



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 291 OF 2015

BETWEEN

ALICE C. KALYA1ST APPELLANT

RHODA AHONOBADHA.....2ND APPELLANT

DUNCAN MWANGI.....3RD APPELLANT

KEN OMANGA4TH APPELLANT

BATRAM M. MUTHOKA(*Sued on their own behalf*

and on behalf of the Agricultural

Society of Kenya).....5TH APPELLANT

AND

JOSEPH GACHAGUA.....1ST RESPONDENT

SAMUEL BUNDOTICH2ND RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Aburili, J.) dated 6th October, 2015

in

H.C.C.C. NO. 136 OF 2015)

JUDGMENT OF THE COURT

The respondents herein filed suit against the appellants at the High Court, being HCCC. No. 136 of 2015. They seemed to have thereafter changed their minds about pursuing the suit and did not therefore serve a memorandum of appearance and the plaint on the appellants. The latter, however somehow became aware of the suit and promptly filed a memorandum of appearance and defence in the suit. Whether in

consequence of such appearance and defence or in furtherance of their having repented the suit, the respondents filed a notice of withdrawal of the suit on 12th June, 2015 under **Order 25 Rule 1** of the **Civil Procedure Rules**. On learning of the withdrawal of the suit, the appellants brought an application under **Order 25 Rule 3** of the **Civil Procedure Rules** through which they asked the registrar of the High Court to award them the costs of that suit.

The appellants contended that the notice of withdrawal was filed after their participation in the proceedings and that they had incurred costs including advocate's fees hence were entitled to costs, while the respondents countered that no service of summons was effected on the appellants.

Somehow, **Aburili, J.** took up the matter and held that there was no evidence that the appellants were served with any court documents requiring them to participate in the suit. She therefore dismissed the appellants' claim by her ruling dated 6th October, 2015. That decision provoked this appeal in which the appellants complained basically that the learned Judge erred in law and in fact by;

- **Usurping the role and powers of the Deputy Registrar thus acting ultra vires and without jurisdiction;**
- **Going against the principle that the costs follow the event and;**
- **Punishing them for their diligence in appearing and defending before service.**

At the hearing of the appeal, **Mr. Millimo** learned counsel for the appellants submitted that the memorandum of appearance and defence were filed and served upon the respondents' counsel even though the appellants had not been served with summons to enter appearance. He argued that there is no law that precludes a party who becomes aware of a suit from taking steps to defend it as was held in **KIMONJO FAMILY CO. LIMITED vs. KIMONJO FAMILY COMPANY & PARTNERS LIMITED & 3 OTHERS [2005] eKLR**. He explained that once they became aware of the notice of discontinuance of the suit, they sought a mention date for purposes of further directions in the case.

Referring to the holding of **Nambye, J.** (as she then was) in **MUDHIHIRI MOHAMMED & 2 OTHERS vs. AHMED IMANI & OTHERS [2009] eKLR** which expressed the adage that costs follow the event and that the withdrawal of the suit is subject to payment of costs, counsel contended that the appellants were entitled to costs upon discontinuance. That is why he made and filed a request for judgment on costs.

He criticized the learned Judge for usurping the powers of the Deputy Registrar under **Order 25 rule 3 of Civil Procedure Rules** as she had no jurisdiction to determine whether or not to grant judgment on costs. Even if she had, they were limited to simply signing the judgment for costs.

For the respondents, learned Counsel **Dr. Njaramba** submitted that **Bosire, J.A** was right that one can enter appearance and defence without having been served with a process but contended that **Section 27** of the **Civil Procedure Act** gives the Judge jurisdiction over costs. He asserted that it is the appellant who brought the matter before the Judge but conceded that the learned Judge did not properly consider **Order 25 (3) of Civil Procedure Rules** which expressly donates the power to enter judgment on costs to the registrar. Nevertheless he contended that a successful party may be denied costs on the basis of their conduct. He urged this Court to be slow to interfere with the decision on costs unless the reasons are wrong. He prayed that we dismiss the appeal.

In response, **Mr. Millimo**, submitted that all they asked for was a mention for the Deputy Registrar to give directions on the main suit. He maintained that since a notice of withdrawal or discontinuance of suit was filed, he was entitled to file a request for judgment on costs. Counsel concluded that the learned judge essentially purported to amend **Rule 25 (3)** by holding that if one is not served with summons one cannot get costs.

We have carefully perused the record, the pleadings and the ruling. We have also carefully considered the grounds of appeal, and the parties' respective submissions and taken into account the case law cited. The main issue for determination is whether the appellants were entitled to costs of a suit that was wholly

discontinued.

