



**Losipan v Komba (Civil Appeal 235 of 2023)
[2024] KEHC 8883 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8883 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 235 OF 2023
MA OTIENO, J
JULY 19, 2024**

BETWEEN

PERIS IMANA LOSIPAN APPELLANT

AND

EMMANUEL MAINA KOMBA RESPONDENT

*(Being an appeal from the Judgment of Honourable WANGECI NGUMI, SRM)
delivered at Gatundu on 15th May 2023 in Gatundu SPMCC No. E053 of 2022)*

JUDGMENT

1. This appeal emanates from the Judgment delivered on 15th May 2022 in Gatundu SPMCC No. E053 of 2022 in which the trial court delivered judgment in favour of the Appellant but failed to make any finding on the issue of costs. This appeal is therefore against the aforesaid judgment to the extent that it failed to award costs.
2. The Appeal was initially filed at the Kiambu High Court as Kiambu HCCA No. E149 of 2023. However, after the establishment and operationalization of the High Court at Thika, this appeal was transferred to this Court and allocated the current case number.
3. The substratum of this appeal is the claim by the appellant that the trial court failed to award costs of the suit to the appellant, despite the appellant having been the successful party in the lower court.
4. According to the appellant, the failure by the trial court to make an order for costs in her favour was erroneous and therefore ought to be reversed by this court since the trial court did not give any reasons in its judgment for the failure to award costs.
5. A brief background of the suit in the lower court is that on 10th March, 2022, as a result of road traffic accident, the Plaintiff, now appellant, commenced suit against the defendant, now respondent, claiming 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
6. Upon service with the plaint, the Respondent, through his counsel entered appearance and filed his defence denying liability. The matter thereafter proceeded for trial on various dates between 11th March, 2022 and 15th May, 2022 with the Advocates for both parties participating leading their respective clients in tendering evidence before the trial court. Parties' advocates thereafter filed their submissions in support of their respective cases.
7. 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. 80,000/-
 - iii. Special damages – Kshs. 3,000/-
- Total – Kshs. Kshs. 83,000/-
8. The trial court however did not award costs to the appellant neither did it make any findings in the issue of costs despite the fact that the appellant had specifically pleaded the same in her plaint of 10th March, 2022.
9. It is that failure by the trial court to award costs or make any findings on the issue of costs that has led to this appeal, with the appellant arguing that as a matter of course, costs ought to have been automatically awarded to her on account of being the successful party in the suit.

Submissions

10. On 9th May, 2024, directions were given by this court that the matter was to be canvassed by way of written submissions. The Appellant was to file their written submissions within seven (7) days from that date, with the Counsel for the Respondent granted an equivalent period from the date of service with the appellant's submissions.
11. The appellant filed their submissions on 9th May 2024 while the Respondent is yet to file their submissions.
12. 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 analyse the appellant's submissions so as to establish the merits or otherwise of the arguments advanced.
13. 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, without giving any reasons in the judgment.
14. 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.



15. The appellant while acknowledging that the decision of whether or not to award costs is discretionary, it was her submissions in this appeal that that discretion by the court ought to have been exercised judiciously, 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.
16. The appellant concluded her submissions by stating that the trial court not only failed to exercise its discretion by awarding costs, but also failed to give any reason for failing to award costs, contrary to the express provisions of Section 27 of the Civil Procedure Act. That from the facts of this case, the trial court ought to have exercised its jurisdiction in favour of the appellant by awarding costs of the suit at the lower court.
17. 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.
18. The Appellant therefore prays that the judgment by the trial court be varied and the order for costs be made in favour of the appellant.

Analysis and determination

19. 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...”

20. 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. No reasons were given by the trial court for the failure to award costs. The court simply kept silent on the issue.
21. 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 court of not awarding costs was justified in the circumstances.
22. 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.”

23. 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.”

24. The Court of Appeal in *Supermarine Handling Services Ltd v Kenya Revenue Authority* [2010] eKLR (Civil Appeal 85 of 2006), had the following to say when the court was called upon to deal with a case where the trial court had failed to pronounce itself on the issue of costs; -

“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. See Section 27 (1) of the Civil Procedure Act.

In the case *Devram Dattan v Dawda* [1949] EACA 35 it was held,

“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 the 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 reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule. (Emphasis added)

25. In the instant appeal, to the extent that the trial magistrate did not give any reasons for his decision not to award any costs to the Appellant, this court is entitled to intervene, especially having found that the appellant was the successful party in the litigation in the lower court and was therefore entitled to costs thereat.
26. In the premises, I find that the trial magistrate committed an error of law. This appeal is therefore merited and hereby succeeds.



27. The Appellant shall have the costs of the suit in the lower court being the Gatundu SPMCC No. E053 of 2022. Consequently, the judgement of the magistrate (Hon. W. Ngumi, SRM) delivered on 15th May 2023 is hereby varied to that extent.
28. The Appellant being the successful party in this appeal, will also have the costs of this appeal as well.
29. It so ordered.

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

ADO MOSES

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JUDGE

Moses – Court Assistant

Ms. Munyua for the Appellant.

Mr Kabita for the Respondent.

