisdiction of the District and Provincial tribunals or the intrinsic merit of the appellant's case? I am of the opinion that the success of the appellant is due to both lack of jurisdiction of the tribunals and the intrinsic merit of her case because in this appeal the appellant sought to have the proceedings before the two tribunals declared a nullity for want of jurisdiction. Had the appeal proceeded to full hearing, no doubt the appellant stood to succeed.

This scenario is different from that in **Mayfair Holdings Limited v Ahmed [1990] KLR at 682** where Omolo J said:

“...on costs, the plaintiff has basically lost and the defendant has in fact won. Under the proviso to Section 27 (1) of the Civil Procedure Act, the court should, therefore award costs to the defendant. But I do not think I am prepared to do this...the defendant has succeeded simply because DW1 failed to register the Power of Attorney, and not the intrinsic merit in his case.”

Relationship of the Parties

I have considered the authorities brought to the attention of the court by the respondent on the issue that the parties are close relatives and that in such cases, the court has directed each party to bear its own costs. However, the appellant pegs her claim on the voluminous of the proceedings and the duration it has taken. The pleadings were not voluminous but the parties have been in court since 1999 and this matter has only been brought to rest in 2011 after a period of 12 years.

Having considered all the above and in exercise of my discretion, I order that the parties do share the costs, with the respondents bearing 75% ($\frac{3}{4}$) of the total costs both in the tribunals and on appeal, while the appellant will bear 25% ($\frac{1}{4}$). It is so ordered.

DATED and DELIVERED this 22nd of November, 2012.

R.P.V. WENDOH

JUDGE

PRESENT:

N/A for appellant

Mr. Gakinya holding brief for G. Chege for respondent

Kennedy – Court Clerk