



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

HCCA NO. 8B OF 2014

REGINA R. MUTHAWA.....APPELLANT

VERSUS

FELISTUS RUTH KIEMA.....1ST RESPONDENT

ELIZABETH MWENDE KITUKU.....2ND RESPONDENT

(Being an appeal against the judgment of A.S Lesootia (Acting SRM) in Kitui Civil Suit No. 193 of 2012)

JUDGMENT

1. The appellant was the plaintiff in the lower court suit who had sued the respondents (defendants) for **an order compelling them to sign withdrawal slips for accounts number KKIX 21812 – 0 at Post Bank, Kitui Branch so that all signatories could access the account.**

The plaintiff and the defendants were joint signatories to the above account which had a balance of Ksh. 18,000/=. The appellant had also sought for costs and interest of the suit.

2. The defendants failed to enter appearance and or file defence and interlocutory judgment was entered against them.

3. The defendant's application dated 15.4.13 by Notice of Motion seeking stay of execution and leave to file defence was dismissed with costs to the plaintiff.

4. The appellant being dissatisfied with the judgment of the court filed a memorandum of appeal dated on 11.2.14 setting out specific grounds.

1. "The learned Acting senior Resident Magistrate erred in law when he failed to note that the Appellant had incurred costs when he was prosecuting this case.

2. The learned Acting Senior Resident Magistrate erred in not considering that when interlocutory judgment was entered against the respondents in the suit, the Appellant had prayed in the plaint costs wherein the court proceeded and entered interlocutory judgment against the Respondents with costs.

3. The learned Acting Senior Resident Magistrate erred in not considering that the respondents after the interlocutory judgment entered against them, they filed an application in court for stay execution and leave to file defence the Appellant had incurred costs in opposing the said application, which was dismissed with costs to the Appellant.

4. The learned Acting Senior Resident Magistrate failed to note that the Appellant had to incur costs in respect of filing fees and service fees when he was prosecuting the suit against the respondents.

5. The learned Acting Senior Resident Magistrate erred in not considering his ruling dated 9.10.2013 that the respondent's application was dismissed with costs to the appellant and after the matter came up for formal proof ruled that costs of the suit be in the cause.

6. The learned Acting Senior Resident Magistrate erred when he delivered judgment / Ruling without awarding the appellant costs in the suit and not considering that the Appellant had engaged the services of a lawyer to take up instructions, draw pleadings file them and prosecute on behalf of the appellant.

7. That the appellant to file supplementary memorandum of appeal in court on receipt of certified copies of proceedings and judgment of the lower court.

Reasons wherefore the appellant prays that the Ruling/Judgment of the learned Acting Resident magistrate be reversed and / or set aside and this appeal on costs be allowed with costs.”

5. Further the appellants filed a supplementary memorandum of appeal on 28.5.2014 with the following grounds.

1) “*THAT the learned Acting SRM erred in not noticing that the money was brought cash in court and was not withdrawn from the Post Bank which money was shared amongst the parties.*

2) *THAT the learned Acting Senior Resident Magistrate erred in not giving the appellant a chance to explain about the case.*

3) *THAT the learned Acting Senior Resident Magistrate erred in recording the parties have agreed to withdraw the suit while the Appellant did not participate in the talk with the Respondents as to what led them to have agreed to withdraw the case which the respondents as to what led the to have agreed to withdraw the case.*

4) *THAT the learned Acting Senior Resident Magistrate averred in proceeding to mark the suit as withdrawn and recording that each party to bear its own costs.*

5) *THAT the learned Acting Resident Magistrate erred in not observing in his ruling that the Respondents were the ones who addressed the court during the hearing of formal proof instead of the appellant who was first to be given chance to address the court as the plaintiff in the suit.*

6) *THAT the learned Acting Resident Magistrate erred in not finding that the Appellant had uncured costs as disbursements in filing the suit, serving summons and other incidental cost.*

Reasons wherefore the appellant prays that the Ruling/Judgment of the learned Acting Resident Magistrate at Kitui be reversed and or set aside and this appeal be allowed with costs.

Submissions

Appellant’s submissions

6. The Appellant appeared in court on 14.12.15 to make oral submissions in addition to the written submissions dated 24.1.2015. It was in her written submissions that she had incurred costs in prosecuting the case, and that she had not agreed to the suit in the lower court being withdrawn and the respondents had misdirected the court stating they had already withdrawn the cash in Post Bank account. She urged the appeal be allowed with costs.

Respondents’ submissions

7. The respondents urged that the appellant on 22.1.2014 had informed the court that the money, which was the subject of the suit, had been equally shared and the suit was marked as withdrawn with each party bearing their own costs.

8. The appeal was on costs but since the appellant during formal proof had informed the court the money had been shared each party was to bear its own costs, and finally they urged the appeal to be dismissed.

Issues for determination

9. The court has referred to the memorandum, the supplementary memorandum of appeal and the issues for determination that arise are as follows:

a) Whether the matter in the lower court was validly withdrawn.

b) If so, whether the appellant was entitled to costs.

Determination

10. The court has referred to the plaint and the proceedings therein. The plaint dated 24.5.12 was filed on 31.5.2012. The issue in contention was an amount of money that was held in account KKIX 021812 – 0 Kitui Post Bank Branch. Interlocutory judgment was entered and the defendant’s application seeking leave to file defence was dismissed with costs. The appellant was asked to set down the matter for formal proof.

