



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CIVIL APPEAL NO.197 OF 2002

FREDRICK NYAMWEYA NYANGWESO APPELLANT

VERSUS

DESH MORAA) RESPONDENTS

CHRISANTUS MAUTI

JUDGMENT:

The appellant's appeal is against an order of Senior Resident Magistrate Kisii given on 19th September 2002 when she entered judgment and costs for the defendants (Respondents) against the appellant (plaintiff) in the sum of shs.168,220/=. She also issued a warrant of arrest against the appellant.

The background of the case in the lower court was as follows: The appellant filed a suit against the Respondents. After several appearances in court on 18th September 2001 the appellant filed a Notice in court withdrawing the case. On 21/0/01 the court made an order of withdrawal of the suit but was silent on costs. Thereafter counsel for the Respondents filled a bill of costs. On 20/12/02 in absence of counsel for appellant the court ordered "Bill taxed as drawn." Thereafter the Respondents set in motion execution process. He had the appellant arrested. Appellant made an application to set aside the taxation but in due course he was arrested and committed to civil jail. He appealed in HCCA No.25 of 2002. The appellant's application in the lower court had been dismissed.

It was after the High Court Ruling the trial magistrate made the order appealed against.

It was submitted for the appellant that he was condemned unheard which is contrary to the rules of natural justice. He was not present when the order was made. The orders were made behind his back he submitted.

Further it was submitted that there were interlocutory matters pending and as such substantial orders should not have been made.

Further it was submitted that the magistrate was wrong in assessing costs when there was no order for costs.

The appellant also took issue with the order for his arrest and committed to civil jail.

The appeal was opposed. It was submitted that the appeal was resjudicata as there was a similar appeal – No.25 of 2002.

Further it was stated that the magistrate followed the proper procedures and the appeal ought to be dismissed.

The record in the lower court is candid. The appellant gave a Notice of withdrawal of the case. The court acted on the said notice and marked the case withdrawn. However there was no mention about costs.

It is true that according to s.27 CPA costs follows the event. The same section however also provides that costs will be at the discretion of the court which means that though costs follows the event the court has to make an order for costs.

The court did not make any order for costs when it made the withdrawal order. It was therefore left to the Respondent to request the court to make an order for costs. However before doing this the respondent's filled bill of costs was ordered to be "taxed as drawn" on 20/9/02. First matters which are in subordinate court, costs are assessed and not taxed. Secondly when the bill of costs was filled and taxed there was no order on record for costs. The exercise therefore was a nullity.

After the ruling of the High Court in the subsequent appeal counsel for the respondent sought to cure the irregularity and that is why on 19/9/2002 he appeared before the learned magistrate and applied for costs. Such application can be made orally as it was done and there was no need of writing to court.

However the appellant should have been informed that the application was to be made but I don't think that he was seriously prejudiced having applied to withdraw the case. The learned magistrate made a proper decision to award the costs to the Respondent. She was entitled to the same having been brought to court by the appellant. Then if the appellant was present when the application was made I cannot see any other conclusion the magistrate could have arrived at. She was therefore right to award the costs to the Respondent. However what followed after that was irregular.

After awarding costs to the Respondent the process of assessing costs should have started all over again. Either the Respondent should have filled a bill of costs or wrote to court showing the costs incurred. Instead of doing this, the magistrate adopted the costs she had awarded on 20/9/02. I have already said such award was a nullity as there was no judgment for costs then. Adopting the same figures and not giving the appellant notice of assessment was all wrong.

From the above therefore the court upholds the magistrate's decision to enter judgment for costs against the Appellant for the Respondents. I however set aside the costs of shs.168,220/= awarded and the subsequent order of warrant of arrest against the Appellant.

I further direct that the file be placed before the different magistrate to assess the respondent's costs.

As the appeal succeeds only partly each party will bear its own costs of this appeal.

It is so ordered.

KABURU BAUNI

JUDGE

Signed, dated and delivered this 10th February 2004 in presence of Mr. Kerosi H/B for Mr. Ondika. Mr. Soire H/B for Mr. Oguttu.

KABURU BAUNI

JUDGE

10/2/04

