Kiteme v Kimanthi (Civil Appeal 61 of 2019)
[2023] KEHC 605 (KLR) (8 February 2023) (Judgment)

Neutral citation: [2023] KEHC 605 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

CIVIL APPEAL 61 OF 2019

RK LIMO, J

FEBRUARY 8, 2023

BETWEEN

VERONICA KITEME ..... APPELLANT

AND

IRENE KATUMBU KIMANTHI ..... RESPONDENT

JUDGMENT

1. This Appeal arose from the Judgement of Hon. Mbungi Chief Magistrate which was delivered on 15th October, 2019 vide Kitui Chief Magistrate Court Civil Case No 350 of 2017.

2. In that case, the Respondent had sued the Appellant for a recovery of Kshs 203,650.75 an amount she claimed to have advanced to the Appellant as a friendly loan.

3. In response to the claim, the Appellant had defended herself denying owing the Respondent Kshs 203,650 claiming that the only amount received was Kshs 113,250 for which she had repaid in full.

4. The trial court evaluated the evidence and found that the Respondent had not proved her claim and dismissed the case. However, the trial court ordered that each party was to bear own costs which decision aggrieved the Appellant and hence the basis of this appeal.

5. The brief facts of the case at the trial court was a follows: -

6. The evidence tendered was to the effect that the Appellant and the Respondent were colleagues both working at Kitui School for the Deaf. The Respondent told the court that she accompanied the Appellant's brother and sister to Kitui G.K Prison on 19th May 2017 where they had gone to visit the appellant who had been committed to civil jail. That while there, the Appellant asked the Respondent to settle her civil debt but the Respondent informed her that she could not raise the amount which she stated was over Kshs 100,000/-. The Respondent then stated that she agreed to assist the Appellant by securing the amount through her SACCO and that the Appellant agreed to settle the cost of the loan

at the SACCO. In her own words, the Respondent stated that the Appellant's loan amount totaling to Kshs 113,250/- but due to the urgency of the situation, the Respondent topped up her existing loan at the SACOO to Kshs 316,900.75/- with an interest of 1.5% which the Respondent agreed to cater for. She claimed that the Appellant refunded Kshs 113,250 leaving a balance of Kshs 203,650.70 upon which she sued her for the recovery of the same inclusive of interests.

7. On her part, the Appellant acknowledged receiving Kshs 113,250/- from the Respondent for purposes of settling her civil debt. She stated that the two entered into an agreement dated 21st June 2017 which indicted the amount owing to the Respondent. She denied agreeing to settle interest charged on the Respondent's loan with the SACCO and further stated that she had settled the full loan amount advanced to her by the Respondent.

8. As observed above, the trial court found that the Respondent failed to prove her case against the Appeal and dismissed it. While dismissing the suit, the trial court ordered each party to bear own costs.

9. The Appellant felt aggrieved and filed this appeal listing the following grounds namely: -

    i. The Learned Trial Magistrate erred in law and fact by failing to appreciate that under S.27 of the *Civil Procedure Act*, costs of any action, cause or other matter or issue follow the event.

    ii. The Learned Trial Magistrate erred in law and facts by denying the defendant the costs of her victory in the suit, basing such a denial on a purported relationship between the parties whereas, evidently, there was no such good relationship between the parties at the time of inception of the suit and during the trial or any at all.

    iii. The Learned Trial Magistrate erred in law and fact by failing to appreciate that the suit was unfounded and malicious and as such, the respondent ought to have been ordered to refund the appellant costs of such a suit.

    iv. That the learned trial magistrate erred in law and facts by improper exercise of his discretion on costs.

10. This appeal therefore, is basically on costs.

11. The appellant faults the trial court's basis for determining that each party to bear own costs submitting that the trial court did not exercise her discretion judiciously as envisaged by Section 27(1) of the *Civil Procedure Act*.

12. The only issue for determination in this Appeal therefore, is whether the Appellant was entitled to costs.

13. The question of costs in litigation is well provided for under Section 27 of the *Civil Procedure Act* which has been majorly relied by the Appellant. The Section 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 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 Emphasis added).

14. As a general rule though costs is a question of discretion, a successful party to a case is entitled to costs unless there are good reasons advanced by the trial court not to award costs to the successful litigant.

15. In the *Party of Independent Candidates of Kenya v Mutula Kilonzo & 2 others* [2013] eKLR the High Court quoted case of *Nedbank Swaziland Ltd v Sandile Dlamini* No (144/2010) [2013] SZHC30 (2013) Maphalala Judge on the issue of costs:

> "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."

16. The Court of Appeal in *Farah Awad Gullet v CMC Motors Group Limited* [2018] eKLR also weighed on this subject by making the following observations: -

> "The law of costs as it is understood by Courts in Kenya, is this, that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part-no omission or neglect, and no vexatious or oppressive conduct is attributed to him, which would induce the Court to deprive him of his costs- the Court has no discretion and cannot take away the plaintiff's right of costs. If the defendant, however innocently, has infringed a legal right of the plaintiff, the plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course."

17. It is also settled that where a trial court exercises its judicial discretion, an appellate cannot interfere unless it is shown that the trial court failed to exercise the discretion judicially.

18. In *Supermarine Handling Services Ltd v Kenya Revenue Authority* [2010] eKLR the court provided guidelines or when an appellate court can interfere with discretion of a trial court with respect to costs by stating:-

> "Costs of any action, cause or other matter or issue shall follow the event unless the Court of Judge shall for good reason otherwise order ... Thus, where a trial Court has exercised its discretion on costs, an appellate Court should not interfere unless the discretion has been exercised injudiciously 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."

19. I have gone through the judgement of the trial court in this instance and it is evident that the trial court made no order as to costs owing to the "history" and frosty relationship of the parties". The trial court did not indicate what frosty relationship was all about and who was to blame for the same. Had it, for example put some blame on the Appellant, then there would be some justification in making no order as to costs.

20. This was well illustrated in *James Koskei Chirchir v Chairman Board of Governors Eldoret Polytechnic* [2011] eKLR where the court held as follows;

> "Notwithstanding the provisions of section 27 above costs is generally a matter within the discretion of the Court. The Court did not, however, explain why it denied the appellant his costs before the trial Court. In absence of any explanation in that regard we think that

the learned Judge of the Superior Court erred in denying the appellant the costs of the suit before the trial Court.

Where there is sufficient reason why a trial Court awarded costs, ..."

21. It was also clear that the Appellant paid the amount agreed upon in full to the Respondent. The allegation that the Appellant agreed to cater for further costs of processing the loan as well as interest chargeable remained unproved and as the trial court found, an afterthought. The Respondent ought to have considered the risks and costs involved in procuring a loan on behalf of the Appellant, further, she should have ensured that the said costs were captured in their agreement.

22. Flowing from the above, this court finds that the trial court fell into error by not awarding the Appellant, cost yet she was the successful party in the suit. She entitled costs as stipulated under Section 27 of *Civil Procedure Act*.

In the premises, this court hereby, allows this appeal and sets aside the order that each party to bear its own costs and makes an order that the Respondent does bear both the costs of this appeal and costs at the trial court.

DATED, SIGNED AND DELIVERED AT KITUI THIS 8TH DAY OF FEBRUARY, 2023.

HON. JUSTICE R. K. LIMO

JUDGE