



REPUBLIC OF KENYA



**Maina v Ngacha & another (Civil Appeal 239 of 2023)
[2024] KEHC 9516 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9516 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 239 OF 2023
FN MUCHEMI, J
JULY 25, 2024**

BETWEEN

EVERLYN MUTHONI MAINA APPELLANT

AND

PETER KANYIRI NGACHA 1ST RESPONDENT

JAMES KIMATA KAMENJU 2ND RESPONDENT

*(Being an Appeal from the Judgment of Hon. W. Ngumi (PM)
delivered on 22nd May 2023 in Gatundu SPMCC No. E56 of 2022)*

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Gatundu Principal Magistrate in SPMCC No E56 of 2022 in which the trial court failed to award costs of the suit to the appellant following his successful suit against the respondent.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 3 grounds of appeal summarized as follows:-
 - a. The learned trial magistrate proceeded on the wrong principles when declining to award costs of the suit to the appellant.
3. Directions were issued that the appeal be canvassed by way of written submissions and from the record only the appellant complied by filing her submissions on 13th May 2024.



Appellant's Submissions

4. The appellant submits that from the judgment of the trial court, the learned magistrate made no mention of the prayer for costs of the suit. As such, the appellant argues that failure to mention the award on costs means that she cannot claim costs from the respondents for the successful litigation.
5. The appellant further submits that the failure to consider the prayer for costs of the suit was erroneous and no reasons were advanced as to why the appellant should not have the costs of the suit.
6. The appellant relies on Section 27 of the *Civil Procedure Act* and submits that a court has the discretion to award costs but the learned magistrate failed to exercise her judicial authority in that regard. The appellant argues that the learned magistrate failed to give reasons for omitting to award costs. It is further submitted that the appellant did not conduct herself in a manner that would justify denial of costs for the suit that was successful on her part.
7. The appellant argues that Rule 53 of the *Advocates Remuneration Order* which requires service of a demand letter prior to filing of a suit was not applicable in the instant matter for the reason that the respondents did not settle the case prior to the first hearing. The appellant submits that her case was a personal injury claim and not a liquidated claim. As such thus the respondents were not in a position to pay any amount prior to filing or hearing of the suit.
8. Relying on the cases of *Joseph Muchiri Mbugua v Gatimu Ndirangu* [2019] eKLR; *Stanley Kaunga Nkarichia v Meru Teachers College & another* [2016] eKLR; *Esther Buchere Maki v South Nyanza Sugar Co. Ltd* [2018] eKLR and submits that failure to issue a demand letter is not a justification to deny a party costs. Furthermore costs are at the discretion of the court and costs follow the event unless for good reason the court declines to award costs.

Issue for determination

9. The main issue for determination is whether the appeal has merit.

The Law

10. Being a first Appeal, the court relies on a number of principles as set out in *Selle and another v Associated Motor Boat Company Ltd & others* [1968] 1EA 123:

“.....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. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

11. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR the Court of Appeal stated that:-

An appeal to this court from a trial by the High 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.



12. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-
- a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
 - c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the appeal has merit

13. It is trite law that the issue of costs is a discretionary one that is awarded to a successful party. Furthermore, this discretion must be exercised judiciously and a party cannot be denied costs unless it can be shown that they acted unreasonably.
14. Section 27(1) of the *Civil Procedure Act* provides:-
- (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 purpose 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 for good reasons otherwise order.
15. Section 27 of the Act is clear that the discretion to award costs lies with the court in any suit. This discretion must be exercised judiciously. It is trite law that where the court denies costs to a party who is successful in a suit, reasons for such decision must be clearly stated.
16. In the case of *Supermarine Handling Services Ltd v Kenya Revenue Authority* Civil Appeal No 85 of 2006 the Court of Appeal stated:-
- 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 to decide, and the Court of Appeal will not interfere with his discretion in that instance.
17. The matter in the court below arose from a road traffic accident involving the appellant who was a pedestrian and motor vehicle registration number KBF 342D along Kenyatta Road in Gatundu. The matter proceeded for hearing and the trial court rendered its judgment on 22nd May 2023. The trial court found the respondent 100% liable. The appellant was awarded general damages in the sum of Kshs 70,000/- and special damages at Kshs 3,000/-. The trial court further awarded interest at court rates on both the general and special damages awards from the date of judgment until payment in full.



The record shows that the magistrate was silent on the issue of costs and did not give any reasons. The appellant was the successful party in the suit and no adverse reference was made against the appellant.

18. It is my considered view that the failure by the learned trial magistrate to give reasons for not awarding costs or rather being silent about the issue of costs despite the successful suit of the appellant, lays a sound basis for this court to interfere with the discretion of the learned magistrate. The appellant was entitled to costs of the suit before the magistrate. It was a misdirection for the magistrate to omit award of costs without giving reasons.
19. I find this appeal merited and it is hereby allowed.
20. The appellant is hereby awarded the costs of the suit in the court below and in this appeal.
21. The appellant shall have the costs of the suit.
22. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 25TH DAY OF JULY 2024.

F. MUCHEMI

JUDGE

