



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED JJ.A)

CIVIL APPEAL NO. 38 OF 2014

BETWEEN

TIMOTHY BUSIENEI 1ST APPELLANT

ELIUD YEGO 2ND APPELLANT

DR. R.N. WAMBUGU 3RD APPELLANT

AND

MECHAI INTERNATIONAL LIMITED RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Eldoret, (Mshila, J.) dated 23rd January, 2013

in

HCCC No. 54 of 2008)

JUDGMENT OF THE COURT

Background:

1. This is an appeal from the judgment of Mshila, J. ordering each party to bear their own costs without giving reasons for not awarding costs to the appellants in whose favour she found.
2. The facts leading up to the suit before the High Court are straight forward. The respondent, Mechai International Limited, sought to construct a workshop on **ELDORET MUNICIPALITY BLOCK 13/444 (the suit property)**. They applied for a change of user of the land from residential to industrial, from the Eldoret Municipal Council.
3. Timothy Busienei, Eliud Yego and Dr. R.N Wambugu, the appellants herein, are officials of Elgon View Residents Association and residents of Elgon View Estate adjacent to the suit property who were apprehensive that the change of user in respect of the suit property would jeopardise their health and security, and interfere with their properties. They accordingly filed objections to challenge the change of user. It was the respondent's claim that the appellants' action stalled their venture thereby occasioning

loss and damage.

4. The learned Judge found that the objections filed by the appellants were not wrongful or illegal as they had a Constitutional right to protect their property and their right to peaceful enjoyment of their property. The suit was dismissed with an order for each party to bear its own costs. Aggrieved by that decision, the appellants filed this appeal on the following grounds;

“a) That learned trial judge erred in law and fact in failing to award the appellants costs of the suit.

b) That the learned trial judge erred in law and fact in ordering that each party should bear its own costs without giving reasons for the same.

c) That the learned trial judge erred in law and fact in denying the appellants an award as to costs without any legal basis whatsoever.”

5. The respondent filed grounds of opposition opposing the appellants’ appeal on the following grounds;-

“1. The appeal contravenes Section 27 of the Civil Procedure Act, which donates exclusive and unfettered discretion to the trial court to award costs.

2. That the grounds of appeal filed do not fault the trial judge for misdirection or omission to award costs as she clearly and unequivocally pronounced herself on the same.

3. The appellants have not demonstrated that the superior courts exercise of its absolute discretion has resulted in an injustice.

4. An award of costs both in this court and the superior court will occasion a miscarriage of justice as it will discourage litigants with genuine grievances from approaching the courts for resolution for fear of being slapped with costs.

5. The appeal is incompetent and an abuse of due process.”

Submissions by Counsel:

6. When the matter came up for hearing both parties were represented by learned counsel: Ms. Lusweti represented the appellants whereas Mr. N. Mbugua represented the respondent.

7. Ms. Lusweti submitted that the learned Judge should have awarded the appellants costs since the suit was defended and dismissed, that the learned Judge failed to give reasons for failing to award them costs. Counsel relied on Section 27 of the Civil Procedure Act that costs follow the event and urged us to allow the appeal.

8. Mr. N. Mbugua opposed the appeal arguing that the learned Judge’s decision is an exercise of an unfettered and unqualified discretion; that the grounds of appeal filed do not fault the learned Judge for misdirection or omission to award costs as she clearly and unequivocally pronounced herself on the same and that the appellants have not demonstrated that the High court’s exercise of its absolute discretion has resulted in an injustice. Counsel urged us to dismiss the appeal for lack of merit.

Determination:

9. We have considered the grounds of appeal, the affidavits filed, the authorities cited and the law.

10. It is trite law that this Court is slow to interfere with the exercise of discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and

that as a result there has been injustice: see **Mbogo v Shah [1968] 1 EA 93.**

11. Section 27 of the Civil Procedure Act grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) of the Civil Procedure Act provides as follows:-

“(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).

12. We are guided by the case of **Supermarine Handling Services Ltd v Kenya Revenue Authority [2010] eKLR** where this Court stated:

“... 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).

13. In declining to award costs to the appellants, the learned Judge took into account that the respondent was a non-governmental organization, a charitable, not for profit organization, dependent on donor funding. The reasons for the learned Judge declining to award costs to the appellants were therefore apparent from the body of the judgment.

14. In the circumstances, we find that in making the order for each party to bear their own costs, the trial Court exercised its discretion judiciously. The appeal lacks merit and is dismissed. In the spirit of the order made by the trial Judge we also order that each party shall bear their own costs in this appeal.

Dated and delivered at Eldoret this 16th day of November, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

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DEPUTY REGISTRAR