11. On 22.1.14 the matter came up before A.S Lesootia A.G SRM. The proceedings for the day were as follows:

“22.1.14

Before A.S.Lesootia Ag SRM.

CC- Janet

Plaintiff –Present

Defendant – Present

Plaintiff in person.

We have withdrawn the money that was in our Post bank account. . The money has been equally shared so we don't have any dispute among us. I therefore wish to withdraw the suit.

A.S Lesootia Ag SRM

Court- *The suit is hereby marked as withdrawn each party to bear its own costs.*

A.S LESOOTIA Ag S.RM.

4/2/14

Plaintiff's Bill of costs assessed at Ksh. 1,670/= on the application dated 15.4.13."

12. The appellant herself was present in court and from the court proceedings it is seen she had informed the court there was no dispute amongst them. There being no dispute between the parties, the case was properly marked as withdrawn. How then can the appellant urge that she was not given an opportunity to talk and say the side of her story yet she is the one who talked and informed the court?

13. The appellant's ground of appeal on the money being brought in cash was an allegation based on falsehood was immaterial as the point in contention was whether the money in the joint account should have been shared among the partners. It is the appellant who filed the suit and told the court on 22.1.14 money had been shared equally. The further ground of appeal that it's the respondents who had addressed the court during formal proof was not true. The record of proceedings set out above say otherwise. The appellant was in court and she cannot turn around and allege she did not address the court. I find the appellant was present in court on 22.1.14 for formal proof hearing.

14. During the hearing of the appeal, this court had issued orders on 28.10.15 that the manager to Post Bank Limited, Kitui Branch do produce a statement of Account No. KK1XOSS0218120, which was in the names of Felistus, Mwendu and Regina. Indeed as per the court order, a statement was issued which was dated 1.12.15. The account showed the transactions and on 27.04.11 it had Ksh.0.10 balance. This date 27.04.2011 was way back before the appellant had filed a suit in the lower court. Even before the suit commenced there was no money in the account and the orders being sought by the appellant would have been in vain if at all the matter had proceeded to formal proof on 22.1.14. How then could the respondents be compelled to appear before the manager, Kitui Post Bank Branch to sign withdrawal slips when there had been no money in the account as at 27.04.2011. I find there was no merit in the lower court suit.

15. I do agree with the respondent's highlighted submissions that there was no money when the appellant filed the suit on 26.5.2012. In fact the appellant herself had referred to the bank statement dated 1.1.15. The respondents had urged that the appellant had asked the three of them to withdraw and share the money. The appellant had received 6,000 which she had agreed and she had further stated that she did not have any claim on the Ksh18,000/=. This implies the lower court matter could not stand, it did not have a foundation. A suit filed without a reason to complain cannot support a claim for costs for filing upon withdrawal. The appellant simply did not have to file the suit as she had no cause of action, and having so filed without a cause action, she opened herself to being mulcted in costs herself for dragging the defendants to court for no reason, and she was lucky that the trial court allowed the withdrawal with no order as to costs.

16. Further the appellant had urged she be awarded costs. On 14.12.15, this is what she stated when she highlighted in her written submission.

"Appellant

We filed submissions on 14.1.15. Respondents filed on 16.12.14. I have also the statement of account dated 1.12.15. I also pray for costs. I refer letter dated 30.3.10 by J. Kiptoo Branch Managers of Post Bank Kitui.

I did not go to the Bank to withdraw the money and I did not sign any papers. My claim in the appeal is for my costs assessed at 1,670."

17. The appellant informed the court her appeal was on costs. Back to the proceedings of the lower court, the matter was marked as withdrawn and each party to bear its own costs.

This implied that the issue on costs could not arise. However the appellant drew her bill of costs which is dated 29.1.14. It was assessed at Ksh.1,670/= and on 4.2.14 the court stated as follows:

"4/2/14

Plaintiff's Bill of costs assessed at Ksh. 1,670/= on the application dated 15.4.2013."

The above taxation had no basis since the court had marked the matter as withdrawn and each party to bear its own costs. The costs were assessed and awarded in error.

18. As a matter of technical legal point, there was no occasion for entering an interlocutory judgment as this was not a liquidated demand. The appellant/plaintiff at paragraph 6 of the Plaint dated 26/5/2012 had pleaded as follows:

*"The plaintiff claim against the defendants therefore is for an order compelling the defendants to sign withdrawal slips for accounts number **KKIX 21812 – 0** at Post Bank Kitui Branch to enable all signatories access the accounts."*

19. The power to enter interlocutory judgment only arises in cases of a liquidated demand as provided for under Order 10 Rule 4(1) & (2) as follows:

"Judgment upon a liquidated demand.

4. (1) Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.

(2) Where the plaintiff makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.

Orders

20. Accordingly, for the reasons set out above, the court makes the following order:

1. The appellant's appeal set out in the Memorandum of Appeal dated 11.2.14 and the Supplementary Memorandum of Appeal dated 28.5.14 is dismissed.
2. There shall be no order as to costs.

Order accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 3RD DAY OF DECEMBER 2018.

G.V. ODUNGA

JUDGE

Appearances:-

Appellant Regina R. Muthawa in person

Respondents: Felistus Ruth Kiema & Elizabeth Mwendu Kituku in person.