



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND ACT AT MURANGA

ELCA NO. 17 OF 2018

GITHAIGA GATHAIGA.....APPLICANT

VERSUS

EPHRAIM MUGACHA THUO T/A

THOME BATA WHOLESALERS.....RESPONDENT

RULING

1. What is before me is the application dated the 15/10/18 by the Respondent seeking the award of costs on appeal as well as interest on costs since the date of the judgment. The background of this case is that Judgement was given on 13/6/12 in favour of the Plaintiff (now Respondent). The Defendant was ordered to pay the Plaintiff Kshs 200,000/- being the decretal amount, costs and interest at Court rates.

2. Aggrieved by the decision of the lower Court (being an appeal against the decision of SPM A K Kaniaru in SPMCC No 13 of 2007), the Appellant filed a notice of appeal on the 3/12/2012. It would appear that the appeal was not prosecuted until 2017 when it came before the Appellate Judge Hon Waweru on Notice to show cause (NTSC) dated the 11/08/2017. After hearing the submissions of the parties in respect to the NTSC, the Hon Judge admitted the appeal for hearing pursuant to section 79B of the Civil procedure Act and made the following orders;

“The Appellant shall file and serve the record of appeal within 45 days of today. In default the appeal shall stand dismissed without necessity of any further orders but with liberty to apply in respect to costs.”

3. It is clear that the Court did not make a determination on the issue of costs but the parties were at liberty to apply.

4. The Appeal was transferred to the ELC Court on the 21/5/18. On the 27/9/18 the Honourable Court noted on record that the appeal stood dismissed as at the 26/11/17 pursuant to the orders of the Hon Justice Waweru cited in para 2 above. The Court observed that there was therefore no appeal before the Court for determination.

5. This prompted the instant application.

6. According to the record, the Memorandum of Appeal was filed on 30/11/17 however, the receipt of payment is dated the 6/2/18. The assessment of the Record of appeal is countersigned by a Mr. Jaoko and dated the 6/2/18. It is doubtful that the documents were assessed after they had been filed on the 30/11/17. The correct inference is that the record of appeal was filed on the 6/2/18, about 4 months out of time. Even if it were to be taken that it was filed on 30/11/17, it would still have been filed out of time in disobedience to the orders of the Hon Justice Waweru. The record should have been filed on the 26/11/17 and that is the date the Court observed that the appeal stood dismissed from that date.

7. In response to the application, the Respondent has filed grounds of opposition anchored on inter-alia that the Court did not make any orders for costs on the 27/9/18. The Appellant passed away on the 23/9/14 and therefore the appeal has abated by operation of law. He has annexed a death certificate to that effect. That no substitution took place within a period of one year and that the Court cannot give orders against a dead person and urged the Court to dismiss the application. One wonders how the record of appeal was filed in 2017, 2 years after the demise of the Applicant. If the Appellant died in 2014, who instructed the advocate in 2017 to file the record of appeal in the absence of the client or a substitute. The Appellants advocate has not addressed the Court on this.

8. I have read and considered the application and the submissions of the parties and the only issue for determination is whether costs and interest are payable.

9. It is trite that a successful litigant is entitled to costs of the suits. It is also trite that costs follow the event. Section 27 of the CPA provides thus;

(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.

10. In the case of **Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited (1970) EA 469** the Court held that;

“The principle that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interests from the date of filing suit. Where, however, damages have to be assessed by the Court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of the judgment.”

11. I need not belabor the issue that costs follow the event. The Applicant was the successful party in the lower Court and costs and interest at Court rates. It is submitted that the decretal amount was settled. The only issue is the costs of the appeal. According to the proceedings, the appeal had suffered inaction for a while and that explains why the Court on its own motion issued a notice to show cause. Even after the Court granting the Appellant 45 days to file the record of appeal in 2017, it would appear that he was long dead in 2014 according to the death certificate on record. The conduct of the Appellant and his counsel leaves a lot to be desired. There was no substitution. Be that as it may the Court made a decision whose effect was that the appeal stood dismissed by the 26/11/17.

12. In the case of **Basani Kaur Vs Rattan Singh CA of East Africa CA No 95 of 1952**, the Court held that costs may be awarded against the estate of a deceased Appellant where the cause of action has abated. This suit abated on 23/9/15. The costs if granted shall be chargeable to the estate of the Appellant.

13. This Court guided by the principles set out above is inclined to grant costs and interest at Court rates to the Respondent from the date of the judgment.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 25TH DAY OF APRIL 2019

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Appellant: Absent. Advocate is absent.

Wandaka HB for Kimwere for the Respondent.

Kuiyaki and Njeri, Court Assistants