



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 75 OF 2019

THARUNI THAMBU KAIBATI.....APPELLANT

VERSUS

ANTHONY MWENDWA.....RESPONDENT

(An appeal from the ruling and order of Hon. G. Sogomo PM made on 30/5/2019 in the Tigania Misc. Succ. Cause No. 43 of 2018)

J U D G M E N T

1. By a Notice of Motion dated 4/2/2019 taken out under **Order 51 Rule 1 of the Civil Procedure Rules**, the appellant sought a Limited Grant to appoint the respondent the personal representative of the estate of the respondent's mother. The respondent raised a preliminary objection, *inter alia*, that the Motion was incurably defective.
2. By a ruling delivered on 30/5/2019, the trial Court upheld the objection and struck out the Motion with costs which it peremptorily assessed at Kshs.20,000/-. It is that part of the ruling that assessed the costs at Kshs.20,000/- that provoked the present appeal.
3. The appellant raised only one ground of appeal, that ***the trial Court erred in assessing the costs at Kshs.20,000/- without hearing the parties or having regard to the provisions of the Advocates Remuneration Order.***
4. The parties filed their respective submissions. The appellant submitted that ***section 27 of the Civil Procedure Act*** granted the Court discretion to make an order for costs. That the discretion in the said section does not extend to the Court assessing the costs without hearing the parties. That the computation of the costs has to be under ***the Advocates Remuneration Order, 2014.***
5. On his part, the respondent submitted that the general rule is that costs shall follow the event and is in the discretion of the court. The cases of **Amritral Bhamji Davda v. Abdi Ahmed & 2 others [1987] Eklr, Kenya Sugar Board v. Ndungu Githinji [2013] Eklr, Stanley Kaunga Nkarichia v. Meru Teachers College & another [2016]** and **Farah Awad Gullet v. CMC Motors Group Limited [2018] Eklr** were cited in support of those submissions. It was contended that the trial Court had properly exercised its discretion which should not be interfered with.
6. The single ground of appeal contests the exercise of discretion by the trial Court. In the case relied on by the respondent of **Stanley Kaunga Nkarichia v. Meru Teachers College & another [2016]**, Gikonyo J observed:-

“.. the law is that, the appellate court will not interfere with the exercise of discretion by a trial court on costs, except (1) where the discretion was not exercised judiciously or was exercised on wrong principles, or (2) where the trial court gives no reasons for the decision and the appellate court is satisfied that the decision is wrong; or (3) where reasons are given, the Appellant (sic) court considers those reasons not to constitute “good reason” within the meaning of section 27 of the Civil Procedure Act”.

7. In the celebrated case of **Mbogo & Another v. Shah [1968], E.A. 93**, the Court of Appeal held: -

“An appellate Court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate Court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been an injustice”.

8. In the present case, the trial Court exercised its discretion in ordering costs in favour of the respondent who had succeeded in the proceedings before it. However, the trial Court proceeded and assessed the quantum of the costs at Kshs.20,000/-. The question to be answered is whether in assessing the costs as it did, the trial Court was exercising the discretion given under ***section 27 of the Civil Procedure Act.***

9. **Section 27** aforesaid grants a Court discretion to determine *by whom and out of what property and to what extent such costs are to be paid*. The assessment of the quantum is given elsewhere. As properly submitted by Counsel for the appellant, the assessment is done under **Schedule 7 of the Advocates Remuneration Order**.

10. Under that provision, the officer assessing the costs is to be guided by certain known principles. Those principles are not to be found under **section 27 of the Civil Procedure Act**. In this regard, it would be difficult to ascertain the basis on which the trial Court arrived at the amount complained of Kshs.20,000/-.

11. Further, it was the appellant's complaint that the costs were assessed without the parties being given an opportunity to be heard. The operative part of the ruling reads, "**... the Applicant's Notice of Motion dated 13th November, 2018 fails in limine and for avoidance of doubt the same is struck out with costs to the respondents (sic) peremptorily assessed at Kshs.20,000/-**".

12. It is clear from the foregoing that; none of the parties had invited the Court to assess the costs; none of the parties were invited to address the Court on the quantum and above all, the trial Court did not give reasons why it assessed the costs at Kshs.20,000/-.

13. In view of the foregoing, I find that the trial Court exercised its discretion wrongly in assessing the costs and that exercise of discretion is amenable to be interfered with.

14. Accordingly, I allow the appeal and set aside the order assessing the costs payable by the Appellant at Kshs.20,000/- and direct that the costs be assessed in the normal manner. I also award the costs of the appeal to the appellant since he was wholly successful in the appeal.

It is so decreed.

DATED and DELIVERED electronically at Meru this 5th day of May, 2020.

A. MABEYA

JUDGE