



Khamisi v Mwamuye & another (Suing as the Personal Representatives of the Estate of the Late Boniface Katana Mwamuye) (Environment and Land Appeal 8 of 2023) [2023] KEELC 20830 (KLR) (11 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20830 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 8 OF 2023
LL NAIKUNI, J
OCTOBER 11, 2023**

BETWEEN

AWADH KHAMISI APPELLANT

AND

PAULINE MBODZE MWAMUYE 1ST RESPONDENT

JANET NYANGA MWAMUYE 2ND RESPONDENT

SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF THE LATE BONIFACE KATANA MWAMUYE

(Being an appeal from the Judgement of Honourable G. Kiage, Senior Resident Magistrate delivered on 17th September, 2021 I CMCC No. 1858 of 2019)

JUDGMENT

i. Preliminaries.

1. The Judgement of this Honorable Court pertains to an appeal lodged preferred by Awadh Khamisi – the Appellant herein. The appeal was filed through a Memorandum of Appeal dated 17th September, 2021 and filed on 30th September, 2021 and a 232 Records of Appeal dated 6th June, 2021 and filed in Court on 7th June, 2021 against the Janet Nyanga Mwamuye and Pauline Mbodze Mwamuye (Suing as the Personal Representatives of the Estate of the late Boniface Katana Mwamuye) the Respondents herein. From the very onset, and perhaps to explain the reason for the slight delay in disposing the said appeal, the Court wishes to point out that the appeal was at first erroneously filed before the High Court of Kenya, Commercial and Admiralty division at Mombasa as Civil Appeal numbers 146 of 2021. On 7th October, 2022, while still before Justice O. A Osewe, of High Court at Mombasa, whereby an order was made admitting the appeal, the Records of Appeal to be served upon the Respondent



forthwith and a mention date for 7th February 2023 and the Deputy Registrar of High Court directed to notify all the parties accordingly. However, on 13th December, 2022, the Learned Counsel for the Appellant herein caused the matter to be placed before the Judge and through the Microsoft Teams Virtual means. He appeared before the Judge whereby the Counsel indicated to court that the appeal had been wrongfully filed before the High Court Commercial & Admiralty division at Mombasa yet the dispute in issue emanated from a land dispute. Thus he requested the Court to invoke its inherent jurisdiction and have the matter to be transferred to this Court as the Respondent who had never participated in the appeal so far would not be prejudice. The Court upon considering the request, it obliged and that is how this appeal found itself before the Environment and Land Court.

2. From the records, the appeal was placed before the Judge on the 6th March, 2023 and 6th June, 2023 whereby directions were taken on how to dispose off the appeal by way of the filed affidavits and submissions under the provision of Order 42 Rules 11 & 13 of the Civil Procedure Rules, 2010. On the 12th June, 2023, the Learned Counsels were accorded ample opportunity to highlight their submissions orally. They executed their tasks and duty so effectively and professionally.

ii. The Appellant's Case

3. In a nutshell, the appeal by the Appellant revolves around the interpretation by the Lower Court of its own orders herein as seen here below. As indicated, the Appeal emanates from a Judgment of the Learned Senior Principal Magistrate Hon. G. Kiage delivered on the 17th September, 2021 in the Civil Case Senior Principal Magistrate Case no. 1858 of 2019, *Janet Nyanga Mwamunye & Pauline Mbodze Mwamunye v Awadh Khamisi*". Based on the Affidavit of Service on record the Record of Appeal was properly served upon the Respondents herein.
4. On 6th June, 2023 the parties having fully complied with court's direction it slated for highlighting the written submissions which the parties discharged effectively. From the filed Memorandum of Appeal, the Appellant averred the grounds of the appeal as follows:-
 - a. That the Learned Magistrate was totally wrong to not granting the Appellant, the Defendant cost, as the principle is law on cost is the cost follows the event.
 - b. That the Magistrate fell into error, in not giving or assigning any reason for not awarding cost. In any event, the Defendant never committed any act for him to be deprived of cost.
 - c. That the Learned Magistrate totally and recklessly exercised his discretion wrongly, hence he fell into error in not awarding cost to the Defendant/Appellant.
 - d. That in denying the Appellant cost, the Learned Magistrate failed in his duty and totally exercised his judicial power wrongly and hence fell into error. Judicial exercise of discretion should be exercised judicially.
5. In the long run, the Appellant prayed that:-
 - a. This Appeal be allowed and the Judgement delivered by the Learned Magistrate be wholly reversed and the Defendant be granted cost in "Civil suit no. 1858 of 20189, Senior Principal Magistrate Court at Mombasa.
6. From the filed pleadings, the Appellant informed Honorable Court that a Plaint dated 22nd October, 2019, the Appellant sought the following orders;
 - a. A Declaration that the Defendant's trespass of Plot No. 287/I/MN is illegal and therefore null and void ab initio.



