



REPUBLIC OF KENYA



KENYA LAW
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**Muli v Pan Africa Chemicals Ltd (Civil Appeal 236 of 2018)
[2023] KECA 573 (KLR) (26 May 2023) (Judgment)**

Neutral citation: [2023] KECA 573 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 236 OF 2018
F SICHALE, FA OCHIENG & LA ACHODE, JJA
MAY 26, 2023**

BETWEEN

DOMITILAR MUENI MULI APPELLANT

AND

PAN AFRICA CHEMICALS LTD RESPONDENT

*(An Appeal from the judgment of the High Court of Kenya at Nakuru
(Mulwa, J.) dated 4th October, 2018 in HCCA No. 102 of 2014)*

JUDGMENT

1. The appeal before us relates to only one issue; and that is whether or not the High Court had erred when it ordered that each of the parties would meet their own costs of the appeal.
2. The learned Judge had allowed the appeal which had been lodged by the appellant herein. However, as regards the costs thereof, the court expressed itself thus;

“For the above reasons I allow the appeal, but due to the peculiar circumstances and upon my discretion make an order that each party bears own costs of the appeal.”
3. The appellant expressed the view that the decision amounted to an;

“... injudicious application of discretion, to the appellant’s detriment.”
4. On the other hand, the respondent was convinced that the learned Judge had taken into account the conduct of the parties, together with the evidence which had been provided. Therefore, the respondent concluded that the court had not exercised its decision injudiciously.



5. It is common ground that the applicable statutory provision is section 27 of the *Civil Procedure Act*, which provides as follows:

“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 at 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.”

6. A plain reading of that provision is that ordinarily, costs shall follow the event. In other words, the party who was successful in a case should, usually, be awarded the costs of the said case.
7. However, the court has the discretion to depart from that position. But in the event that the court should choose to exercise its discretion by departing from the norm, it may only do so for good reason.
8. In this instance, the learned Judge based her decision upon “the peculiar circumstances.” It was the submission of the respondent that, even though the Judge allowed the appeal, that was;

“... purely out of the efforts and initiative of the Court, with very little or not much input from the parties or their counsel.”

9. At paragraph 15 of the judgment, the learned Judge had expressly stated that;

“Neither counsel have been of much help.”

10. First, it is to be noted that the learned Judge did not make reference to the parties. The persons who were said to have been of little help are the advocates. Notwithstanding the dearth of help, the court set aside the “grossly and inordinately low” award of Kshs. 500,000/- in respect of future medical expenses, and awarded Kshs. 2,500,000/-.
11. We find that the success of the appeal can only have been possible because there was sufficient material which the appellant had made available to the court.
12. According to the respondent, the Court of Appeal ought only to interfere with the decision if it is demonstrated that the court from whose decision the appeal arose, had exercised its discretion in a manner that was plainly wrong.
13. The appellant shares the same view. Citing the decision in *Parliamentary Service Commission vs Martin Nyaga Wambora & Others* [2018] eKLR, the appellant invited us to adapt the following words;

“For myself I like to put it in the words, that a Court of Appeal should not interfere with the exercise of discretion of a Judge

unless it is satisfied that the Judge misdirected himself in some matter and or as result arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge had been clearly wrong in the exercise of his discretion and that as a result there had been misjustice.”



14. We note that it is well settled that where a Judge has exercised his discretion on the question about which party is to be awarded costs, the discretion is unimpeachable unless it is shown that he had either taken into account irrelevant factors, or that he had failed to take into account some relevant factors.
15. Pursuant to section 27 of the Civil Procedure Act, costs ought, normally, to follow the event, unless the court directs otherwise, for good reason.
16. The respondent quoted the following words from “Halsbury’s Law of England”, 4th Edition [2010] Vol. 10 paragraph 16;

“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 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.”
17. The costs in issue are those payable by one party to another party. We believe that that is why, ordinarily, costs follow the event; so that a successful party would expect to be awarded costs.
18. When the respondent attributes the “poor performance” by the advocates as a justifiable reason to deprive a successful appellant his costs, we find that is a misdirection.
19. The costs of the appeal were not payable to the appellant’s advocate. The costs would be payable to the party, unless there was good reason to deprive the said successful party.
20. We find that the learned Judge did not put forward a good reason, that could warrant the order to deprive the successful party of costs.
21. Accordingly, we find merit in the appeal, and we now set aside the order directing each party to pay his own costs of the appeal. The said order is substituted with an order directing the respondent to pay to the appellant, the costs of the appeal at the High Court.
22. We further order that the respondent to pay to the appellant, the costs of this appeal.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF MAY, 2023.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed



DEPUTY REGISTRAR

