



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 66 OF 2009

LOCAL AUTHORITIES PROVIDENT FUND.....APPELLANT

VERSUS

JOSEPH NJOGU GATHU.....1ST RESPONDENT

COUNTY COUNCIL OF NYERI.....2ND RESPONDENT

(Being an appeal from the Ruling/Order of the Principal Magistrate, Hon. E.J. Osoro (Mrs) delivered on 28th May, 2009)

In the Nyeri Chief Magistrates Chief Magistrate's Court Civil Case No. 122 of 2008

Between

JOSEPH NJOGU GATHU.....PLAINTIFF

VERSUS

COUNTY COUNCIL OF NYERI.....1ST DEFENDANT

LOCAL AUTHORITIES PROVIDENT FUND.....2ND DEFENDANT

JUDGMENT

The appellant together with the 2nd respondent were sued by the 1st respondent in the magistrates' court for the sum of Kshs. 426, 366.60 together with compound interest at 3% per month until payment in full. The plaintiff also sought for costs of the suit and interest thereof.

Both the defendants filed their respective statements of defence and denied the plaintiff's (the 1st respondent's) claim. The appellant went further and filed a statement of indemnity or contribution against the 1st defendant (the 2nd respondent).

It is worth noting that the suit against the plaintiff was preceded by his counsel's letter dated 22nd February 2008 notifying the defendants that if they did not settle the plaintiff's claim within a specified time a suit was going to be lodged against the defendants jointly and severally, for recovery of this claim.

The record shows that while the suit was pending for hearing the appellant made a payment of Kshs. 737,868.65 in satisfaction of the plaintiff's claim; however, the appellant declined to bear the costs of the suit insisting that they should be borne by plaintiff. Since parties could not agree on who should bear the costs the court directed them to file submissions on this issue and in its ruling delivered on 28th May, 2009 the court held that the defendants should bear the costs, jointly and severally. In holding as it did, the court noted that having been paid after the suit was filed, the plaintiff was the successful party and since the costs follow the event, the plaintiff was entitled to costs which in the circumstances, were payable by the defendants or by either of them. It is this decision that the appellant is aggrieved with and against which it has appealed; in its memorandum of appeal, the appellant has raised the following grounds:-

- 1) That the learned magistrate erred in law and in fact in entering judgment for the 1st respondent against the appellant with costs.
- 2) That the learned magistrate erred in law and in fact in disregarding the appellant's evidence.
- 3) That the learned magistrate erred in law and in fact in disregarding the appellant's submissions.
- 4) That the learned magistrate erred in law in condemning the appellant to pay costs whereas the facts, evidence and law demonstrated that the 2nd respondent was liable to pay the same.
- 5) That the learned magistrate erred in fact and in law in failing to follow the procedure as laid down in law.
- 6) That the learned magistrate erred in fact and in law in failing to follow the laid down principles of law.
- 7) That the learned magistrate erred in fact and in law in misdirecting himself (sic) on the law.
- 8) That the learned magistrate erred in fact and in law in failing to conduct the trial or hold proceedings as required in law.

Parties agreed to have the appeal disposed of by way of written submissions and they took directions to that effect; they subsequently filed and exchanged their respective written submissions pursuant to those directions. I have considered the grounds of appeal set forth by the appellant and parties' arguments in respect of those grounds and in my humble view, the only question whose determination should dispose of this appeal is whether the plaintiff was entitled to costs and if so whether the learned magistrate was correct in condemning the defendants to pay those costs. Although the second limb of this question dominated the submissions by the respective parties and thus deserve more attention in this judgment the two limbs are largely intertwined and can conveniently be determined together.

Section 27 of the Civil Procedure Act, (Cap. 21) deals with this whole question of costs arising within or as a result of a civil suit. According to this provision of the law, the award of the costs to any party, the extent of such costs and who between the contesting parties ought to bear the burden of the costs are amongst questions whose determination is influenced by the discretion of the court or judge; it states:-

27. Costs

(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.

Halsbury's Laws of England (Civil Procedure Volume 11 (2009), 5th Edition, Para 1738 at page 321 reiterates that the court has discretion as to whether costs are payable by one party to another, the amount of those costs and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him and that the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice.

It has been held that the discretion is not exercised judicially where costs are ordered against a party who has been completely successful and is guiltless of any misconduct. (**See *Kierston v Joseph L Thompson & Sons Ltd* [1913] 1 KB 587, CA**). This appears to be the rationale behind the proviso to **section 27** of the Act that the exercise of the court's discretion on making of any order on the award of costs is subject to the principle that costs will always follow the event unless for good reason the court orders the contrary.

The principle that 'costs follow the event' or 'costs abide the event' is defined in ***Black's Law Dictionary Standard 9th Edition*** as costs incurred by a successful party who is therefore entitled to those costs incurred at the conclusion of a matter.

The question whether or not to pay costs either because a claim has been contested or not or whether a successful party is entitled to costs has been considered in several decisions before. In ***Laxmibai versus Radhabai* (1917), 42 Bom. 327**, a decision cited with approval in ***Wambugu versus Public Service Commission* (1972) E.A 296**, was a case between two women both of whom claimed to be widows of one person. The defendant is said to have lost throughout but the trial judge, regarding the plaintiff to be more at fault, ordered the costs to come out of the estate. On appeal, the High Court upset this order as a violation of the established principle that, in the absence of misconduct, a successful party must not be burdened with costs of the unsuccessful party.

There is no doubt that the plaintiff was the successful party in the suit against the appellant and its co-defendant. His pleadings in the magistrates' court shows that he demanded from the defendants payment of his retirement benefits upon retirement from the service of the 1st defendant. He notified them that if they refused, neglected or otherwise failed to pay him as demanded, he would institute recovery proceedings for what he thought was his rightful dues. A suit was subsequently filed and as noted, the defendants filed their respective defences denying the plaintiff's claim. Despite this denial, the appellant settled the whole of the plaintiff's claim during the pendency of the suit.

In these circumstances the court was bound by the general rule that where it decides to make an order about costs the unsuccessful party will be ordered to pay the costs of the successful party. I appreciate that when making an order on costs the court must take into consideration all the circumstances including, for instance, the conduct of the parties, before and during the proceedings, and whether it was necessary to institute the suit in the first place or raise, pursue or contest a particular allegation or issue. The court may also consider whether a party has wholly or partly succeeded in his case or the manner he has proved or defended his case, a particular allegation or issue. All these factors are a necessary consideration particularly if the court has to deviate from the norm and make an order different from the general rule.

As far as this appeal is concerned I have not seen anything, and none was shown to me, in the plaintiff's conduct, before and in the course of the proceedings that would deny him his costs. Neither was it demonstrated that the plaintiff's suit was unnecessary taking into account that he had alerted the appellant that he would sue for recovery of his claim if it was not settled within a specified period. The facts are also clear and it is not disputed his whole claim and not just part of the suit succeeded. In the words of **section 27** of the Act, there is no 'good reason' for the magistrates' court not to have awarded the plaintiff his costs and ordered the appellant and its co-defendant to pay them. I am constrained to disagree with the appellant that the plaintiff was not entitled to costs or that he should have borne them if the court was inclined to make an order for costs. I do not find any merit in any of the grounds of the appeal and I hereby dismiss the appeal with costs to the 1st respondent. Orders accordingly.

Dated, signed and delivered in open court this 10th July, 2015

Ngaah Jairus

JUDGE