



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 45 OF 2015

M'NDAKA MBIUKI.....APPELLANT/RESPONDENT

VERSUS

JAMES MBAABU MUGWIRIA.....RESPONDENT/APPLICANT

R U L I N G

1. By a Motion on Notice dated 22/7/2019, brought under **section 27 of the Civil Procedure Code and Order 51 Rule 1 Civil Procedure Rules**, the applicant sought that he be awarded costs for the appeal that was dismissed for non-attendance.

2. The grounds upon which that application was made were set out in the supporting affidavit of **James Mbaabu Mugwiria** sworn on 2/7/2019. He averred that the appeal herein was dismissed but the Court did not make any orders as to cost. That the respondent spent a lot of money to defend the appeal and costs should follow the event.

3. The application was heard on 25/11/2019. Counsel for the applicant argued that the appeal was dismissed on merit. That for that reason, under **section 27 of the Civil Procedure Rules**, costs should follow. On the other hand, counsel of the appellants opposed the application and argued that the appeal having been dismissed for want of prosecution and in the absence of the parties, no costs should be ordered. Further, that the application was improperly before court because under paragraph II of the Advocates Remuneration Order, the application should have been by way of a reference.

4. **Section 27 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 give all the necessary directions for the purposes aforesaid; and the fact that the court 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 direct”.

5. In **Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd [2014] eKLR** it was held:-

“The issue of costs is in the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case”.

6. Costs is in the discretion of the Court. Like in all cases of exercise of discretion, it must be shown that a court wrongly exercised its discretion. There was no allegation that the Court when dismissing the appeal and not awarding costs exercised its discretion wrongly.

7. In the present case, the matter was properly listed for hearing on 9/5/2019. Neither the appellant nor the respondent nor their advocates appeared. In that regard, the Court dismissed the appeal for non-attendance. It is clear that the dismissal was at the Court's own motion. It is the Court that listed the matter for hearing served the parties to attend the hearing. The parties, including the applicant, failed to appear on the appointed day. The court then exercised its discretion in accordance with the law and dismissed the appeal.

8. To this Court's mind, there was no reason that was advanced to show why the applicant should have been awarded costs yet he did not attend Court on the appointed day.

9. In view of the foregoing, the application is without merit and the same is hereby dismissed.

SIGNED at Meru

A. MABEYA

JUDGE

DATED and DELIVERED at Meru this 13th day of February, 2020.

F. GIKONYO

JUDGE