

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU
Civil Appeal 55 of 2007

HENRY

MUTHEE
MUTONGAAPPELLAN
T

VERSUS

M'IKIARA M'MBIJIWE.....RESPONDENT

RULING

The appellant filed an action before the lower court against the respondent. By that action, he sought declaration that a tenancy agreement entered between him, (the tenant), and the respondent, (the landlord) over plot number 58A Nkubu market was null and void. He alleged that it had come to his knowledge during the said tenancy that the said plot belonged to a 3rd party called M'Mbijiwe. In the lower court's judgment the appellant's claim was dismissed. In that judgment, the learned magistrate stated and it is worth quoting:-

“At this point, I must ask myself one question that the plaintiff (appellant) used to pay rent to the defendant (respondent) up to the year 2001 when he suddenly stopped and started paying rent to PWII (M'Mbijiwe). Why did he stop? If the plaintiff did not wish to be involved in the legal wrangles between the defendant and the 3rd parties..... He had several alternatives including leaving the premises in question.”

As I stated, the appellant was dissatisfied with that judgment and filed this present appeal. This appeal was filed on 24th May 2007. From the time the appellant filed the memorandum of appeal, he took no action to ensure that the appeal is heard and concluded. It was even the respondent who prepared and filed the record of appeal. Even though the appellant submitted that such a record should have been prepared by the court which I do not accept, a practice has evolved where the appellants now prepare those records of appeal. The appellant is guilty of dereliction of his obligations. When the appeal was finally set for hearing on 1st October 2009, the appellant withdrew the appeal. He however sought that the court will not order that he do pay costs to the respondent. Parties were given an opportunity to file written submissions on whether costs to this appeal should be awarded to the respondent. The respondent submitted by referring to section 27 (1) of the Civil Procedure Act Cap 21. That is the section that guides the court when considering the issue of costs. It is in the following terms:-

“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.”

The respondent also relied on the case of **Husein Janmohamed & Sons Vs. Twentsche Overseas Trading Co. Ltd** Civil Appeal No. 12 of 1965 [1967] EA pg 287 where the court held inter-alia:-

“The general rule is that costs should follow the event and the successful party should not be deprived of them except for good cause.”

Indeed, the general principle that costs must follow event can only be mitigated by good reason such as misconduct of a successful party amongst others. As shown from what I stated relating to the lower court case, it is clear that the appellant was a tenant of the respondent for a period of time and thereafter around the year 2001 unilaterally stopped paying rent to the respondent on the basis that the plot did not belong to the respondent. The learned magistrate who heard the case quite rightly found that the right action that the appellant should have taken was to vacate the premises. If misconduct is to be found, it probably would only be against the appellant. It adds no credit to the appellant that he withdrew the appeal. It is obvious he had no serious intention of prosecuting it. In considering what should guide this court in ordering for costs, it is useful to look at what is stated in the book of A Practical Approach to Civil Procedure by Stuart Sime where he had the following to say:-

“Case law under the old system (Gupta Vs. 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 Elgindanta Ltd (No. 2) [1992] 1 WLR 12070, 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.”

I can find no good reason why the respondent should be deprived of the costs of this appeal. It is obvious that the lower court suit was ill advised and much more this appeal. I therefore hereby order that the appellant do pay the respondent's costs of this appeal.

Dated and delivered at Meru this 6th November 2009.

MARY KASANGO

JUDGE