- b. A Mandatory Order of Injunction directed to the Defendant to vacate and pull down any improvements on Plot No. 287/I/MN located at Mlaleo, Kisauni belonging to the Plaintiffs and restore the said land to its original condition.
- c. A Permanent Injunction restraining the defendant from entering and/or interfering with Plot No. 287/I/MN.
- d. A mandatory Order directing to remove at his cost all the debris emanating from all the demolitions of his improvements on the Plaintiffs piece of land.
- e. Any other Order or relief that this Honourable Court may deem fit and just to grant
- f. Costs of and/or incidental to this suit
- g. Interest.

iii. The Submissions.

7. On the 6th June, 2023 while all parties were in Court, it was directed that they each be accorded some brief moment on the 12th June, 2023 to orally highlight their submission on the appeal. On 12th June, 2023, Mr. Ambwere Advocate for the Appellant and M/s. Akola Advocate for the Respondent herein executed their roles very well as stated herein below.

a). The Oral Submissions by the Appellant.

8. Mr. Ambwere Advocate for the Appellant commenced his oral submission by stating that the Appeal was one through a Memorandum of Appeal dated 17th September, 2021 and filed in Court on 30th September, 2021. He asserted that it was arising from a Judgement delivered by the sub – ordinate Court on 17th September, 2021 in the CMCC. No. 1858 of 2019.
9. The Learned Counsel submitted that the appeal was mainly of the four grounds all stated out on Pages 2 to 4 of the Records of Appeal. His contention was that the appeal mainly revolved around the dissatisfaction on why the Learned Magistrate deprived the Appellant the right award of Costs despite of the fact that the other part of the Judgement was in favour of the Appellant (then the Defendant) having effectively proved his case.
10. The strong contention by the Learned Counsel was that the Learned Magistrate failed to demonstrate or provide any justifiable reason or cause or impediments as to not awarding Costs to the Appellant as founded under the provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21. He held that this provision of the law envisages that the costs was an issue of the discretion of the Court but also costs followed the event and in this case the result of the matter the Appellant had been able to successfully prove its case. He emphasized that the Judicial discretion should be exercised judiciously. The Court gave no reason for arriving at that decision. He argued that the Learned Magistrate made a finding that although the sale agreement of 22nd June, 2025 expressed an intention to effect a transfer of title, evidently that was never done - the suit land was never sold. There was no proof of sale. He further stated that instead they sued the wrong person. To buttress on this point he relied on the case of “*Haraf Traders Limited v Narok County Government* (2022) eKLR” and also cited by the Respondent’s Learned Counsel where Justice Gikonyo held:-

“From the jurisprudence in this area of law, the exercise of discretion on costs depends on the facts of each case and is guided by the principle that costs should follow the event unless the Court orders otherwise. Such circumstances as are relevant include:



- i. the conduct of the parties;
- ii. the subject of litigation;
- iii. the circumstances which led to the institution of the proceedings;
- iv. the events which eventually led to the termination;
- v. the stage at which the proceedings were terminated;
- vi. the manner in which they were terminated;
- vii. the relationship between the parties; and
- viii. the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) of the *Constitution* of Kenya;
- ix. Public interest”.

