

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELCLA E015 OF 2024

JOHNSON OMARIBA ..... 1<sup>ST</sup> APPELLANT

NEHEMIAH OMARIBA ..... 2<sup>ND</sup> APPELLANT

ZEPHANIA OMARIBA ..... 3<sup>RD</sup> APPELLANT

DANIEL OMARIBA ..... 4<sup>TH</sup> APPELLANT

VERSUS

JOSHUA MONGARE OMWENGA ..... RESPONDENT

JUDGMENT

(Being an appeal against the judgment of Hon. S.N. Abuya , Chief Magistrate, delivered on 17 April 2024 in the suit Kisii MCELC No. E071 of 2022. Appeal being on the issue of costs)

*(Respondent filing suit against the appellants for a plot of land said to have been co-owned by himself and father of the appellants; appellants being nephews of the respondent; suit of respondent dismissed as appellants had no capacity to represent the estate of their deceased father; suit dismissed with order for each party to bear their cost since they were close relatives; appeal filed on costs with appellants urging that they deserved the costs since case was dismissed; costs in the discretion of court; court not persuaded that the trial Magistrate wrongly exercised her discretion; appeal dismissed with no orders as to costs)*

1. The background to this appeal is that vide a plaint dated 12 October 2022, the respondent sued the appellants claiming that he is entitled to half the Plot 19A Kegogi Market, which he identified as Plot 19C. He also wanted the appellants evicted from this plot and permanently restrained from it. The appellants filed defence wherein they pleaded that the Plot 19A was owned by their father Alfayo Omariba who was deceased. They otherwise denied that the respondent was entitled to half the Plot 19A as claimed. Though they pleaded that the plot was owned by their deceased father, they did not plead that they had no capacity to be sued.
2. The matter proceeded for hearing with the respondent calling five witnesses and the appellants calling eight witnesses. The judgment was delivered on 17 April 2024. In her judgment the trial Magistrate held that the appellants had no capacity to be sued as it was never demonstrated that they were legal representatives of Alfayo Omariba under whose

name the Plot 19A was registered. She thus found no need of going into the merits of the suit. She found the suit fatally defective and she dismissed it. On costs she ordered each party to bear their own costs “as they were close relatives.”

3. This appeal is against that order on costs.
4. Within the grounds of appeal, it is raised that the trial court failed to address her mind on the principle of awarding costs to the winning party; that the order oppressed the appellants as they were deliberately sued by the respondent; that some of the appellants incurred a lot of money travelling from Mombasa and Nairobi to Kisii; that the trial court had requested the parties to reconcile which the respondent declined; and that the issue of close relatives could not arise during judgment.
5. I directed the appeal to be dispensed through written submissions. I have seen the submissions of Mr. Sagwe, learned counsel for the appellants. Counsel for the respondent did not file any submissions. I have given the appeal due consideration.
6. The issue of costs is addressed in Section 27 of the Civil Procedure Act, Cap 21, Laws of Kenya, which provides as follows :

*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.*

*(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.*

7. From the foregoing, I can flesh out three directions regarding costs, being :
  - (i) The costs of and incidental to all suits shall be in the discretion of the court or judge,
  - (ii) 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;

(iii) 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.

8. So first, we must appreciate that costs are in the discretion of the court though the court is guided in the proviso that costs need to follow the event unless the court for good reason otherwise orders.

9. This question regarding discretion on costs was extensively analysed by the Supreme Court in the case of *Rai & 3 others v Rai & 4 others (Petition 4 of 2012) [2014] KESC 31 (KLR) (4 March 2014) (Ruling)* where the court affirmed the principle that costs are in the discretion of court. The Supreme Court pronounced itself as follows :

*It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. (emphasis mine).*

10. It will be seen that this is a discretion and it is now settled that an appellate court would not normally interfere with the exercise of discretion. In *United India Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd (1985) EA 898* Madan J.A commented as follows at page 908:

*“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established : first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”*

11. In the case of *Joseph Oduor Anode v Kenya Red Cross Society (Nairobi High Court Civil Suit No. 66 of 2009) [2012] KEHC 3607 (KLR) (28 June 2012) (Ruling)*, Odunga, J held that : *“The first point of reference, with respect to the exercise of discretion is the guiding principles provided under the law. In matters of costs, the general rule as adumbrated in the aforesaid statute (the Civil Procedure Act) is that costs follow the event unless the Court is satisfied otherwise. That satisfaction must, however, be patent on record. In other*

*words, where the Court decides not to follow the general principle, the Court is enjoined to give reasons for not doing so. In my view it is the failure to follow the general principle without reasons that would amount to arbitrary exercise of discretion and not the other way round.”*

12. In our case, the trial Magistrate opted to depart from awarding costs to the appellants on the ground that the parties were close relatives. I see nothing wrong with that. She had the discretion to award costs and she gave reasons for departing from the general rule that costs follow the event. The relation of the parties can be a material consideration that the court may take into account so as to deviate from the general rule that costs follow the event. Indeed, the evidence tendered showed that the appellants are nephews of the respondent i.e sons to his deceased brother. That close relationship was a genuine consideration in determining the issue of costs. It is of course not every case where parties are relatives that costs will not be awarded; at the end of the day it is discretion. One court may decide to make the award of costs despite the parties being relatives, and another court may not. It is all discretion. In our case, the court in exercise of its discretion considered the relationship as a valid factor for not awarding costs. I am unable to fault the trial court in coming to that conclusion. It was a genuine and valid exercise of discretion.
13. It is mentioned that the respondent rebuffed efforts to settle the matter but I have seen nothing of the sort in the record. I have also not seen any record of a witness from Mombasa. The furthest witness is one who said that he resides in Nairobi but I observe that he testified virtually. But even if it ended up being as claimed in this appeal, it still wouldn't change the fact that the court utilised its discretion on the award of costs. I therefore see nothing on the grounds of appeal to disturb the findings of the trial court.
14. For the above reasons I do not find merit in this appeal and it is dismissed.
15. Yet again, given that the parties are close relatives, and in exercise of my discretion, there will be no orders as to costs.
16. Judgment accordingly.

DATED AND DELIVERED THIS 11 DAY OF NOVEMBER 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Sagwe for the appellants

N/A on part of M/s Maosa & Co for the respondent

Court Assistant – Michael Oyuko.