



REPUBLIC OF KENYA



Lenana Hardware Stores Limited v Oxy Plus International Company Limited (Civil Appeal E058 of 2023) [2024] KEHC 2802 (KLR) (13 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2802 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E058 OF 2023
DKN MAGARE, J
MARCH 13, 2024**

BETWEEN

LENANA HARDWARE STORES LIMITED APPELLANT

AND

OXY PLUS INTERNATIONAL COMPANY LIMITED RESPONDENT

(Being an appeal from the Judgment of Hon. E. M. Gaithuma in Nyeri SCC COMM. No. E178 of 2023, Lenana Hardware Stores Ltd –Vs- Oxy Plus International Company Limited, delivered on 7th August, 2023)

JUDGMENT

1. This is an appeal from the judgment and decree of the Honourable Court in Nyeri SCC Comm. E178 of 2023. The Appellant being aggrieved with the decision, filed this appeal on the following grounds:
 - a. That the learned magistrate/adjudicator erred in law and in fact in holding that the Appellant had not proved his claim on a balance of probabilities when the Respondent admitted partial performance of the contract with the Appellant.
 - b. That the learned magistrate/adjudicator erred in law and in fact by failing to appreciate and take judicial notice of the principle in equity that equity regards to be done what ought to be done.
 - c. That the learned magistrate/adjudicator erred in law and in fact by proceeding on a misapprehension of facts and holding that the Appellant was not entitled to the relief sought of payment of Kshs.900,000.
 - d. That the learned magistrate/adjudicator erred in law and in fact in holding that the appellant had not proved its case on a balance of probabilities despite having concluded that there was a valid contract between the Appellant and the Respondent.



- e. That the learned magistrate/adjudicator by awarding costs to the Respondent failed to appreciate that the conduct of the parties in the making of the contract and the circumstances that led to the institution of the proceedings were considerations to be taken when awarding costs.
2. A perusal of the Memorandum of Appeal, I note that only questions of fact are raised. The Appellant submitted that the court ought to set aside the order of costs. That the same is as a result of the Small Claims Court failing to exercise discretion properly.
3. In *Mbogo & Anor v Shah* the former Court of Appeal for East Africa stated:

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
4. Thus the appeal relates to the issue of arrest of costs. Award of costs are discretionary. However section 33 of the *Small Claims Court Act* provides as doth:
 1. The court may award costs to the successful party in any proceedings.
 2. In any other case parties shall bear their respective costs of the proceedings.
 3. Without prejudice to subsections (1) and (2), the court may award to a successful party disbursements incurred on account of the proceedings.
 4. Except as provided in subsection (2), costs other than disbursements, shall not be granted to or awarded against any party to any proceedings before a Court.
5. The court was urged that in view of the admissions in cylinders then there should not have been costs. This was a strange argument. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.”
6. There is no single question of law raised. Consequently, I dismiss the appeal with costs of 45,000/=.



Determination

7. The upshot of the foregoing is that I make the following orders;-
- a. The appeal lacks merit and is consequently dismissed with costs of 45,000/= payable within 30 days.
 - b. In default execution to issue.
 - c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 13TH DAY OF MARCH, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Wangeci for the Appellant

Sibika for the Respondent

Court Assistant – Ms. Thaithi

