



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 71 of 2003

Editorial Summary

1. *Civil Appeal*
2. *Finalized appeal*
3. *Subject of original appeal Case*

LANDOWNERSHIP

- 3.1 *Business Plot 186 Ongata Rongai*
- 3.2 *Residential Plot 817 Ongata Rongai*
- 3.3 *Original suit:*
 - Dispute on allocation of land by County Council*
 - of Olkejuado between two parties*
 - Original plaintiff – respondent*
 - Original 1st defendant – appellant*
 - Original 2nd defendant – Party to No. 1 suit.*
- 3.4 *Trial magistrate decision held that ownership of land belongs to plaintiff.*
- 3.5 *Costs awarded to plaintiff to be paid by defendant one and two.*
- 3.6 *Defendant No. 1 appeals to the High Court.*
- 3.7 *High Court upholds decision of Hon. Magistrate*

- 3.8 *Appeal dismissed with costs to original plaintiff/
respondent in both courts.*
- 3.9 *Parties at taxation stage.*
- 3.10 *2nd respondent original 2nd defendant opposes
issue of costs.*
- 3.11 *Requests Deputy Registrar to place file before
court.*

4. *Costs*

A) *Arguments by 2nd defendant/2nd respondent:*

- i) *Whereas named in the appeal – did not wish
to appeal.*
- ii) *Costs be paid by 1st appellant/1st defendant
at High Court.*
- iii) *Costs in magistrate's court not disputed.*

B) *Arguments by Respondent/Original Plaintiff*

- i) *Costs part of judgement*
- ii) *Option is to challenge the same on appeal.*

C) *Arguments by Appellant/Original Defendant No. 1*

i) *Costs be borne by both
appellants.*

5. *Held:*

- i) *2nd appellant never appealed.*
- ii) *Should have been 2nd respondent*
- iii) *Costs to be paid by 1st appellant to respondent.
2nd respondent to be paid no costs nor to pay*

costs.

6. *Case Law:*

Nil

7. *Advocates :*

- i) *J. O. Awele instructed by Oraro & Co Advocates for
1st appellant.*
- ii) *M/s M.M. Kinyanjui instructed by Kantai & Co Advoctes
for 2nd appellant*
- iii) *M/s C. Muriithi instructed by Muriithi & Co Advocates
for respondent/original plaintiff*

**KIMONDO MUTAMBUKI & ANOTHERAPPELLANTS/ORIGINAL
DEFENDANTS**

VERSUS

KENNEDY MURIIRA RESPONDENT/ORIGINAL PLAINTIFF

J U D G M E N T

I. INTRODUCTION

1. This is a finalized appeal. The judgment of this High Court was determined on the 20th June 2012. Parties appeared before the deputy registrar for taxation on the 6th August 2012, when one of the parties requested that this file be placed before the Hon. Judge to deal with the issue of costs.
2. The issue being whether costs should be paid by the 2nd appellant who never appealed to the High Court but participated in the appeal?

II BACKGROUND

3. The original suit in the magistrate's court dealt with land ownership. A dispute on land allocation arose on Land Business Plot 186

Ongata Rongai and Residential Plot 817 that had been allegedly allocated by the County Council of Olekejuado between the two parties being original plaintiff/respondent in the appeal and original

1st defendant/appellant No. 1 in the appeal.

4. After trial, the Hon. Magistrate held that the ownership of the land belonged to the original plaintiff/respondent. Further orders as to costs was that the original 1st and 2nd defendant, who are the 1st and

2nd appellants herein, were to pay costs to the original plaintiff/respondent.

5. Being dissatisfied with this decision, only the original 1st defendant appellant No. 1 filed appeal but named the appellant No. 2 original

2nd defendant.

