



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL 255 OF 2001

FREDRICK M NGINDU. APPELLANT

VERSUS

JUSTUS M MAITHYA.RESPONDENT

(From the order of Ondabu D. O. SRM in Mwingi, SRM CC NO. 58 OF 1997)

J U D G E M E N T

The issue in this appeal is that the lower court dismissed the suit before it but failed to grant the appellant, who was the defendant, his costs of the dismissed suit. The defendant appealed to this court on the issue of costs only.

The facts before the lower court as this court understands them, are that the respondent's donkeys went to the appellant's home and purportedly ate appellants crops. He detained the donkeys until the police arrested him and ordered him to release the donkeys and have the matter possibly settled before Clan Elders. Upon that condition the appellant/defendant was apparently released.

On reaching home the appellant summoned clan elders who on examining the dispute, apparently found that little damage had been caused by the donkeys. In addition to the fact that the parties were close family members, they were reconciled on condition that they each paid the clan elders allowance which was decided to be Ksh. 350/- each. The dispute about donkeys appeared to have been resolved that way. Because the appellant did not have money to pay the clan elders as resolved, the respondent voluntarily had offered to pay the appellant's share of the clan elders fees of Ksh.350/- in an agreement that the appellant/defendant, would pay it back to the respondent.

Unfortunately the defendant/appellant did not refund the money soon. The delay angered the respondent/plaintiff to the extent that he filed a suit in the lower court claiming a refund of Ksh.700/- from the appellant. This court in passing, wonder whether that should have been claimed should have not been the Ksh.350/-, which the respondent/plaintiff had paid to the clan elders on behalf of the defendant/appellant.

Be that what it may, because the lower court, in my finding, rightly dismissed the Respondent/Plaintiff's claim. The relevant question however, is whether he had right in his discretion, to deny the appellant his costs. In dismissing the Respondent/Plaintiff's claim, the trial court concluded that the plaintiff's claim was vexatious in view of the fact that it had been fully settled by Clan Elders who had brought reconciliation between the parties. It was then that the trial magistrate arrived at the following conclusion: -

“..... To me I find that there are two vexatious litigants and I find that since they had settled the matter at home, none is supposed to pay the other and I dismiss the suit and in order to discourage such trivial matters in court, I order that each party pay own costs”

The last sentence is what caused the appellant to file this appeal.

To start with, and with respect, the respondent/plaintiff may have had good cause to claim in the lower court what he had paid to the Clan Elders on behalf and for the appellant. The cause of action in respect of the sum claimed (which should have been Ksh.350/-) did not arise before the reconciliation between the parties. It arose clearly after reconciliation and had probably nothing to do with the donkeys. It arose when the appellant had no money to pay the elders and undertook to refund the respondent/plaintiff if the latter paid for him, which he did. It was not denied by the appellant that he was not under obligation to refund after agreeing to do so before the respondent/plaintiff paid it for him. In this court’s view, had the respondent cross-appealed against the dismissal of his claim, this court could have sympathized with him. However, the matter was not an issue here and this court would say no more over it.

Further more the conclusion by the trial magistrate that the suit was vexatious, while it has not been challenged by the appellant, could only have been true (if true it was) as against the plaintiff/respondent who had filed the suit. On what basis would the trial court blame the defendant/appellant when the latter did not agree with the plaintiff/respondent to file the suit? The conclusion I arrive is that the fault in filing the suit wholly lay with the plaintiff/respondent. Was there any reason, why the Honourable trial magistrate may not have granted the appellant his costs for succeeding in defending the claim against him?

This court would see no reasonable ground if the basis is on the facts and conclusion reached by the honourable trial magistrate. In my view it was because the matter had been settled before the clan elders that it should not have been filed in court so that the fault lay with the plaintiff who should have been ordered to pay the costs.

But the above conclusion is merely on the face of things as they appeared before the trial magistrate who, in my view, arrived at a wrong conclusion. In this case the problem started with the appellant who had refused to pay his share of the clan elders fees. This means that the appellant’s victory in the lower court was based on a wrong premise by the trial magistrate, not on the really blameworthiness of the respondent. If the conclusion I have reached has merit as I think it has, the whole blameworthiness was originally triggered by and lay with the appellant. The latter triggered the suit to be filed by the plaintiff, and rightly so in the opinion of this court. His success in the dismissal of the case was therefore based on wrong and improper reasons and fails to remove the blame from the appellant.

Accordingly, the appellant did not deserve or is not entitled to costs although on clearly different reasons from those used by the lower court to deny him the costs. Put differently, this court while aware that costs generally follow the event, in this case the court’s discretion, for reasons given above, deny the appellants the costs. This appeal has therefore no merit and is dismissed.

Taking into account the history of this case, however, and in consideration of the fact that the origin of all the woes reflected therein is the conduct of respondent’s donkeys, neither party deserves to be granted costs of this appeal. Orders accordingly.

Dated and delivered at Nairobi this 4th day of December 2007.

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D A ONYANCHA

JUDGE