



Kisumu Water & Sanitation Company Ltd (KIWASCO) v Tough (Civil Appeal E051 of 2021) [2024] KEHC 1216 (KLR) (13 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1216 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E051 OF 2021
RE ABURILI, J
FEBRUARY 13, 2024**

BETWEEN

KISUMU WATER & SANITATION COMPANY LTD (KIWASCO) .. APPELLANT

AND

WILLIAM ROMAN MC TOUGH RESPONDENT

RULING

Introduction

1. Vide an application dated 26th June 2023 the appellant sought review of the judgement of 2nd May 2023 on account that there was no leave of court sought to appeal as well as costs of the application.
2. Through a ruling delivered on the 16th December 2023 this court granted the appellant's prayer for review as leave was obtained on 28th April 2021. What remained for determination was the second limb of the application dated 26th June 2023 regarding costs.
3. Mr. Omondi counsel for the appellant submitted that costs follow the event and that as the appellant expended time and expenses in prosecuting their appeal, denying them costs without reason amounted to a denial of compensation.
4. He submitted that they ought to be awarded costs of the lower court and of the appeal. Reliance was placed on the case of *Haraf Traders Ltd v Narok County Government* [2022] eKLR, *Nation Media Group Ltd v Awale Transporters Ltd* [2022] eKLR and *Southern Star Sacco Ltd v Vanacho Ndwiga* [2021] eKLR.
5. The general rule on costs is set out in section 27 of the *Civil Procedure Act* which specifies that;

"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.”

6. Therefore, it is trite that though costs follow the event they are awarded at the discretion of the court. 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 their 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) (c) of the Constitution;
- (ix) public interest.

7. In the case of *Supermarine Handling Services Ltd v Kenya Revenue Authority*, Civil Appeal No. 85 of 2006, the Court of Appeal explained the circumstances that would lead an appellate court to interfere with the trial court’s exercise of discretion thus:

“Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance...Thus, 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. It will also interfere where the reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule...”

8. The respondent herein had filed a suit against the appellant in the lower court seeking injunctive orders and costs. In response, the appellant filed an application seeking to have the respondent’s suit struck out. However, the application was dismissed by the trial court thus necessitating this appeal.



9. At the end of this appeal, this court ordered that each party bear their own costs of the suit and the application in the lower court as well as costs of this appeal as it was the duty of the trial court to determine that question of jurisdiction at that stage to avoid parties escalating the dispute to this court.
10. As earlier stated herein, costs follow the event and are granted in the discretion of the judge. The court herein in making an order that each party bear their own costs gave reasons for the decision. The appellant has not demonstrated any reason why this Court should interfere with its earlier decision on the issue of costs. The said decision was rendered and a reason advanced as to why each party ought to bear their own costs in both the lower court and this court. If the applicant was aggrieved by the said decision, he should have appealed instead of returning to this court for review. I say so because this court does not find nay reason or error whatsoever that is apparent on the face of the record to warrant a review of the order made on costs of the appeal.
11. Accordingly, I find no reason to review the discretion exercised by this court. I dismiss the application for review dated 26th June, 2023 and order that each party shall bear their own costs of the application.
12. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 13TH DAY OF FEBRUARY, 2024

R.E. ABURILI

JUDGE

