



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CIVIL APPEAL NO. 3 OF 2020

SOUTHERN STAR SACCO LIMITED.....APPELLANT

VERSUS

VANANCIO NTWIGA.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The Appellant filed Memorandum of Appeal dated 7th May, 2020 against an order issued by **Hon. Sudi** in regard to **C.M.C.C No. 276 of 2018**;
2. The brief background in the matter is that the Respondent moved the court vide a plaint dated 11th.12.2018 seeking orders that:-
 - i. An order directing the appellant to handover title deed for land parcel number Karingani/Mugirirwa/3199 to the respondent.
 - ii. An order directing the appellant for release to the respondent CIC Cheque No.226523 for Kshs.500150/-- which is the property of the plaintiff.
 - iii. Any other damages the court may deem fit and just to grant.
 - iv. Costs of the suit.
3. On the 17th.1.2019 the Appellant entered appearance and filed a defence.
4. The Appellant indicated that at the appropriate time he shall file a preliminary objection which he did file on the 8th.7.2019
5. Appellant's preliminary objection was premised on:
 - i. The lack of jurisdiction by the court.
 - ii. The suit being an abuse of court process.
6. The Appellant filed their submissions on the 22nd.1.2019 while Respondent filed a replying affidavit on 12th.2.2020.

RULING

7. The trial magistrate heard the preliminary objection and delivered a ruling was delivered on the 31st.3.2020 dismissing the pre-liminary objection with costs. She further directed the parties to withdraw the suit and file it in the right forum for hearing and determination. She further directed the parties to record a consent on withdrawal terms and file the necessary consent to close the file.
8. Being aggrieved by that ruling of the Learned Magistrate the appellant preferred this appeal. The same is premised on the following grounds: -

i. THAT the trial magistrate erred in law and fact by condemning the appellant to pay cost in a preliminary objection that was dismissed despite that the preliminary objection raised an issue of law to wit jurisdiction and which preliminary

objection made the trial magistrate to down the tools.

ii. THAT the trial magistrate erred in law and fact by condemning the appellant to pay costs despite that it was the appellant's preliminary objection that stopped the proceedings in the suit and that the appellant was condemned for correctly, legally and lawfully bringing to the attention of court that the trial magistrate had no jurisdiction to hear and determine the canvassed issues by dint of section 76 of the Co-operative Societies Act Cap 496 L.O.K.

iii. THAT the trial magistrate served gross injustice to the appellant by condemning him to pay costs in a P.O. that raised a point of law and which the trial magistrate used and applied in delivering the ruling herewith appealed against.

iv. THAT the trial magistrate erred in law and fact by failing to exercise her mandate as a magistrate by failing to give a conclusive and final ruling only to leave it to the parties to consent and under what terms how to withdraw the suit when the P.O. was clearly seeking for dismissal of the suit for want of jurisdiction.

v. THAT the trial magistrate erred in law and fact by failing to award the prayers sought in the P.O. despite the fact that the appellant was entitled to the said cost.

9. When the matter came before court on the 12th.10.2020, the court did direct that the application be canvassed by way of written submissions.

10. The Appellant's written submissions dated 20th.11.2020 were filed on 21st.11.2020 while those of the Respondent dated 23rd.11.2020 were filed on 3rd.11.2020.

11. On the 10th.12.2020 the parties did inform court that they had complied and the matter was listed for Judgment.

THE APPELLANT'S SUBMISSIONS

12. The appellant argued that the court lacked jurisdiction in regard to the matter that was before it.

13. The Appellant reasoned that the trial court erred by condemning the appellant to pay costs despite having downed its tools for want of jurisdiction.

14. The appellant questioned the principle employed by the court in dismissing the preliminary objection even after downing its tools.

15. He therefore urged this court to allow this appeal.

THE RESPONDENT'S SUBMISSIONS

16. The Respondent argued that the dispute herein was solely between an employer and employee.

17. He stated that costs was awarded in his favour despite the court downing its tools due to want of jurisdiction in Chuka CMCC Civil Case No.276 of 2018.