The appellants' position is that although they were not served with summons to enter appearance, once they became aware of the suit, they, out of due diligence, got particulars of it and filed a memorandum of appearance and defence before it was discontinued. They also incurred further costs on hiring an advocate. Their Counsel defended their action by referring to

CENTRAL BANK OF KENYA vs. UHURU HIGHWAY LIMITED & 3 OTHERS Civil Appeal No. 75 of 1998, where this Court held;

“...service of summons to enter appearance sets on the clock for counting the time within which to enter appearance and no more. If however, as happened in this case, a defendant became aware of a suit against him, otherwise than through formal service, there is nothing in our law to preclude him from filing a defence to the claim against him. Where he does so time within which to file a reply starts running against the Plaintiff and the proceedings are supposed to continue in the normal manner.”

We think, respectfully, that the above dictum of **Bosire JA**, with which the other judges who sat with him agreed, is a proper enunciation of the legal position. We therefore hold without hesitation that nothing bars a diligent defendant, desirous of the defense of his rights, from entering appearance and defending an action once he learns of its existence, even before he is served with summons to enter appearance.

A defendant who has so entered appearance and defended is not to be placed under any disadvantage by that reason alone in the matter of costs of the suit. Thus, when the plaintiff elects to wholly discontinue the suit or to withdraw part only of his claim, the defendant is entitled as of right to request for judgment for costs under **Order 25 rule 3** of the **Civil Procedure Rule**, which is in the terms;

“3. Upon request in writing by any defendant the registrar shall sign judgment for the costs of a suit which has been wholly discontinued, and any defendant may apply at the hearing for the costs of any part of the claim against him which has been withdrawn.”

Now, it is patently clear from the rule that the request for judgment for costs is to be in writing as it is to be addressed to and dealt with by the registrar of the court where the suit was filed. It is also evident that the registrar once requested on the face of it is bereft of any discretion in the matter and must enter judgment. This appears to us to be in keeping with the principle that costs follow the event and once a plaintiff decides to discontinue a suit, it must be taken that it was ill-advised as against the defendant or was otherwise unsustainable and must be terminated to the favour of the defendant who must then have costs.

As the person appointed to take action on the request for judgment on costs is the registrar, we find substance in the appellant's contention that the learned Judge in taking up and dealing with the matter did so without jurisdiction. In proceeding as if she had such jurisdiction, the learned Judge, respectfully, fell into error that calls for reversal. It is in fact quite peculiar that the learned Judge proceeded to deal with the matter before her as if it were a reference from the decision of the registrar on costs when clearly it had been listed before her merely as a mention and Mr. Millimo did in fact address her thus; *“The matter was for mention with regard to costs of withdrawal (sic) of suit. We have applied for judgment for costs.”*

It would seem counsel were then asked to make representations whereafter the learned Judge reserved ruling for 6th October, 2015 at 2.30 pm. We think that the entire manner that the matter was dealt with was irregular. Jurisdiction having been absent at conception, the parties could not by addressing the learned Judge thereby have conferred it upon her. The learned Judge therefore misdirected herself and misapprehended the law when she presumed that the request for judgment for costs under **Order 25 Rule 3** called for her decision or ruling.

The learned Judge's categorical finding, after discussing the substantive provision of costs which is in **Section 27** of the **Civil Procedure Act** and a number of authorities, was an extension of the error we have

already pointed out;

“The absence of any evidence that the defendants were served with any court process requiring them to do anything in this matter, the request for judgment on costs of a wholly discontinued suit which Order the Deputy Registrar has powers to make under Order 25 Rule 3 of the Civil Procedure Rules lacks merit and is accordingly dismissed with no orders as to costs.”

We think that even had the learned Judge the requisite jurisdiction and discretion, (and she did not) she was plainly wrong in denying the appellants costs merely because appearance and defence were made before summons were served on them. We do not see such action on the part of the appellants, which may well be described as a case of excessive zeal, can be such as to attract punitive judicial action. Even in a proper case such a denial of costs would be overturned on appeal on the reasoning of the Court in many cases including ***SUPERMARINE HANDLING SERVICES LTD vs. KENYA REVENUE AUTHORITY [2010] eKLR***, where it was held that;

“Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance...”

Thus, 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. It will also interfere where the reasons are given if it considers that those reasons do not constitute „good reason? within the meaning of the rule ... In the instant case the learned Judge gave no reasons whatsoever for his decision to deprive the successful plaintiff of its costs and yet it was not shown that the defendant had been guilty of some misconduct which led to litigation. In the court?s view the learned Judge?s order was wrong and for the foregoing reasons, the plaintiff?s appeal succeeds as to the award of interest and costs on the principal sum awarded.”

We have said enough to show that the learned Judge acted without jurisdiction and, moreover, wrongly exercised discretion such as to warrant our interference. See ***SHAH vs. MBOGO [1968] EA 93***. The appeal is accordingly allowed as prayed and with costs.

Dated and delivered at Nairobi this 15th day of December, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR