



REPUBLIC OF KENYA



KENYA LAW
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**Okeke v Ndiege & another (Civil Appeal E050 of 2024)
[2025] KEHC 8696 (KLR) (19 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8696 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E050 OF 2024**

**DK KEMEL, J
JUNE 19, 2025**

BETWEEN

CHRISPIN OUMA OKEKE APPELLANT

AND

JOB OJUKWU NDIEGE 1ST RESPONDENT

ROSENTA LIMITED 2ND RESPONDENT

(An appeal arising from the proceedings and ruling of Hon. Chepchirchir Christabel Maiyo (RM) in Siaya MCCE062.2024 delivered on 2nd day of October 2024)

JUDGMENT

1. The appeal herein arising from the ruling of Hon. Chepchirchir Christabel Maiyo (RM) in Siaya MCCC No. E062 of 2024 dated 2nd day of 2024 wherein she struck out the Plaintiff's suit and ordered each party to bear their own costs.
2. Aggrieved by the aforesaid ruling on costs, the Appellant filed his Memorandum of Appeal dated 18/10/2024 wherein he raised the following grounds of appeal:
 - i. That the learned Resident Magistrate erred in law in not awarding costs to the Appellant upon following the Appellant's preliminary Objection dated 16/9/2024 as prayed and striking out the 1st Respondent's claim for lack of geographical territorial jurisdiction.
 - ii. That the learned Resident Magistrate was wrong in declining to award the Appellant costs of the dismissed claim without giving any reasons for so doing.
 - iii. That the lower court erred in law in not finding that the Appellant being the successful party was entitled to costs of the suit pursuant to Section 27 of the Civil Procedure Code.
 - iv. That the learned Resident Magistrate was unfair, unjust and unlawful in the circumstances.



The Appellant therefore prayed that the appeal be allowed and that the order made on 2/10/2024 directing each party to bear their own costs be set aside and in its place an order be made granting the Appellant costs in the lower court and that the Appellant be awarded costs of the appeal.

3. The appeal was canvassed by way of written submissions. Parties duly filed and exchanged submissions.
4. This being the first appellate court, its duty is well spelt out namely to re-evaluate, analyze the evidence tendered before the trial court and subject it to an independent analysis so as to arrive at an independent conclusion as to whether or not to uphold the decision of the trial court. In doing so, the court has to take into consideration the fact that it did not have the benefit to see or hear the witnesses while they testified and that the court will have to provide an allowance for that fact. (See *Selle vs. Associated Motor Boat Company Limited* [1968] EA 123).
5. It is noted that the 1st Respondent had sought for a sum of Kshs252,994/= being special damages as well as costs and interest vide his Plaint dated 11/7/2024. His claim is that on or about 12/7/2021 his motor vehicle Registration No. KCN 9X9W was lawfully being driven along Kisumu Bondo road near Chapel area when the Appellant 2nd Respondent herein either by themselves, their driver, agent or servant and/or employee so negligently carelessly and/or recklessly drove, managed and/or controlled motor vehicle registration No. KBS 8X6W causing it to hit the 1st Respondent's motor vehicle Registration No. KCN 9X9W as a result of which the 1st Respondent's motor vehicle was extremely damaged.
6. The Appellant herein later filed a Notice of Preliminary Objection dated 16/9/2024 wherein he challenged the trial court's geographical/territorial jurisdiction to hear and determine the matter. The trial court vide its ruling dated 2/10/2024 ruled that it did not have the requisite geographical/territorial jurisdiction to determine the matter and struck out the suit and ordered that each party do bear their own costs. This thus precipitated the present appeal.
7. The issue of costs is provided for under Section 27 (1) of the *Civil Procedure Act* as follows:

“27(1) Subject to such condition and limitations may be prescribed and to the provisions of any law for the time being in force the costs 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 cost of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reasons otherwise order.”

It is noted that the trial court despite agreeing with the Appellant's Notice of Preliminary Objection opted not to grant the Appellant costs of the suit. Indeed, the issue of costs is at the discretion of the trial court which has discretion as to whether costs are payable by one party to another and the amount of those costs and when they are to be paid. It is trite that where costs are in the discretion of the court a party has no right to costs unless and until the court awards them to him and that the court has an absolute and unfettered discretion to award or not to award them.

8. It is also trite that appellate courts will rarely interfere with the discretion of the trial court unless it is shown that such discretion was not exercised judiciously. Certain factors must be taken into account by the Appellate court such as whether the trial court took into account an irrelevant factor or it failed to take into account a relevant factor or that it misapprehended some point of law or fact applicable



to the issue at hand. The Court of Appeal in *JMM vs. GNT Civil Appeal No. E014 of 2022* [2023] eKLR held as follows:

“In simple terms judicial discretion is the exercise of judgment by a Judge or court based on what is fair under the circumstances and guided by the rules and principles of law. The exercise of discretion may either be judicial or judicious. It is judicial, if it is exercised in statutes while it is judicious when it carries or conveys the intellectual wisdom or prudent intellectual wisdom or prudent intellectual capacity of the Judge. However, whatever of the two approaches, the exercise must be based on a sound and sensible judgment with a view to doing justice to the parties.

9. The Appellant has taken great exception at the failure by the learned trial magistrate to give reasons in support of her order on costs. Indeed, the learned trial magistrate did not give reasons when she ordered each party to bear their own costs. It is obvious that the learned trial magistrate must have had her reasons which guided her to issue the orders that she did. As noted above, matters of discretion are such that they are within the mind of the trial court after appreciating all the issues placed before it by the parties. In the case of *Joseph Oduor Amole Vs. Kenya Red Cross Society* [2012] EKLROdunga J (as he then was) made the following observations;

“I agree with the Mr. Kuloba that whereas this court when awarding costs, that decision must as usual be exercised judicially. The first point of reference with respect to the exercise of discretion is the guiding principles provided under the law in the matter of costs, adumbrated in the aforesaid statute is that costs follow the event unless the court is satisfied otherwise. That satisfaction must, however, be patently shown where the court decides not to follow the general principles, the court is enjoined to give reasons for not doing so. In my view, it is the failure to follow the general principles without reasons that would amount to arbitrary exercise of discretion and not the other way round.

Even though the learned trial magistrate in her mind had come up with such a decision to order each party to bear their own costs, I find that it was proper for her to give reasons for departing from the general rule that costs follow the event. Nothing prevented the learned trial magistrate from stating the reasons which persuaded her to reach the decision that she did so as to leave any anxiety on the part of the parties. It is in this regard that I find that I must agree with the Appellant's request that this court should interfere with such a discretion as it is clear that there has been misjustice. (See *Mbogo & Another vs. Shah* [1968 EA 93]). It is noted that the Appellant had defended the suit strenuously before the same was struck out for lack of geographical/territorial jurisdiction by the trial magistrate and hence it is entitled to the costs thereof. It was erroneous on the part of the learned trial magistrate to keep the reasons to herself and not inform the parties about them so as to enable them understand why they are not entitled to costs.

10. In view of the foregoing observations, it is my finding that the Appellant's appeal has merit. The same is allowed. The trial court's order made on 2/10/2024 directing that each party to bear their own costs is hereby set aside and in its place an order be and is hereby made granting the Appellant the costs of the suit in the lower court. The Appellant is also awarded the costs of this appeal.

DATED AND DELIVERED AT SIAYA THIS 19TH DAY OF JUNE, 2025.

D. KEMEI

JUDGE



In the presence of:

Ochanyo.....for Appellant

M/s Besare.....for Respondent

Okumu.....Court Assistant

