REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NUMBER 69 OF 2019

FRANCIS MAINA WANGUNYI.....APPELLANT

VERSUS

EQUITY BANK LIMITED.....1ST RESPONDENT

JOYLEY HARDWARE LIMITED.....2ND RESPONDENT

NICODEMUS MWADIME.....3RD RESPONDENT

(Being an appeal from the judgment/decree of Honourable E. Kelly

(Senior Resident Magistrate, Nakuru Law Courts), delivered on

29th March, 2017 in the original Nakuru CMCC NO 481 OF 2017)

J U D G M E N T

1. This appeal is before me on the following grounds;

i. That the Learned trial magistrate erred in law and fact by not awarding the appellant herein costs of the suit despite being the successful party.

ii. That the learned trial magistrate erred in law and in fact by failing to exercise her discretion to award of costs properly, judicially, fairly, legalistically and /or in tandem with the well-established principles/consideration in respect thereto.

iii. That the learned trial magistrate erred in law and fact by misapprehending the applicable principles, law, considerations, reasons and/or circumstances that applies/behooves award of costs in a suit generally.

iv. That the learned trial magistrate erred in law and fact by holding that the demand letter and statutory notice had not served.

v. That the learned trial magistrate erred in law and fact in holding that failure to serve the demand letter and the statutory notice alone disentitles a successful party costs of the suit.

Background to the Appeal

2. On 1st April 2017, a Road Traffic Accident took place involving the motor vehicle registration number KWS 099 Toyota Saloon belonging to the plaintiff, and motor vehicle registration number KCA 457 S. Isuzu Lorry belonging to the 2nd defendant and driver by the 3rd defendant.

3. The plaintiff filed suit vide plaint dated 11th May 2017 seeking orders;

Judgment against the defendants jointly and severally for;

a) Kshs. 130,000/= being net loss for damage.

b) General damages for loss of user and or inconvenience arising from damage of the said car.

c) Special damages of Kshs. 16,450/=

d) Costs of the suit

e) Interest on all the above and court rates.

4. On 5th October 2018, the parties entered into a consent, in the following terms;-

a. Judgment on liability be and is hereby entered at 20% against the plaintiff and 80% against the 2nd and 3rd defendant.

b. The claim for loss of user (prayer b) in the plaint is marked as abandoned.

5. On 29th March 2019 the learned trial magistrate delivered the judgment in the following terms;

> "I enter judgment for the plaintiff and against the 2nd and 3rd defendants jointly and severally for the sum of Kshs. 130,000/= being the net damage of the Toyota Saloon car, and Kshs. 16,450/- being special damages, total Kshs. 146,450/= less 20%. The total amount awarded to the plaintiff in damages is hence Kshs. 117,160/= with interest from the date of judgment. The defendant however denied receipt of the demand letter and notice of intention to sue prior to the institution of the suit. The demand letter was produced as P. Exhibit 5 and a perusal of the same confirms that acknowledgment of receipt of the said letter was not endorsed on it by the defendants. The notice of institution of the suit is dated 11th May 2017. The same date as the plaint. I find therefore that the defendants were hence not served with a Notice of Intention to institute the suit and for the said reason, I decline to grant costs of the suit to the plaintiff."

6. The issue then is whether the failure to serve Notice of Intention to Sue is a ground for denial of costs to a successful litigant.

7. Parties through their respective advocates *J Ndung'u Njuguna* for the appellant and *Githiru & Co. Advocates* for the Respondents filed their Written Submissions.

8. I have carefully considered the said submissions and the authorities cited.

9. First on this court's obligations in this matter, the words of the learned judge in the case of **Stanley Kainga Nkarichia vs Meru Teacher's College & Another [2016] eKLR** are illuminating:

> "On my part the law is that, the appellate court will not interfere with the exercise of discretion by the trial court on costs except;
>
> 1. Where the discretion was not exercised judicially or what exercised on wrong principles, or
>
> 2. Where the trial court gives no reasons for the decision and/or the appellate court is satisfied that the decision was wrong; or
>
> 3. Where reasons are given, the appellate court considers those reasons not to constitute "good reasons" within the meaning of Section 27 of the Civil Procedure Act."

10. Section 27 of the Civil Procedure Act states;-

> **"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 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."**

11.The clear purport of **Section 27** is that costs follow the event unless there is good reason given by the court.

12. In opposing the appeal the Respondent argued that the trial magistrate's decision was supported by the pleadings, the record and case law.

i. That in the statement of defence the defendants denied receipt of the Demand Notice or the Statutory Notice of Intention to Sue and put the plaintiff to strict proof thereof.

ii. In the evidence of plaintiff and his demeanour, and the record supported the defendant's position that they were not served with the demand notice or statutory notice to sue although the plaintiff produced both the Demand Letter and Statutory Notice as P. Exhibit 2. Counsel submitted that the plaintiff confirmed that the documents were not served on the defendants and thereafter it was clear that these were not served. Counsel argued that this failure to serve had a direct impact on the issue of costs because it was an event or factor to be considered as defined in **Morgan Air Cargo Limited vs Everest Enterprises Limited [2014] eKLR** as quoted in **David Kiptum Koros vs Kenya Commercial Bank and Another**, that factors to consider awarding costs include:

a. Conduct of parties

b. Subject of litigation

c. Circumstance which led to the institution of the proceedings.

d. The events that eventually led to their termination.

e. The stage at which the proceedings were terminated.

f. The manner in which they were terminated.

g. The relationship between the parties.

h. The need to promote reconciliation amongst disputing parties.

13. Counsel for the respondents argued, service of the documents would have given the respondents the opportunity to settle the matter without trial hence saving parties on costs.

14. This position was countered by the appellant's counsel who referred the court to the pleadings and the proceedings. That the pleadings indicated denial of service. However that there was nowhere in the proceedings that the plaintiff had conceded to failure to serve the documents.

15. That in any event the defendants in their defence dated 23rd November 2017 only conceded to the occurrence of the accident but denied every other allegation of fact and law contained in the plaint, and indication that even if they were served early, there would not have been an out of court settlement without the subsequent litigation. It was submitted for the appellant that there was no indication that service would have averted the lodging of the claim and the suit in court.

16. In ***David Kiptum Koros*** the judge citing from **Reid, Hewitt & Co. vs Joseph, AIR 1918 Cal 717** and **Myres vs Defries (1880) 5EX D 180** held that ***events*** as referred to with regard to costs referred to any other proceedings incidental to the litigation.

> **"The expression 'costs follow the event' means that the party, who, on the whole, succeeds in the action gets the general costs of the action, but where the action involves separated issues, whether arising under different causes of action or under one cause of action, the word "event" should be read distributive and the costs of any particular issue should go to the party who succeeds upon it."**

17. I doubt that service of the statutory notice of intention to sue is one of the contemplated events as hereinabove set out to have an effect on costs. Perhaps if there had been a preliminary objection on the issue, such would qualify as proceedings or cause that would have attracted costs.

18. It is clearly evident from the record of the proceedings of the trial that the only mention of these two (2) documents in when the plaintiff was under cross examination is what he said, *"The statutory notice is only signed by my counsel."*

19. There is no evidence that he was asked about service, on that he even said they were not served. He produced the documents in evidence, and the defence did not challenge the same to warrant the inference that they had not been served.

20. Is there any correlation between service of Demand Notice and Statutory Notice to Sue and costs? The learned trial magistrate did not demonstrate in her judgment what effect, other than the mere fact that she found that these had not been served, had on costs.

21. There is sufficient body of jurisprudence that the mere failure to serve Demand Notice or Notice to Sue is not sufficient or good reason to deny a successful litigant costs, unless there is good reason, *Emukule J* in **Catherine Ngore Obare vs Stephen Mulatya & 2 Others [2014] eKLR** held;

> "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 the suit would have been avoided, the principle also applies where though the suit has been filed, the defendant pays the claim well before the hearing of the suit the general rule and principle of law however is that costs follow the event, unless there is good reason for

denial of costs…."

This is to be found in **Stanley Kaunga Nkarichia vs Meru Teachers College & Another [2016] eKLR, Loice Ngángá vs Andrew Kipchumba Cherutich [2019] eKLR, and Judicial Hints on Civil Procedure by R. Kuloba who at page 96** puts emphasis on the principle that a successful litigant is entitled to his costs:

> **"So, the law as to costs as it is understood by courts in Kenya, is this, that where the plaintiff comes to enforce a legal right, and there has been no misconduct on his part, no omission or neglect, and no vexations or oppressive conduct is attributable 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 to costs. If the defendant in an action, however innocently has infringed on the legal right of the plaintiff, the plaintiff is entitled to enforce his legal right and in the absence of any real reason such as misconduct, is entitled to costs of the suit as a matter of course."**

22.There is nothing in this matter to show that the alleged failure to serve the Demand Notice or Notice to Sue affected the suit in any way. At some point along the way the defendants said they were willing to settle the matter out of court, negotiations were entered into and a consent on liability. The plaintiff abandoned part of his claim, and the matter proceeded to hearing. If the defendants were so keen on settling the matter and they were not denying the accident, it means they were well aware of their liability, they did not demonstrate that they had initiated any process to settle the matter out of court before the suit was filed. They cannot therefore be heard to lay blame on the plaintiff yet that was not even an issue at the trial.

23. From the foregoing I come to the conclusion that the learned trial magistrate did not exercise her discretion fairly, she did not apply the correct principles, and her decision was not supported by the evidence on record. *"This court is therefore entitled to interfere with her discretion on costs."*

24. In the upshot I find that no good reason was given by the learned trial magistrate. The appeal succeeds.

25. The judgment of the subordinate court remains the same save for the order on costs, whereby the plaintiff appellant will have costs of the suit plus interest at court rates from the date of the consent.

26. The plaintiff/appellant will have costs of this appeal.

27. Orders accordingly.

DATED, SIGNED AND DELIVERED VIA EMAIL THIS 6TH DAY OF OCTOBER, 2021

MUMBUA T. MATHEKA

JUDGE

Edna Court Assistant

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