

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL NO.74 OF 2001

**MWANANCHI BUS SERVICE LTD)
GBRIEL KIPKERING CHEKWONY).....APPELLANTS
VERSUS
LEONARD BRASA OKUTUMERI.....RESPONDENT**

J U D G M E N T

This is an appeal from the ruling of the Senior Resident Magistrate, Nakuru(Mrs. H. Wasilwa) dated 5th June, 2001. In her brief ruling the learned trial magistrate ordered for the return of the plant to enable the plaintiff to file it in the court with competent jurisdiction. She ordered for the costs to be in the cause. Her ruling followed a successful application by the plaintiff's advocate made under Order VII Rule 9(1) of the Civil Procedure Rules and Sections 3A of the Civil Procedure Act. From the Appellants submissions on appeal and their Memorandum of appeal, the gist of this appeal is two fold. One that the trial court erred in not making any order as to the fate of the filed defence. And two for denying the defendants/applicants costs.

I have considered the entire record together with the submission by both parties.

The respondent has argued that the appeal is incompetent for not showing what the court should do if the trial court's ruling is reversed. Order VII Rule 9(1) of the Civil Procedure Rules gives the court two options. One to strike out the suit or two to order the return of the plant. The trial Magistrate, after considering the Respondent's application before her opted to return the plant. In so doing, she acted well within her powers as provided under Order VII Rule 9(1) of the Civil Procedure Rules which powers were invoked in the application before her. I do not agree with the appellants that in exercising her discretion and opting for one of the two available options that she erred either in law or fact. As for the order on costs the appellants were not denied costs. Costs follow the cause and she vested the issue of costs to the cause the suit would take once filed in the competent court.

In the circumstances it is not true for the appellants to say they were denied the costs.

I find no merit in this appeal and dismiss it in its entirety with costs of the appeal to the respondent.

Dated this 6th day of March, 2004 at Nakuru.

JESSIE LESIIT

JUDGE