11. The Appellant had to incur substantial costs while defending the case from the year 1991 to the date of the final determination of the case. He had to borrow finances from a financial institution in order to afford and support his case. He was able to vehemently distinguish all the authorities cited by the Respondent herein being as they were, on the contrary, in support of the Appellant’s case instead. He urged the Court to allow the Appeal accordingly.

b). The Oral Submission by the Respondent

12. M/s. Akola Advocate in response to the submissions by the Appellant and while opposing the Appeal overly relied on the legal provision founded under the provision of Section 27 (1) of the *Civil Procedure Act*, cap. 21. The Learned Counsel’s contention was that the provision provided Court with unfettered discretion in as far as issues of Costs was concerned. It follows therefore, she further advanced her argument that the Learned Magistrate while delivering his decision exercised its discretionary powers so to do.
13. According to the Learned Counsel, during the hearing, the Defendant failed to provide good reason, as expected under the provision of Sections 107 and 108 of the *Evidence Act*, cap. 80 as to how they found themselves trespassing on the suit land belonging to the Plaintiff. According to the Counsel, the Lower Court focused on the issue of the parties having been neighbours for a long time and without showing the boundaries of the suit property.
14. She asserted that the suit was not only on of the Appellant as a tenant interfering with the by illegally trespassing but also causing pollution through illegal environmental degradation activities causing a loss and damage on the land. To support her case she relied on the cases of “*Haraf Traders Limited (Supra)* on Page 4 of the Bundle; “*Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another* (2016) eKLR; and *Juma Abdalla Munyao Kathenge & Another v James Kibet Chirchir & Another* (2018) eKLR.
15. In conclusion, she urged the Court to focus on the circumstances which led to the institution of the case for the Court to deny award or granting costs and also while dismissing the appeal for lack of merit.

iv. The Issues for Determination.

16. I have had a chance to critically assess all the pleadings filed in this Appeal being the 232 Pages Record of Appeal dated 6th June, 2021 and its contents, the Memorandum of Appeal dated 17th September,



2023 by the Appellant, the oral submissions, the plethora of cited authorities by the parties herein, the relevant provisions of *Constitution* of Kenya, 2010 and the statutes.

17. To arrive at an informed, reasonable, just, equitable and fair decision, this Honourable Court has condensed the main subject matter in this appeal into the following three (3) broad issues for its determination. These are:-
- a. Whether the Learned Trial Magistrate while delivering his Judgement on 17th September, 2021 in favour of the Appellant in Civil Case Numbers 1858 of 2019 at Mombasa erred in not awarding the costs of the suit to the Appellant.
 - b. Whether the parties herein are entitled to the reliefs sought from this appeal.
 - c. Who bears the cost of this appeal.

v. Analysis and Determination

Issue No. (a) Whether the Learned Trial Magistrate while delivering his Judgement on 17th September, 2021 in favour of the Appellant in Civil Case Numbers 1858 of 2019 at Mombasa erred in not awarding the costs of the suit to the Appellant.

18. Under this sub heading, from the very onset, the Honourable Court wishes to state that before delving into the substantive issues on the main appeal by the Appellant, it must reinstate the duty of the appellate Court. The duty of the appellate Court is to re-evaluate and re – analyse the evidence afresh and draw its own evaluations and calculations. This was aptly provided in the case of “*Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA 123 in the following terms:

“I accept Counsel for the Respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif v Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270).

19. While in the from the case of: “*Abok James Odera* (*Supra*) to the effect that: -

“This being a first appeal we are reminded of our primary role as a first Appellate Court namely to re-evaluate, re-assess and re-analyze the extracts on the record and then determination whether the conclusion reached by the Learned Trial Judge are to stand or not and give reason either way”.

Similarly, in the case of “*Peter v Sunday Post Limited* 1958 E.A. 424” Sir Kenneth O’Connor P. rendered the applicable principles as follows:-

“It is a strong thing for an appellate court to differ from the finding on a question of facts, of the judge who tried the case and who had the advantage of seeing and hearing the witnesses. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether



the conclusion originally reached upon the evidence should stand. But this is a Jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion....”

20. Nonetheless, all said and down it is also trite law that this Court is slow to interfere with the exercise of discretion of a Judge or Judicial officer unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge or Judicial Officer was clearly wrong in the exercise of his discretion and that as a result there has been injustice: see the case of “*Mbogo v Shah* [1968] 1 EA 93”.
21. It is now well established that the issue of Costs are at the discretion of the Court. Costs mean any award that is granted to a party at the conclusion of a legal action of proceeding in any litigation process as it is the case in this Appeal. The provision of Section 27 of the *Civil Procedure Act*, Cap. 21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) of the *Civil Procedure Act* provides as follows:-
 - “(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.”
22. I reiterate that the appellate court will not interfere with the exercise of discretion by trial court on costs, except
 - a. where the discretion was not exercised judicially or was exercised on wrong principles, or
 - b. where the trial court gives no reasons for the decision and the appellate court is satisfied that the decision was wrong; or
 - c. where reasons are given, the Appellant court considers those reasons not to constitute “good reason” within the meaning of section 27 of the *Civil Procedure Act*.
23. In the case of “*Supermarine Handling Services Ltd v Kenya Revenue Authority* [2010] eKLR” the Court stated that:

“... where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the appellate court will interfere if it is satisfied that the order is wrong.”
24. This Honourable Court is left to wonder whether there was a reason given good enough in the sense of the law as to support the departure from the general rule on costs under Section 27 of the *Civil Procedure Act*? Or did the Learned Magistrate exercise its discretion on wrong principles or capriciously?
25. Looking at the facts of the suit and the circumstances of the case, the Learned Magistrate held that the Plaintiffs who are now the Respondents herein had failed to make out their case to the required



standard to merit the reliefs sought, the suit is dismissed accordingly. He therefore proceeded to hold that each party should bear its own costs. Indeed, the Judgment of the Sub – Ordinate Court upon which the Appellant is aggrieved by read verbatim in part:-

“During the cross examination, the Plaintiff stated that they lived on the land as tenants since 1978 and subsequently purchased the same from the registered proprietor vide the Sale Agreement dated 22nd June, 2005. The question therefore is whether the legal status of the Plaintiff was altered following the said sale/Purchase or to put it another way, did the Plaintiff cease to be a tenant under the “house without land” system and become (sic) a holder of an independent title over the subject land? I do not think so. Although the sale agreement of 22nd June, 2015 expressed an intention to effect a transfer of title, evidently that was never done. Further no proof of payment of the stated purchase price of Kshs. 250, 000.00/= was presented in evidence, In fact the Plaintiff during cross examination admitted that she had not presented such proof.....If follows from the foregoing that the purported sale of the proportion of land in dispute to the Plaintiff did not alter the Plaintiff legal position vis a vis the suit land and further the Plaintiff as a consequence of the prevailing system tenure system i.e. “house without land” could not set in the pleadings a description of the property sufficient to identify it due to the fact that under that system the land is held by the registered proprietor and not the tenant which the Plaintiffs are.

In the end I find that the Plaintiffs have failed to make out their case to the required standard to merit the reliefs sought, the suit is dismissed accordingly.

Each party will bear their own costs.”

26. It is my view that where a trial court has exercised its discretion in costs, an appellate court should not interfere unless the discretion has been exercised injudiciously or on wrong principles. However, the [Civil Procedure Act](#) gives this court discretionary powers to order payment of costs where it deems fit to do so. I fully associate myself with the statements of the Jearned Judge in “[UAP Insurance Company v Toiyoi Investment Limited](#) [2020] eKLR” where it was held that:

“The law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter.

The Court should, therefore, look at the event within the circumstances of the case. And that exercise will inform the exercise of discretion by the Court. It should also be understood well; that a successful party does not refer to a person who has been taken through rigorous and convoluted motions of litigation by the other party.

Similarly, a party does not cease to be a successful party merely because he met little or no contest in his claim against the Defendant. He is a successful party because he is declared so by the Court after looking at the result of the entire litigation, which includes; negotiations or steps which culminates to, and the recording of a consent thereto, conduct of the Plaintiff etc.”

27. In the case of the “[Party of Independent Candidate of Kenya v Mutula Kilonzo & 2 Others](#) [2013]”, the court held that:

“...it’s clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs in a matter in which the trial judge is given discretion...but this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule



that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

28. Further to this, in the case of:- “*Orix Oil (Kenya) Limited v Paul Kabeu & 2 Others* [2014] eKLR” the court stated:

“...the court should have been guided by the law that costs follow the event, and the Plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied the costs or the successful issue was not attracting costs. None of those deviant factors are present in this case and the court would still have awarded costs to the Plaintiff, which I do.”

29. Additionally, I associate myself with the court’s holding on the exercise of discretion in the case of “*Leo Sila Mutiso v Rose Hellen Wangari Mwangi* Civil Application No. Nai. 255 of 1997 [1999] 2 EA 231”, where the court held that:

“A Court will not interfere with the exercise of discretion unless it is satisfied that it is clearly wrong, because it has misdirected himself, or acted on matters which it should have not acted or failed to take into consideration matters which it should have considered and in so doing arrived at a wrong conclusion...Discretion must be exercised judicially and not arbitrarily or capriciously; nor should it be exercised on the basis of sentiment or sympathy.”

30. Be that as it may, in the instant case, the Learned Trial Magistrate having decided the suit in favor of the Defendant/Appellant departed from the rule that costs shall follow the event and did not award costs of the suit to the Appellant. Despite this departure from the rule, no substantial or empirical reason was given by the Learned Trial Magistrate for failing to do so or otherwise stated whatsoever. The decision seem to leave everyone hanging at the edge and/or downhill loose cliff. That is extremely dangerous and unfair to say the least not envisaged in law. Therefore, I discern that there was no justifiable cause, reason or good basis for depriving the successful Defendant/Appellant their costs in the absence of good reason particularly because they had expressly made a prayer for costs in their defense and the court was obliged to make an order on the same. A party is entitled to enjoy the fruits of the Judgement as it is in this case. The appeal is merited and is allowed. The orders by the trial court on the issue of costs be and are hereby quashed and set aside, and costs in the matter are reinstated and awarded to the Appellant.

Issue No (b) Who Will Bear the Costs Of The Appeal?

31. Already the Court has elaborately expressed itself on the issue of Costs being at the discretion of Courts. Further, the Honourable Court has cited the proviso of the provision of Section 27(1) of the *Civil Procedure Act*, Cap 21 which holds that costs follow the events (See the Court of Appeal cases of “*Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another* [2016] eKLR while quoting with approval the case of “*Republic v Rosemary Wairimu Munene ex – parte Applicant v Ihururu Dairy Farmers Co- operative Society Limited* (2014) eKLR; and Supreme Court case of “*Jasbir Rai Singh v Tarchalan Singh* (2014) eKLR held thus:-

“The basic rule on attribution of costs is that costs follow the event...it is well recognized that the principle costs follow the event is not be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”



32. Thus, in the instant case, the Appellant has succeeded in this appeal and hence entitled to the costs from it. It follows that the Respondents shall bear the costs of both the Appeal and the auit before the Sub – ordinate Court.

vi. Conclusion and Disposition.

33. The upshot of the foregoing, and having conducted an in-depth analysis of the framed issues herein, the Honorable Court finds that the Appeal by the Appellant has merit to a certain extent. Accordingly, and for avoidance of any doubts, the Honorable Court makes the following orders for disposal thereof:-

- a. That the appeal herein be and is hereby founded to be merited and is allowed.
- b. That the orders by the trial court on the issue of costs be and are hereby quashed and set aside, and costs in the matter are reinstated and awarded to the Appellant.
- c. That closes the matter before this Honourable Court
- d. That the Respondents shall bear the costs of this appeal.

It is so ordered accordingly

JUDGEMENT DELIEVERD THOUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS...11THDAY OFOCTOBER.....2023.

HON. MR. JUSTICE L.L. NAIKUNI

(JUDGE)

ENVIRONMENT AND LAND COURT AT

MOMBASA

Judgement delivered in the presence of:-

- a) Mr. Ambwere Advocate for the Appellant.
- b) Mr. Ambwere Advocate for the Appellant.
- c) No appearance for the Respondents.

