



Mutiso v Nzuki & 2 others; Mukuu FCS (Interested Party) (Environment and Land Appeal E022 of 2023) [2025] KEELC 6012 (KLR) (16 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6012 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E022 OF 2023
AY KOROSS, J
SEPTEMBER 16, 2025**

BETWEEN

SUSAN MBAIKA MUTISO APPELLANT

AND

MUTUNGA NZUKI 1ST RESPONDENT

NORAH KAMENE KAVEKE 2ND RESPONDENT

MAWEU JOSEPH 3RD RESPONDENT

AND

MUKA MUKUU FCS INTERESTED PARTY

(Appeal from the orders of Hon. Daffline Nyaboke Sure PM, delivered on 18/09/2023 in Kangundo CM's Court ELC Case No. 157 OF 2019 (Susan Mbaika Mutiso versus Mutunga Nzuki & Others)

JUDGMENT

Background

1. This appeal emanates against the orders issued on 18/09/2023 in respect of a notice of motion dated 6/09/2023, where the appellant, who was the plaintiff in the lower court, had sought to set aside ex parte court proceedings of 4/09/2023. The respondents were the defendants and counterclaimants in the lower court suit and had proceeded with their case ex parte on either 1/09/2023 or 4/09/2023.
2. When parties appeared before the trial court on the fateful date of 18/09/2023, the respondents' counsel, Mr. Kaveke, submitted that he would not be opposing the motion; nevertheless, he sought throwaway costs of kshs. 60,000/, which included witness expenses. In response, the appellant's



counsel, Mr. Muuo, submitted that kshs. 10,000/- as witness expenses and kshs. 5,000/- as advocates' costs should suffice.

3. On hearing the parties and allowing the motion dated 6/09/2023, the learned trial magistrate assessed the throwaway costs at kshs. 42,000/-. On making this order, Mr. Muuo informed the court that he intended to appeal on the issue of costs.

Appeal to this court and the hearing

4. As earlier stated, the above outcome did not augur well with the appellant and, dissatisfied with the orders of the trial court, she faulted the learned trial magistrate's exercise of discretion in awarding the costs and raised the following grounds of appeal in her memorandum of appeal dated 9/10/2023: -
 - a. Erring in law and fact in failing to consider that the hearing date of 5/09/2023 was unilaterally changed without inviting the appellant to fix a mutually agreeable hearing date.
 - b. Failing to find that there was improper service.
 - c. Erring in law and fact in awarding manifestly high throwaway costs of kshs. 42,000/-
 - d. Erring in law and fact by abusing her discretionary powers.
5. Accordingly, the appellant implored this court to allow the appeal, set aside the orders of 18/09/2023 and proceedings of 4/09/2023 and reinstate the appellant's suit.
6. Thus, and as directed by the court, the appeal was canvassed by well-articulated written submissions that were received from the law firms of Ms. Mulekyo & Co. Advocates for the appellant, dated 4/04/2025, and Ms. Munguti Ngulukyo & Co. Advocates for the respondents, dated 15/04/2024. Upon identifying and considering the issues for determination, this court will, in its analysis and determination, consider the respective counsels' arguments as posited on the particular issue and also consider provisions of the law and judicial precedents that were relied upon to advance the arguments.

Preliminary issues and issues for determination

7. As held in *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR, as a 1st appellate court, this court is not necessarily bound to accept the findings of fact by the lower court but it conducts a retrial and its guiding principles are inter alia reconsider the evidence, evaluate it and draw its independent conclusions and bear in mind that it has neither seen nor heard the witnesses and should make due allowances in that respect.
8. Regarding the matter at hand, this court has anxiously considered the record, the impugned orders, the submissions by learned counsels, the illuminating authorities cited on behalf of the respective parties and the law, and it has become necessary to address certain preliminary issues that arose in the grounds of appeal and the appellant's submissions.
9. Regarding the 1st limb, and as highlighted earlier in this judgment, Mr. Muuo's submissions before the trial court on the fateful date never raised grounds (a) and (b) of appeal as a basis for determining and/or assessing the costs awarded to him. As held in *Kenya Hotels Limited v Oriental Commercial Bank Limited* [2018] KECA 692 (KLR), which cited with approval the case of *United Dominion Trust Ltd v. Bycroft* [1954] All ER 455, it is now settled law that, unless with consent, a party cannot be allowed to raise a new point not raised or canvassed before the lower court.
10. The basis for this is that in accordance with public interest, a party who has been defeated in the lower court, should not be allowed to put a new case in an entirely different way as a matter of law and so



make the other party, hitherto successful, litigate the matter again at the risk of having to pay costs not only below, but in this court. In consequence, this court finds that grounds (a) and (b) of the appeal were not canvassed before the lower court on the issue of costs. It therefore follows that they shall be disregarded.