6. When the appeal was heard, the two appellants participated fully in the appeal.

7. In its judgment, this court upheld the decision of the Hon. Trial Magistrate.
8. Costs was awarded to the respondent/original plaintiff in both counts. This was to be paid by both the 1st and 2nd appellant.
9. The 2nd appellant objected to this on grounds that they never appealed against the decision of the magistrate.

III ISSUE

10. Should the 2nd appellant who never appealed the decision of the magistrate's court but fully participated in the appeal be made to pay the costs?

IV SUBMISSIONS

11. The 2nd appellant argued that as they never filed appeal, they should not be bound to pay the costs. This costs should be borne wholly by the 1st appellant/original 1st defendant at the bench of the High Court.
12. The costs in the magistrate's court was not disputed.
13. The respondent original plaintiff stated that the issue was a matter of appeal to the court of Appeal and does not lie with the court as the costs is part of the judgment.
14. There was full participation in the appeal by the 2nd appellant. The issue of costs had not been raised even after judgment was read.
15. The appellant No. 1 supported the arguments put forward by the respondent. That the costs be borne by both appellants.

V OPINION

16. The issue of costs in the magistrate's court is not disputed. The trial magistrate made orders that the costs in that court be borne by both appellant one and two original defendant No. 1 & 2.
17. Where costs are being questioned in the High Court or magistrate's court, the Hon. Judicial Officer is required to settle this issue.
18. I do not think that it is a matter to go on appeal but it is a matter to be dealt with under Order 21 r 8 Civil Procedure Rules. This rule deals with the approval of a decree and its settlement where disagreement arises. Costs is part and parcel of a decree.
19. The applicant or any party is required to file a draft decree marked as "for settlement." The registrar is required to list the matter before the Judge who heard the matter.
20. I was not presented with a draft decree "to settle". (It is hoped in future that the deputy registrar places such draft decree marked "for settlement" before the Judge to settle)
21. If the court would ask the question as to whether the appeal had been successful would both appellants one and two have been awarded costs? The appellant No. 2 was non committal on this point but would have argued rigorously that he be awarded costs of the appeal too.
22. Whereas the 1st appellant did indeed file the appeal, the 2nd appellant was enjoined to the appeal. All along the 2nd appellant supported the 1st appellant's case. Arguments before this court began

with the words, “I support the submissions by the 1st appellant”. Further submissions were made in the support of having the trial magistrate’s decision set aside.

23. Upon the submissions by the respondent, further submission in reply were extensively made by both appellants.

24. I am of the opinion the 2nd appellant should have raised the issue of costs during the submission on appeal.

25. What went wrong herein is that the 2nd appellant should have never been made the 2nd appellant in this appeal. This is because he never filed nor appealed. He should have been named the 2nd respondent together with the plaintiff as the 1st respondent. That way, the issue of costs would have been clear.

26. The 1st appellant bears the plaintiff’s costs. The 2nd appellant would not bear the respondent/plaintiff’s cost. If the appeal had been successful, the 2nd appellant would not have been awarded the costs in the appeal as he indeed did not appeal.

27. I would therefore come to the conclusion and settle the decree on the issue of costs under Order 21 r 8 Civil Procedure Rules as follows:

“- The appellant No. 1/original 1st defendant bears the costs of this appeal to be paid to the respondent/original plaintiff.

- **The appellant No. 2/original 2nd defendant would not bear the costs in the appeal neither would he be paid any costs in the High Court on appeal.**
- **The appellant one and two/original defendant one and two are to both bear the costs to be paid to the plaintiff in the magistrate’s court.**
- **Those are my orders.”**

DATED THIS 1ST DAY OF NOVEMBER 2012 AT NAIROBI

M.A. ANG’AWA

JUDGE

Advocates:

- i) *J. O. Awele instructed by Oraro & Co Advocates for
1st appellant.*
- ii) *M/s M.M. Kinyanjui instructed by Kantai & Co Advocates
for 2nd appellant*
- iii) *M/s C. Muriithi instructed by Muriithi & Co Advocates
for respondent/original plaintiff*