18. It was his averment that the appellant relied on an incorrect law or position to raise the preliminary objection and so it had to fail.

19. He pointed out that cost follows event and that the same was at the discretion of the court.

20. He reasoned that there was no good reason or cause demonstrated by the appellant to warrant the award of costs.

21. The Respondent relied on the case of **David Karobi v Charles Nderitu & Ano. High Court Civil Appeal No. 27 of 2016** and **William KipronoTowett and 1597 Others v Farmland Aviation Ltd & 2 Others (2018) Eklr.**

22. He therefore urged this court that this appeal be dismissed with costs.

ISSUE FOR DETERMINATION

23. The substantive issue for determination is whether trial magistrate erred by making an inconclusive ruling on jurisdiction.

Whether the trial magistrate erred in law by dismissing the preliminary objection with costs even after finding that she had no jurisdiction.

ANALYSIS AND DETERMINATION

24. I have considered the, memorandum of appeal, the ruling of the trial Magistrate, the submissions by learned counsel, the authorities cited on behalf of the respective parties and the law.

25. The duty of this court as the first appellate court is to reconsider the evidence, assess it and make own conclusions on the evidence, subject to the cardinal fact that the court did not have the advantage singularly enjoyed by the trial magistrate, of seeing and hearing witnesses and leave room for that (*See Seascapes Ltd v. Development Finance Company of Kenya Ltd [2009] KLR, 384*).

26. The decision appealed from was made in exercise of the discretionary power of the court. As was stated in **Mbogo and Another V Shah [1968] E.A. 93** it is well settled:

“...that this court will not interfere with the exercise of...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 failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

Jurisdiction

27. *Halsbury’s Laws of England 4th Edition, Vol. 10, paragraph 314*, defines jurisdiction as:-

‘By ‘jurisdiction’ is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision.’

28. The jurisdiction of the court flows from the constitution and statute. In **The Matter of Advisory Opinion of the Court under Article 163 of the constitution** - Application No. 2 of 2011 at paragraph 30, the Supreme Court held: -

“It is trite law that a court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavours to discern or interpret the intentions of Parliament, where the legislation is clear and there is no ambiguity.”

29. And similarly by the Supreme Court in the case of **Samuel Kamau Macharia & Another vs Kenya Commercial Bank & 2 others, Application No. 2 of 2011 [2012] eKLR** where it stated;

“A court’s jurisdiction flows from the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law.”

30. It is true that jurisdiction is the soul and lifeblood of judicial activity. Jurisdiction is fundamental and a judgment rendered by a court that does not have jurisdiction to hear is void *ab initio*. It has been famously stated that jurisdiction is everything and without it the court has no power to make any further step and must down its tools. (See **The Owners of the Motor Vessel Lilian ‘S’ v Caltex Kenya Ltd (1989) KLR 1**). However, in the same case, **Nyarangi J.** remarked that:

I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it.

31. Parties are, therefore, expected to raise the issue of jurisdiction at the earliest opportunity. However, since jurisdiction goes to the question of judicial authority to decide a matter on its merits, courts have been consistent that the issue of jurisdiction can be properly raised by a party at any stage – including on appeal. Hence, in **Floriculture International Ltd v Central Kenya Ltd & 3 Others (1995) eKLR**, the Court of Appeal held that the issue of jurisdiction can be argued at any time. The Court remarked as follows:

“It has been held in the case of **Kenindia Assurance Co. Ltd v Otiende (1989) 2 KAR 162** that the normal rule that a party could not raise for the first time on appeal a point he had failed to raise in the High Court, did not, and could not apply when the issue sought to be raised *de novo* on appeal went to jurisdiction.”

32. In determining whether or not the 1st Respondent acted outside its powers, regard is made to the description of illegality by **Lord Diplock in Council of Civil Service Union v Minister for the Civil Service [1985] AC 374 at 410** as a failure by a public body to understand correctly the law that regulates its decision making power, or a failure to give effect to that law.

33. In addition, in **Anisminic vs Foreign Compensation Commission (1969) 1 All ER 208 at 233**, Lord Pearce held as follows on when a public body may lack jurisdiction:

“Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make.

Or in the intervening stage, while engaged on a proper enquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account.

Thereby it would step out of its jurisdiction. It would turn its enquiry into something not directed by Parliament and fail to make the enquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity.

34. It is therefore necessary when deciding whether a statutory power or duty has been lawfully exercised or performed, to identify the scope of that power and duty, and which involves construing the legislation that confers the power and duty.

35. The trial court did address itself to the issue of jurisdiction and in the words of the court, the court found it a bit challenging since the case had a multi-pronged face encompassing employment aspect.

36. The question to be answered in this appeal is whether the dispute herein is one that falls within the ambit of **Section 76 of the Co-operatives Societies Act**, and thus ought to be heard and determined by the Co-operatives Tribunal.

Section 76 of the Co-operative Societies Act Cap 490 of the Laws of Kenya provides that concerning the business. If any dispute of a Co-operative Society arises;

- (a) Among members, past member and persons claiming through members, past members and deceased members or
- (b) Between members past members or deceased members and the Society, its committee or any officer of the society
- (c) Between society and any other Co-operative Society it shall be referred to the tribunal”

“2 A dispute for the purpose of this section shall include-

- a) A claim by a Co-operative Society for any debt or demand due to it from a member of a past member or from the nominee or personal representative of a deceased member whether such a debt or demand is admitted or not
- b) A claim by a member, past member or a nominee or personal representative of a deceased member.....whether such debt is admitted or not.
- c)

The facts of the case are not in dispute that Appellant is Co-operative Society for the purpose of the Act and that there was a dispute between the appellant and the respondent. It is clear that from the provisions of **Section 76 of the Co-operative Societies Act** the dispute fell squarely among the disputes governed under the Section and was therefore required to be referred to the Co-operatives Tribunal under the Section. For orderly resolution of disputes and the maintenance of the rule of law there must compliance with statutory provisions which are constitutional for settlement of disputes. In the Speaker of the **National Assembly -v- James Njenga Karume (1992) eKLR** it was stated that – where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by a law must be strictly adhered to:

1. The **Court of Appeal in Geoffrey Muthinja Kabiru & 2 Others vs. Samuel Munga Henry & 1756 Others [2015] eKLR**, stated that:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same has to be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews.....

The courts must be in the forefront in ensuring strict compliance with the relevant statutory procedure for the resolution of dispute. Having said that it is my finding that the trial magistrate had no jurisdiction to entertain the suit. The trial magistrate ought to have downed her tools having found that she was not seized with jurisdiction. The Act is not ambiguous as it states clearly that “any” dispute that arises between it and its members shall be referred to the tribunal established under the Act. This includes disputes between the appellant and its employees with regard to their employment. The word “Any” under the section and shall give a wide interpretation to the term dispute.

37. The trial magistrate erred by dismissing the Pre-liminary objection despite holding that she had not jurisdiction. She was alive to the holding in **Owners of Motor Vessel Lilian’s -v- Caltex Kenya Ltd Supra** that without jurisdiction she had to pen off at that point, down her tools and let the party do the honourable thing of deciding which way to go.

A suit filed in a court without jurisdiction in my view cannot be cured by ordering parties to enter consent to move it to the tribunal. In this regard, with respect to the learned trial magistrate, she clearly fell into error.

Costs

2. I now proceed to determine the question whether the trial court properly exercised its discretion when it condemned the Appellants to pay the costs of the suit.

3. As for costs, it was correctly submitted by the Respondent that the discretion of the Court to grant or withhold costs is enshrined in section 27 of the Civil Procedure Act. It provides *inter alia* as follows: -

Sec.27(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 who 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.”

4. Therefore, it is trite that though costs follow the event they are awarded at the discretion of the court. In the case of **Supermarine Handling Services Ltd vs Kenya Revenue Authority, Civil Appeal No. 85 of 2006**, the Court explained the circumstances that would lead an appellate court to interfere with the trial court’s exercise of discretion thus;

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

5. Similarly, in **Edward Sargent versus Chotabha Jhaverbhat Patel [1949] 16EACA 63**, it was held that an appeal does lie to an Appellate Court against an order made in the exercise of judicial discretion, but the Appeal Court will interfere only if it be shown that the discretion was exercised injudiciously.

6. In the **Party of Independent Candidates of Kenya versus Mutula Kilonzo & 2 others, HC EP No. 6 of 2013**, the High Court had this to say 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.”

7. In **Richard Kuloba, Judicial Hints on Civil Procedure, 2nd Edition, page at page 101**, the author authoritatively states as follows on the issue of costs:-

“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”.

8. In **James Koskei Chirchir versus Chairman Board of Governors Eldoret Polytechnic [2011] eKLR** (Civil Appeal No. 211 of 2005), the Court held *inter alia*, that:

“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, then the appellate Court will not interfere with that award as was the case in S.K. Njuguna& another versus John Kiarie Waweru & another [2009] eKLR (Civil Appeal No. 219 of 2008) where the Court stated that:

“We reiterate that the issue of costs is in the discretion of the Court and in this appeal, we are satisfied that there were justifiable reasons why the appellants herein were ordered to pay the costs although the Election Petition against them was dismissed.”

9. See also **Margret Ncekei Thurania versus Mary Mpinda & another [2015] eKLR** where the principles on the discretion to award or withhold costs were summarized as follows:

“ On the issue of costs, rule 31 of the Rules of this Court enjoins us at the end of our determination to make any necessary, incidental or consequential order including orders as to costs.

In Devran Dattan versus Dawda [1949] EACA 35, it was held that the decision as to whether the successful litigant has a right to recover his costs should be left to the discretion of the Judge who tried the case, a position reiterated

In James Koskei Chirchir versus Chairman Board of Governors Eldoret Polytechnic [2011] eKLR (Civil Appeal No. 211 of 2005) when this Court ruled that notwithstanding, the provision of section 27 of Civil Procedure Act, costs are generally a matter within the discretion of the Court.

See also the decision in the case of Super Marine Handling Services Limited versus Kenya Revenue Authority [2010] eKLR (Civil Appeal No. 85 of 2006) for the proposition that 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. Herein, the learned trial Judge properly exercised his discretion in awarding costs to the respondents. We find no good reason to interfere with the exercise of that discretion as the costs therein had followed the event considering that the respondents were the victorious party”.

10. In the light of the above principles, the factors this court are well established. The exercise of discretion must be done ought to consider when deciding whether to interfere or otherwise with the award of costs made by the trial court judiciously and not on which or caprice. The rule is that costs must follow the event and can only be disregarded where the court has a good reason and has stated that good reason in her ruling or judgment. A successful party is entitled to the fruits of his labour. And one of these fruits is the costs of prosecuting the suit. The rule of the game is that an award of costs follows the event, and a successful litigant will be awarded costs so as to recoup the costs he has undergone in the course of the litigation. The trial magistrate erred as there was no good reason why she denied the appellant's his costs.

CONCLUSION

In view of the reasons aforesaid, the learned trial magistrate had no jurisdiction to entertain the dispute and her last word ought to have been that she has dismissed the suit for want of jurisdiction and proceed to award the appellant costs.

I therefore find that the appeal has merits. I allow the appeal and order that the ruling of the learned magistrate dated 31/3/2020 is set aside. It is substituted with an order allowing the pre-liminary objection with costs for want of jurisdiction.

The suit by the respondent is consequently struck out with costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 11TH DAY OF MARCH 2021.

L.W. GITARI

JUDGE

11/3/2021

Judgment read out in open court.

L.W. GITARI

JUDGE

11/3/2021