11. The 2nd limb is entwined to the 1st as a new ground of appeal has been introduced in the submissions, which is whether the trial court erred by dismissing the appellant's case on 4/09/2023. This court finds that it is improper for the appellant to introduce a new ground in her submissions without first amending her memorandum of appeal. Thus, this ground of appeal falls by the wayside.
12. Now, having dealt with the preliminary issues and reverting to the substantive grounds for determination, which are grounds (c) and (d) of the appeal, this court now proposes to deal with them together by framing the singular issue for determination which is whether the learned trial magistrate erred in the exercise of her judicious discretion in assessing costs at kshs. 42,000/-,

Analysis and determination

13. These residual grounds of appeal call on this court to exercise its discretion and review the awarded costs. Nonetheless, doing so is an uphill task for an appellate court, as it is settled and as held in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] KECA 606 (KLR), an appellate court has a limited function since it has no jurisdiction to exercise an independent original discretion of its own. It must defer to the exercise of discretion by the magistrate in the court below and must not interfere with it merely upon the ground that it would have exercised the discretion differently.
14. Thus, this court in considering the issue at hand will seek to satisfy itself whether the impugned decision was clearly wrong because of some misdirection, or because of failure to take into consideration relevant matters or because the learned trial magistrate considered irrelevant matters and as a result arrived at a wrong conclusion, or where there is a clear abuse by the learned trial magistrate of her discretion. It must be borne in mind that whenever a court exercises a discretion, there is always a presumption of correctness of decision which is reversible only upon showing of a clear abuse of discretion. See *Nguruman Limited* (Supra).
15. In making the arguments, the appellant's counsel relied on the persuasive decision of *Sheila Wambui Muturi v Peter Macharia Muiuru* [p [2021] KEHC 7870 (KLR) which held that throwaway costs of kshs. 100,000/= was excessive, as what was being set aside was an interlocutory judgment. Counsel argued that the throwaway costs were unjust because they penalised the appellant for a failure that was not of her making. In their counterarguments, the respondents' counsel relied on the decision of the *County Government of Tana River & another v Hussein Fumo Hiribae* [2021] KEHC 5909 (KLR), which outlined the guiding principles on costs in the following: -

“In my view the award of costs either in the classification defined in section 27 as those that follow the event or throwaway costs as it's in the case herein, the uniting factor is closely linked to adjudicative procedures before courts by a litigating party. These procedures can consume time, energy and money. This award of costs may be one route to improve due diligence and efficiency in our legal system as whole. The Court further in *Scherer V Counting Instruments Ltd*[1986] IWLR 615 the English Court of Appeal set out the principles for the award of costs which are in essence not far distanced from our local jurisprudence. They are;-

- a) The normal rule is that cost follows the event. The party who turns out to have unjustifiably either brought another party before the court, or given another



party cause to have recourse to the Court to obtain his rights is required to compensate that other party in costs; but

- b) The judge has an unlimited discretion to make what orders as to costs he considers that the justice of the case requires.
 - c) Consequently, a successful party has a reasonable expectation of obtaining an order for his costs to be paid by the opposing party, but has no right to such an order, for it depends upon the exercise of the Court's discretion.
 - d) This discretion is not one to be exercised arbitrarily, it must be exercised judicially, that is to say, in accordance with established principles and in relation to the facts of the case.
 - e) The discretion cannot be well exercised unless there are relevant grounds for its exercise, for its exercise without grounds cannot be a proper exercise of the judges' function.
 - f) The grounds must be connected with the case. This may extend to any matter relating to litigation, but no further. In relation to interim application, "the case" is restricted to the application, and does not extend to the whole of the proceedings.
 - g) If a party invokes the jurisdiction of the court to grant him some discretionary relief and establish the basic ground therefor, but the relief sought is denied in the exercise of discretion the opposing party may properly be ordered to pay his costs. But where the party who invokes the Court's jurisdiction wholly fails to establish one or more of the ingredients necessary to entitle him to the relief claimed, whether discretionary or not, it is difficult to envisage a ground on which the opposition party could properly be ordered to pay his costs."
16. Concerning the circumstances of this case and taking into consideration the record, the case before the trial court had earlier been slated for hearing on 5/09/2023 but due to constraining circumstances, the court suo moto rescheduled the hearing of the suit to the earlier date of 4/09/2023 and communicated this new date to all the parties' counsel including that of the appellant but on 4/09/2023, her law firm on record and herself were a no show.
17. From the record, it is not in dispute that her law firm on record was duly served by the court because in paragraphs 11 and 12 of her affidavit deposed on 6/09/2023, she affirms that though served, there was human error and mistake. Since they were a no-show, the appellant's case, which had been partially heard, was closed, and the matter proceeded with the respondents' 4 witnesses. Eventually, the respondents' cases were closed, and judgment was slated for 30/10/2023.
18. Bearing in mind the non-exhaustive principles enunciated in Scherer (Supra) and considering the proceedings of 18/09/2023, the assessed throwaway costs, took into account the time that was wasted when the hearing took off on 4/09/2024 and now has to be heard afresh, the amount of time spent, the no. of witness who were called on 4/09/2024 and will have to be recalled for the fresh hearing and of course, the expenses they incurred and will have to incur once again.
19. Since the non-attendance on 4/09/2025 was caused by the appellant, she has to take full responsibility for mitigating this cost to compensate the respondents for the time wasted and expense. Having taken all factors into consideration, this court has no reason to interfere with the learned trial court's exercise of judicious discretion and finds that she did not err in assessing throwaway costs at kshs. 42,000/=.



20. Ultimately, this court finds and holds that this appeal is devoid of merit. It is hereby dismissed, and this court upholds the orders issued on 18/09/2023. As a matter of established law, costs follow the event, and considering the appeal was unsuccessful, this court awards costs to the respondents.

It is so ordered.

DELIVERED AND DATED AT MACHAKOS THIS 16TH DAY OF SEPTEMBER, 2025.

HON. A. Y. KOROSS

JUDGE

16.09.2025

**JUDGMENT DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
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In the presence of;

Mr Muuo for the appellant.

M/s Ngulukyo for 1st – 3rd respondent.

N/A for Interested Party.

Ms Kanja- Court Assistant.

