REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 106 OF 2016

BETWEEN

DAVID MWANGI MUIRURI.....APPELLANT

AND

ALI BAKARI MOHAMMED.....RESPONDENT

(Being an appeal against part of the Judgment and Orders of the High Court of Kenya at Malindi, (S. Chitembwe, J.) dated and delivered on 21st September, 2016

in

H.C.C.A. No. 54 of 2013)

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JUDGMENT OF THE COURT

1. The respondent filed two identical but consecutive suits before the Resident Magistrates' Court at Malindi against the appellant for alleged defamation. The first of these suits was Malindi CMCC No. 223 of 2012 while the latter was Malindi CMCC No. 19 of 2013. Before the first suit could be heard, the appellant successfully moved the court and had it struck out for failing to disclose a cause of action. Undeterred, the respondent filed the second suit, which was premised on similar facts as the first.

2. In opposition, the appellant raised a preliminary objection to the latter suit, contending that the same was *res judicata* the first suit and should be dismissed. The court upheld that objection and dismissed the suit with costs to the appellant. Convinced that he had a merited case against the appellant, the respondent once again moved the court in the latter suit; this time vide an application dated 3rd October, 2013 seeking *inter alia* the following orders:

> *"(i) That the orders dismissing the Plaintiff/**Applicant's suit be varied, reviewed and/or set aside.***
>
> ***(ii) That the Plaintiff/ Applicant's suit be reinstated for hearing on it's** (sic) **merits."***

The application was opposed through the grounds of opposition dated 10th October, 2013. In support of the application, the respondent contended that there was an error apparent on the face of the record, that he had a merited case as the defamation upon which his action was founded was evident from the sworn affidavits filed by the appellant in Malindi HCCC No. 27 of 2012 and that it was only just and fair that his case is reinstated and heard on merit. For the appellant, it was contended that the suit was irredeemable, an abuse of court process and that the same was rightly struck out.

3. Upon hearing submissions from both parties, the learned trial magistrate, **Y.A Shikanda (Mr.)** delivered his Ruling on 16th December,

2013. In his findings, the magistrate reiterated that Malindi CMCC No. 19 of 2013 was *res judicata* Malindi CMCC 223 of 2012 and that the former suit had been struck out for failing to disclose a cause of action. He further held that though an affidavit is not a pleading the statements uttered in affidavits are nonetheless privileged and cannot found an action in defamation. Consequently, he deemed the application to be without merit and dismissed it with costs to the appellant.

4. Dissatisfied with that decision, the respondent lodged an appeal before the High Court at Malindi, being HCCA No. 54 of 2014. The grounds of that appeal were given as follows:-

> ***"(a) That the learned magistrate errored*** *(sic)* ***in both law and fact by holding that Malindi CMCC No. 19 of 2013 is res judicature*** *(sic)* ***Malindi CMCC No. 223 of 2012.***
>
> ***(b) That the learned trial magistrate errored*** *(sic)* ***in both law and fact by holding that any defamatory material filed in court cannot give cause of action*** *(sic).*
>
> ***(c) That the learned magistrate errored*** *(sic)* ***in the interpretation of section 7 of the Civil Procedure Act.***
>
> ***(d) That the trail*** *(sic)* ***magistrate failed to appreciate the rights of litigates*** *(sic)* ***by according the appellant herein with an opportunity to ventilate his case on merits.***
>
> ***(e) That the learned magistrate failed and/or misdirected his minds*** *(sic)* ***that the appellant is not a party to Malindi HCCC No. 27 of 2012."***

On the basis of the above, the court was asked to set aside the trial magistrate's findings and reinstate the respondent's suit for hearing on merit. With leave of court, the matter was disposed of by way of written submissions, with judgment thereon being delivered on 21st September, 2016.

5. Dismissing the appeal, the learned Judge **Chitembwe J.,** stated that the appeal was one against the decision to strike out the suit, disguised as an appeal against the dismissal of review. He agreed with the trial magistrate that CMCC No. 19 of 2013 was *res judicata* CMCC No. 223 of 2012, for the reason that no appeal had been preferred against the decision striking out the former suit. The learned Judge however differed with the trial magistrate's findings that contents of an affidavit could not form a cause of action in a defamation suit. In the Judge's view, though they form part of court proceedings, the contents of affidavits are not privileged and can be actionable in defamation. Consequently, he said, the striking out of Malindi CMCC No. 19 of 2012 ostensibly for failure to disclose a reasonable cause of action, was erroneous. In light of this finding, he dismissed the appeal but nonetheless proceeded to set aside the order for costs made in CMCC No. 19 of 2013; stating that the respondent should not be condemned to pay costs in that suit. With regard to the appeal, each party was ordered to bear their own costs.

