



**EWW (Minor Suing Through her Mother and Next Friend MWN) v Kamau
(Civil Appeal 237 of 2023) [2024] KEHC 8885 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8885 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 237 OF 2023
MA OTIENO, J
JULY 19, 2024**

BETWEEN

**EWW (MINOR SUING THROUGH HER MOTHER AND NEXT FRIEND
MWN) APPELLANT**

AND

PETER MAINA KAMAU RESPONDENT

*(Being an appeal from the Judgment of Honourable WNAGECI NGUMI, SRM)
delivered at Gatundu on 15th May 2023 in Gatundu SPMCC No. E233 of 2021)*

JUDGMENT

1. This appeal emanates from the Judgment delivered on 15th May 2022 in Gatundu SPMCC No. E233 of 2021 in which the trial court delivered judgment in favour of the Appellant but failed to award costs on the basis that the Appellant, then a Plaintiff, had not shown evidence that she had served a notice of intention to sue. This appeal is therefore against the aforesaid judgment to the extent that it failed to award costs.
2. A brief background of matter is that the Plaintiff on 9th May 2021 commenced a suit, being, Gatundu SPMCC No. E233 of 2021 against a defendant, now the Respondent, for compensation due to injuries suffered by the plaintiff as a result of a road traffic accident. The claim was for the following reliefs; -
 - i. General damages for pain, suffering and loss of amenities;
 - ii. Special damages of Kshs. 3,000
 - iii. Costs of the suit
 - iv. Interest



3. Upon service with the plaint, the Respondent, through his counsel entered appearance on 22nd September 2021 and filed his defence on the same date denying liability.
4. The matter proceeded for hearing on 19th December 2022 when the Plaintiff's case was heard with two witnesses for the plaintiff testifying. Counsel for the defendant participated in the trial by cross-examining the witnesses. The defence closed its case on that day without calling any witness. The parties thereafter filed submissions in support of their respective cases.
5. On 15th May 2023, the trial court delivered its judgment in favour of the Appellant in the following terms; -
 - i. Liability – 100% against the Respondent
 - ii. General damages – Kshs. 200,000/-
 - iii. Special damages – Kshs. 3,000/-Total – Kshs. Kshs. 203,000/-
6. On costs, the trial court's finding was that the same was not payable since there was no evidence tendered by the plaintiff to the effect that they had served the defendant with a notice of intention to sue prior to commencing the suit.
7. It is that failure by the trial court to award costs that has led to this appeal. the Appellant's argument in this appeal is that being the successful party in the suit, costs ought to have been automatically awarded to her, since it is an established principle of law that costs follow the event.

Submissions

8. On 2th May, 2024, directions were given by this court that the matter was to be canvassed by way of written submissions. That parties were to file and exchange written submissions within fourteen (14) days from that date.
9. The appellant filed their submissions on 24th May 2024 while the Respondent did not file their submissions.
10. The Respondent having failed to file their submissions or any other response to the appeal, the appeal is obviously unopposed. On this alone, this appeal ought to succeed. I will however proceed and analyze the appellant's submissions so as to establish the merits or otherwise of the arguments advanced.
11. Having perused the grounds of appeal as enumerated in the memorandum of appeal, I note that the Appellant's sole and only complaint against the Judgment by the trial court is the failure by the court to award costs of the suit, on the basis that no notice of intention to sue had been given by the Plaintiff prior to the institution of the suit.
12. The appellant in her submissions argued that to the extent that the suit before the trial court was a contentious non-liquidated claim for damages, she was entitled to the reimbursement of costs pursuant to the provisions of Section 27 of the *Civil Procedure Act*, the suit having been determined in her favour.
13. The appellant while acknowledging that the decision of whether or not to award costs is discretionary, submitted in this appeal that that discretion by the court must be judiciously exercised, taking into account the principle under Section 27 of the *Civil Procedure Act*, that costs shall follow the event unless the court, for good reason, otherwise order.



14. The appellant concluded her submissions by stating that the trial court failed to exercise its discretion judiciously when it declined to award costs to the Appellant despite the appellant being the successful party in the suit in the lower court contrary to the express provisions of Section 27 of the Civil Procedure Act. That the reason given by the trial court for not awarding costs constituted an error in law on the part of the trial court.
15. In the aid of her case, the appellant cited the court's decisions in Joseph Muchiri Mbugua v Gatimu Ndirangu [2019] eKLR; Stanley Kaunga Nkarichia v Meru Teachers College & another [2016] eKLR and that of Esther Buchere Maki v South Nyanza Sugar Co. Ltd. [2018] eKLR. The Appellant asserts that Paragraph 53 of the Advocates Remuneration Order which ostensibly formed the basis of the trial court's decision in declining to award costs is not applicable in the circumstances of this case, especially taking into account that the defendant had contested the suit at the trial court.
16. The Appellant therefore prays that the judgment be varied and the order for costs be made in favour of the appellant.

Analysis and determination

17. This being a first appeal, I am enjoined to reconsider evidence tendered before the trial court, reevaluate the same and draw my own conclusions. In doing so, I am required to bear in mind that I did not have the advantage of seeing and hearing the witnesses testify. This is the principle as laid down in the case of Selle & another v Associated Motor Boat Co. Ltd & Others [1968] EA where the court stated that:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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...”
18. The uncontroverted fact in this appeal is that by its judgment of 15th May 2023, the trial court delivered its judgment in favour of the Appellant in a road traffic accident claim, finding the Respondent 100% liable for the accident. The court also awarded compensation under general and special damages. However, no costs were awarded by the trial court despite the fact that the same had been expressly pleaded by the Appellant in the suit. The basis for denial of the costs was explained by the trial court, to be the failure by the Plaintiff to serve on the Defendant, a notice of intention to sue prior to the commencement of the suit.
19. This court is therefore invited by the appellant in this appeal to reconsider the facts and evidence in the trial court with a view of establishing whether the decision by the trial magistrate of not awarding costs and the reasons given for the failure to award costs was justified in the circumstances of this case.
20. In civil proceedings, the order on costs is governed by the provisions of Section 27 of the CPA which provides that; -
 - “(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.

- (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

21. In *Punchlines Limited v Joseph Mugo Kibaria & 10 others* [2018] eKLR, the Court of Appeal quoting with approval the decision of the High Court in *Party of Independent Candidates of Kenya v Mutula Kilonzo & 2 others*, HC EP No. 6 of 2013, had the following to say on the issue of costs under section 27 of the *Civil Procedure Act*; -

“It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs is 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, is a rule which should not be departed from without the demonstration of good grounds for doing so.”

22. Paragraph 53 of the *Advocates Remuneration Order* which ostensibly informed the trial magistrate’s finding on the issue of costs provides that no costs are to be awarded where a suit is brought without notice to the defendant, except on special order. This provision of the law has been interpreted in a number of cases including that of *Joseph Muchiri Mbugua v Gatimu Ndirangu* [2019] eKLR where the court stated that; -

“ 17. The appellant had also complained that the trial magistrate erred in law when he declined to award him costs of the suit. The law is that the award of costs is at the discretion of the trial court as provided for by Section 27 of the Civil Procedure Act. The provision further states that costs should follow the event unless the court shall for good reason otherwise order. In this case, the trial court denied the appellant costs on ground that he had not served on the respondent a notice of intention to institute suit against him.

18. As expected, the respondent supported the trial court’s finding on costs relying on the persuasive authority of *Kajuna Idd Noor v Rapid Kate Services Ltd & 4 Others*, [2013] eKLR where the court held that where a plaintiff had not served a demand notice on a defendant prior to filing suit, under paragraph 53 of the Advocates Act, the plaintiff was not entitled to costs. Paragraph 53 of the Advocates Act states as follows:

“If the plaintiff in any action has not given the defendant notice of his intention to sue, and the defendant pays the amount claimed or found due at or before the first hearing, no advocate’s costs shall be allowed except on a special order of the judge or magistrate.”

It is clear from the foregoing that the authority cited by the respondent was not applicable to the appellant’s suit since the respondent did not pay the appellant any money before or during the trial given the nature of his claim.



19. The above provision seems to suggest that in liquidated claims, failure to serve a defendant with a demand letter would disentitle a plaintiff of an award of costs. The rationale for this position was well captured by Emukule J in *Catherine Ngore Obare v Stephen Mulanya Kula & 4 Others*, [2014] eKLR where he expressed himself as follows:

"The basis of denial of costs for failure to give notice to sue is founded upon the principle that where the claim is for liquidated damages, it is considered that had the defendant been notified of the debt due, he would have paid, and the necessity of suit would have been avoided. The principle also applies where though suit has been filed, the defendant pays the claim well before the hearing of the suit. The general principle of law however is that costs follow the event."

20. Given that the appellant's claim was not liquidated, it is my finding that the learned trial magistrate erred in law when he refused to award costs to the appellant who was the successful litigant in a suit which was contested.

Having found the respondent liable, there was no good reason to deny the appellant costs even if he had not served a demand notice on the respondent prior to filing suit."

23. In the instant appeal, just like in the case of Joseph Muchiri Mbugua (*supra*), I find that the failure by the trial magistrate to award costs on the basis that no notice of intention to sue was given prior to the commencement of the suit, constituted an error of law.
24. Accordingly, I find the appeal merited and hereby allow the same. The Appellant shall therefore have the costs of the suit in the lower court being the Gatundu SPMCC No. E233 of 2021. Consequently, the judgement of the court (Hon. W. Ngumi, SRM) delivered on 15th May 2023 is hereby varied to that extent.
25. The Appellant being the successful party in this appeal, will also have costs of this appeal as well.
26. It so ordered.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 19TH DAY OF JULY 2024

ADO MOSES

JUDGE

Moses – Court Assistant

Ms Munyua for the Appellant.

Mr. Kabita for the Respondent.

