



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 32 OF 2019

MR. LAWRENCE MOSES ESILIA.....1ST APPELLANT

LEMSOFT CONSULTANCY LIMITED.....2ND APPELLANT

VERSUS

OFFICE OF THE ATTORNEY GENERAL

AND THE DEPARTMENT OF JUSTICE.....RESPONDENT

[Being an Application that relates to Kisumu Chief Magistrate's Court

Civil Application 114 of 2013 and 629 of 2015, Kisumu High Court

Civil Appeal No. 100 of 2013 and Kisumu Court of Appeal

Civil Applications 1 of 2015 and 65 of 2015]

JUDGMENT

The appeal before me emanates from the decision made by Hon. R. M. Ndombi dated 6th November 2018.

1. The Appellants asserted that the learned trial magistrate erred by making a finding that was the exact opposite of the decision made on 29th June 2018, when the Appellants were awarded judgment as prayed in the Plaint.
2. The Appellant emphasized that the trial court failed to take into account the fact that both Court of Appeal and the Supreme Court had held that the case before the learned trial magistrate should be determined without undue regard to procedural technicalities.
3. In their considered opinion, the trial court ought to have overlooked any faults and technicalities, so as to enable timely processing of the payments which had been awarded.
4. The Appellants drew attention to their 2 Bills of Costs dated 12th March 2018 and 30th July 2018, which they believe, ought to have been processed.
5. In her Ruling the learned trial magistrate expressed herself thus;

“From the look of things and all facts considered, there is a matter pending for trial at the Supreme Court, from which the Plaintiff is seeking costs against.

He has filed several applications for the same, which were also dismissed.

I will agree with Senior Counsel's submission in its entirety. I find that the suit herein together with the bill of costs filed, offends the sections of the law, in that they ought to have been filed in the matter before the Supreme Court.

But an issue that arises is how does one claim costs when a suit is pending trial?

This is an abuse of the court process.

The suit itself is a non-starter and ought

Not to have been filed in the first place.

I uphold the preliminary objection raised by defendant's counsel.

The suit is hereby dismissed and plaint struck out.

As for the costs, although ignorance of the law is no defence, I will not make any award for costs in the matter, since, clearly the

Plaintiff lacks knowledge of the law and Procedure.

The preliminary objection is upheld with no Order as to costs."

6. In their submissions, the Appellants identified the Plaint dated 12th October 2015 as the genesis of the case.

7. A look at the said Plaint reveals that there was only one Plaintiff, **LEMSOFT CONSULTANCY LIMITED**.

8. The Plaint does not cite **MR. LAWRENCE MOSES ESILIA** as a Plaintiff.

9. **LAWRENCE MOSES** was named in the Plaint as being the Managing Director of the Plaintiff.

10. At paragraph 7 of the Plaint, the Plaintiff put forward the following claim;

"THAT, after attending court from 21st July 2014 up-to-date, the Plaintiff has incurred a total of Kshs 1,116,225.00 that is part of Kisumu High Court Civil Appeal No. 100 of 2013 and Kisumu Court of Appeal Civil Application 1 of 2015. The Plaintiff needs the Office of the Attorney General and the Department of Justice to cater for these costs based on the Legal report in support of our claim and the days we attended court from 21st July 2014 to the date of the Judgment dated 6th August 2014, that was delivered in Kisumu on the 24th day of September 2015."

11. It is my understanding that the Plaintiff's claim was for costs and expenses incurred by him in both the High Court and the Court of Appeal.

12. At paragraph 8 of the Plaint, it was asserted as follows;

"THAT, when claiming this monies, we rely on the order of Judges of Appeal, S. Ole Kantai (In Chambers) dated 4th March 2015 pending the hearing of Court of Appeal of Civil Application 1 of 2015 and all other suits related to it."

13. By the Plaintiff's own contention, the **Civil Application No. 1 of 2015** was still pending before the Court of Appeal.

14. Pursuant to **Section 27 (1)** of the **Civil Procedure Act**;

"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 shall follow the event unless the court or Judge shall for good reason otherwise order."

15. It therefore follows that in each and every single case which the Appellant has filed in court, the said court has full power to determine by whom and to what extent, costs of and incidental thereto, are to be paid.
16. If the learned Judge of Appeal issued an Order or directions on costs, in **Civil Application No. 1 of 2015**, the said orders or directions should be enforceable.
17. The Appellants would not need to file a new case in order to give effect to orders which had already been granted.
18. Similarly, if orders were already made in **Kisumu High Court Civil Appeal No. 100 of 2013**, such orders should be enforceable, without the need for a new case.
19. For that reason, I find that the learned trial magistrate did not err when she held that the suit before her was a non-starter.
20. If the Appellants have already obtained orders directed at the Respondent, requiring the said Respondent to pay costs, all that the Appellants should do is to take steps to execute the said orders, within the suits in which the respective orders were made.
21. On the other hand, if any case was still pending before the court, the Appellants ought to prosecute the said case to finality. In its determination of the case, the court would determine whether or not the Appellants were entitled to costs.
22. The responsibility of making that determination is vested on the court.
23. The Appellants have no authority to determine whether or not they are entitled to costs of the case. However much the Appellants believe that they are entitled to recover costs from the Respondent, their belief can only become a reality if they were to persuade the court to grant appropriate orders.
24. Furthermore, the Appellants have no authority to determine the quantum of costs payable to them, by the Respondent.
25. Pursuant to the provisions of **Section 27 of the Civil Procedure Act**, it is the court or the Judge, that has the requisite mandate to determine, inter alia, the extent or the quantum of costs payable.
26. Every person who institutes proceedings in court would ordinarily incur expenses and costs. They would expend time, effort and money to put together their case, and to canvass the said case.
27. However, just because the person had spent time, effort and money, would not, of itself, imply that he was entitled to recover what he had spent, from the Respondent.
28. It is possible that the case could succeed or fail.
29. And the court determining the case would also determine the party who should pay costs to the other party.
30. Until a determination is made on the issue of costs, none can seek to recover the same.
31. One other factor comes into play, concerning the quantum of costs or expenses recoverable.
32. Even though a party may incur expenses such as Advocates Fees; Transport; Fees for Process-Servers; Writing letters; and Making copies of Documents: that fact alone, does not automatically mean that he will be entitled to recover the expenses incurred.
33. First, the party cannot presume that his case will be successful. Secondly, even if the case was successful, the court has the discretion to make appropriate orders for costs.
34. And when a party is awarded costs of or incidental to his case, the quantum thereof is determined by the court; not by the party.
35. For instance, when a party has hired an expensive advocate, such costs cannot be reimbursed by the other party, just because the other party was ordered to pay costs.
36. Similarly, if a party uses either commercial or chartered flights to and from court, or he stays in expensive hotels, he cannot expect to be reimbursed for such expenses, even when his case is successful.
37. Party and Party costs are regulated by the **Advocates Act**.
38. On another aspect of the matter, I have carefully gone through the court files before me. I failed to trace any receipt which was issued to the Appellants, when they filed the Plaintiff.
39. In the absence of an official receipt issued by the court, the Plaintiff was not "*filed*".
40. In the case of **MOMBASA CEMENT LIMITED V SPEAKER NATIONAL ASSEMBLY & ANOTHER, PETITION NO. 177 OF**

2015, Mativo J. held as follows;

“Payment of Court Filing Fees is a jurisdictional prerequisite to the commencement of an action.”

41. The learned Judge went on to conclude his Ruling in the following words;

“The filing of a civil case requires the payment of filing fees. It follows that failure to pay Court Fees renders the suit incompetent because there is no competent suit filed before the Court.”

42. Pursuant to **Section 96** of the **Civil Procedure Act**, the court has the discretion to allow a party who has paid either no fee or part fee, to remedy the situation by paying what was still unpaid.

43. If the party remedies the situation, by making payment of the requisite court filing fees, the court will treat the situation as if the fee had been paid in the first instance.

44. In this case, the Appellants failed to demonstrate that the Court Filing Fees was paid, either at the time when the Plaint was lodged in court or subsequent thereto.

45. The Appellants have also failed to demonstrate that they procured a court order authorizing them to file the Plaint without paying the Court Fees.

46. In the circumstances, the learned trial magistrate did not err when she struck out the Plaint, as the same had not been filed in accordance with the law.

47. I emphasize that the legal requirement that Court Filing Fees be paid, unless expressly exempted by an order of the court, is not a legal technicality.

48. In the result, I find no merit in the appeal. It is therefore dismissed.

49. The costs of the appeal shall be paid by the Appellants, to the Respondent.

DATED, SIGNED and DELIVERED at KISUMU

This 10th day of February 2020

FRED A. OCHIENG

JUDGE