6. In turn, the appellant was unhappy with that decision and lodged this second and perhaps last appeal, in which he alleges that the learned Judge erred in; treating the matter as an appeal against the orders issued in CMCC No. 223 of 2012 yet there was no such appeal; treating the matter as an appeal against the striking out orders issued in CMCC No. 19 of 2013 yet there was no such appeal; failing to appreciate that there was no proper appeal before court since there can be no appeal against an order dismissing an application for review under **Order 45** of the Civil Procedure Rules; failing to appreciate there was inordinate delay in filing the review application; holding that the contents of affidavits filed in the course of proceedings are privileged; making findings of fact regarding matters not before him, to wit, Malindi HCCC No. 27 of 2012 and lastly, that having found that Malindi CMCC No. 19 of 2012 was *res judicata* CMCC No. 223 of 2012, the Judge erred in interfering with the order of costs made in CMCC No. 19 of 2012 and in not awarding the costs of the appeal to the appellant.

7. With leave of this Court, parties filed written submissions, upon which they relied to ventilate their respective cases. Learned counsel for the appellant, **Mr. Muranje** appears to have abandoned the other grounds of appeal and instead condensed the issue in this appeal to simply costs. In that regard, he submitted that the appellant, having successfully defended both suits before the trial court and having incurred expense, it was only just that costs be awarded to him. On record for the respondent was **Mr. Kilonzo,** who submitted that while costs follow the event, the same are discretionary and this Court can only interfere with an award of costs if it is shown that the discretion was not exercised judiciously, which was not the case here. Counsel urged for the dismissal of the appeal with costs.

8. The law on costs is enumerated under **Section 27** of the Civil Procedure Act which states that;

> ***"(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. (Emphasis added)

It is thus without doubt that awards of costs are left to the court's unfettered discretion. This much has been held to be the case in a host of cases, including ***Supermarine Handling Services Ltd v Kenya Revenue Authority [2010] eKLR*** where this Court stated as follows:

> ***"…where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the appellate court will interfere if it is satisfied that the order is wrong."*** (Emphasis added).

Additionally, as stated by this Court in the case of ***Carl Ronning v Societe Navale Chargeurs Delmas Vieljeux (The Francois Vieljeux) [1984] KLR***

1, an appellate court may only interfere with the exercise of judicial discretion if satisfied either;

> ***"(a) The judge misdirected himself on law, or***
>
> ***(b) That he misapprehended the facts, or***
>
> ***(c) That he took account of considerations of which he should not have taken an account, or***
>
> ***(d) That he failed to take account of consideration of which he should have taken account, or***
>
> ***(e) That his decision, albeit a discretionary one, was plainly wrong.***

9. In the present case, the issue for our consideration is the reason given by the learned Judge for denying the appellant costs of the suit before the trial court and also before the High Court. The Judge found, and we agree with him, that CMCC No.19 of 2013 was not *res judicata* as the previous suit had been struck out and not heard and determined on merit. That being so, the respondent herein ought not to have been condemned to pay costs to the appellant. Was that proper exercise of discretion? We think so. In all fairness, the respondent was dethroned from the seat of justice 'erroneously' as the learned Judge put it. Why would he be penalized to pay costs to the person who had benefitted from the said error? This is what the learned Judge said;-

> ***"The appellant was forced to institute suits as a result of averments made in proceedings in which he was not involved. He cannot be condemned to pay costs yet he was pulled into the dispute by the respondent. The respondent cannot sit pretty and tell the appellant that he accused him of stealing and destroying court files and also stretch his hand asking for his costs of the suits."***

10. From this statement, it is clear that the learned Judge considered all the relevant issues he was supposed to consider and arrived at the conclusion that condemning the respondent to pay costs in the circumstances explicitly highlighted by the Judge would have been very oppressive to the respondent and would have amounted to a travesty of justice. Our conclusion is that the learned Judge used his discretion judiciously and we cannot interfere with his decision. Our finding is that this appeal lacks merit and it is hereby dismissed with costs to the respondent.

Dated and delivered at Mombasa this 25th day of January, 2018

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR