



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT KISII

CORAM: A.K NDUNG'U J

CIVIL APPEAL NO. 43 OF 2019

JANE MOSOMI MOSETI APPELLANT

VERSUS

BOM NYATARO SEC SCHOOL RESPONDENT

(Appeal arising from the judgment of Hon. G.N Barasah (RM) dated 2nd day of April 2019 in Ogembo PMCC No. 223 of 2017)

JUDGEMENT

1. This is an appeal against the Judgement of Resident Magistrate (G.N Barasah) in Ogembo PMCC No. 223 of 2017 dated 2.4.2019.
2. The appeal is premised on grounds that;
 1. The learned trial magistrate erred in law and in fact in not awarding the appellant costs in the court below as costs follow the event as per the provisions of S.27 of the Civil Procedure Act.
 2. The learned trial magistrate erred in law and in fact in relying on extraneous matters and showing bias in denying the appellant costs.
 3. The learned trial magistrate erred in law and in fact in not giving cogent reasons to deny the appellant costs.
3. It is sought by way of this appeal that a decree do issue compelling the court below to award and assess costs.
4. The appeal was canvassed by way of short written submissions.
5. From the Memorandum of Appeal and the submissions on record, the only issue for determination is whether the trial court properly exercised its judicial discretion on award of costs donated by S 27 of the **Civil Procedure Act** (Cap 21 Laws of Kenya) in denying the appellant costs.
6. The clear wording of S 27 of the **Civil Procedure Act** leaves no doubt that the award of costs is a discretionary power. The section provides;

“S 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.

Such discretion must however be exercised judiciously.

7. This being an appellate court, I can only interfere with the exercise of discretion by the trial court if;

1. The discretion was not exercised judiciously or was exercised on wrong principles.

2. Where the trial court gives no reason for the decision and am satisfied that the decision is wrong or

3. Where reasons are given and I consider them not to constitute “good reason” within the meaning of section 27 of the Civil Procedure Act (See Supermarine Handling Services Ltd –vs- KRA C.A No. 85 of 2006).

8. As held in the case of **Devram Daltani vs Haridas Kalidas Danda (1949)16 EACA 35** a successful party can only be deprived of his costs when it is shown that his conduct, either prior or during the course of the suit has led to litigation which but for his own conduct might have been avoided.

9. A useful guidance is also found in the Ugandan Case **Re Ebuneiri Waisswa Kafuku Kampala HCMA No. 81 of 1993** where the court stated;

“The judge in his direction may say expressly that he makes no order as to costs and in that case each party must pay his own costs. If he does not make an order as to costs, the general rule is that he shall order that the costs follow the event except where it appears to him in the circumstances of the case some other order should be made as to the whole or any part of the costs. But he must not apply this or any other general rule in such a way as to exclude the exercise of the discretion entrusted to him and the material must exist upon which the discretion can be exercised. The discretion, like any other must be exercised judicially and the judge ought not to exercise it against the successful party except for some reason connected with the case. It is not judicial exercise of the judge’s discretion to order a party who was completely successful and against whom no misconduct is even alleged to pay costs.”

10. In our instant suit, in explaining the reason for denial of costs to the appellant, the magistrate stated;

“Because the debtor is a school with a lot of debts ordering them to pay costs where clearly procurement rules were not followed would be punishing them further hence each party to bear its own costs.”

11. This conclusion by the trial magistrate is confounding and goes to the root of the question for determination in the suit before the trial court i.e whether the sums claimed were due and owing to the appellant. It is perplexing how the trial magistrate could make a finding that procurement rules were not followed and yet base liability on, to her, an irregular contract.

12. But I digress. I have not been invited to interfere with the findings in the overall outcome of the suit and I will therefore stick to the straight and the narrow and deal with the issue at hand; whether the costs were justifiably denied.

13. In my considered view, the reason given in the exercise of discretion was wrong and does not constitute a good reason for denial of costs within the meaning of **Section 27** of the **Civil Procedure Act**.

14. Under **Section 27** of the **Civil Procedure Act** the court shall have the full power to determine by whom and out of what property and to what extent costs are to be paid. If the trial magistrate had in her finding singled out any party who was culpable for the indebtedness the respondent found itself in, nothing would have been easier that to require such person or body of persons to personally bear the costs.

15. The indiscretions of officers of the respondent or other players in the subject school cannot be visited on the appellant by denying him costs.

16. In the end, I make a finding that by failing to award costs the trial court, for reasons above stated, fell into error.

17. I proceed to set aside the order on costs made by the trial court and substitute thereof an order awarding costs to the appellant at the Lower Court to be assessed in the usual manner.

18. The appellant shall have the costs of this appeal.

Dated, Signed and Delivered at Kisii this 13th day of May, 2020.

A. K. NDUNG’U

JUDGE