



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, OKWENGU & AZANGALALA, JJ.A)

CIVIL APPEAL NO. 109 OF 2009

BETWEEN

GEORGE GIKUBU MBUTHIA..... APPELLANT

AND

SMALL ENTERPRISES FINANCE LTD.....1ST RESPONDENT

GWIRI GATAMA.....2ND RESPONDENT

ANAB HUSSEIN ARAB.....3RD RESPONDENT

*(Appeal from the Ruling and Order of the High Court of Kenya at Milimani Commercial Courts
Nairobi (Kimari, J) Dated 6th February, 2009 in H.C.C.C. NO. 1403 OF 1997)*

RULING OF THE COURT

This is an appeal against the ruling of the High Court (**L. Kimaru, J**) dated 6th February, 2009 whereby the High Court declined to set aside the certificate of taxation issued by the Deputy Registrar on 14th July, 2003 in favour of the 3rd respondent herein, **Anab Hussein Arab**. The order of costs had been made by **Mwera J.**, as he then was, on an application made by the 3rd respondent to be struck off the appellant's suit on the ground that she had been improperly joined to the suit.

A background of the matter will put the current dispute in perspective. The 1st respondent, **Small Enterprises Finance Co. Ltd.**, granted two loan facilities to a company called **Palace Drycleaners Limited** in the years 1989 and 1992 on the security of L.R. No. 36/11/1 Eastleigh, Nairobi (herein after "the suit property"), then registered in the name of the appellant who also guaranteed repayment of aforesaid loans. Among other things, **Palace Drycleaners Limited** (herein after "the borrower"), defaulted in the repayment of the loans and the 1st respondent commenced the process of exercising its statutory power of sale under the charge and further charge created over the suit property. The 3rd

respondent bid for the suit property at a subsequent auction authorized by the 1st respondent. She was the highest bidder and paid 25% deposit of the auction price which deposit amounted to Kshs.4,500,000/=.

The auction sale was not completed and the 3rd respondent instituted **Milimani HCCC No. 500 of 2000** against the 1st respondent for breach of contract. Although the claim for damages for breach of contract was not successful, judgment was entered for the 3rd respondent for the said sum of Kshs.4,500,000/= plus interest and costs. It would appear that no appeal was lodged against that decision. Armed with that judgment, the 3rd respondent lodged a Notice of Motion in the suit giving rise to this appeal. The Notice of Motion was dated 10th December, 2001 and was filed by **M/s Shapley Barret & Co. Advocates** on behalf of the 3rd respondent. The principal relief sought in the motion was the striking out of the 3rd respondent from the suit on the main ground that there was no privity of contract between her and the appellant whose claim was rooted in the aforesaid loans granted over the suit property and further that refund of the 3rd respondent's deposit had been ordered in the said **HCCC No. 500 of 2000. Mwera J.**, heard that Notice of Motion and allowed it, concluding as follows:-

“Having heard all sides this application succeeds with costs of the application against the plaintiff and the 1st defendant and costs of the suit against the plaintiff. This court came to that conclusion on the basis that at no time did the 3rd defendant have privity of contract between her and the plaintiff in the loan agreement. The loan agreement was between the plaintiff and the lender (1st defendant). As for the contract at the auction sale, it was between the 1st defendant (seller-mortgagor) and the 3rd defendant as the buyer of the property. The plaintiff is not in this one at all. But that the latter contract was successfully rescinded against the 1st defendant, the 3rd defendant had no business being sued on the first contract in which she was not a party at all.

In that one the plaintiff can only hope to get relief from the 1st defendant. He cannot enforce it against a non-party, the 3rd defendant at all.....

In sum the 3rd defendant is improperly joined in this suit and should be struck out on the terms of costs stated above.”

It is plain therefore that it was by the said order of **Mwera J.**, that the 3rd respondent earned costs of the suit as, in the learned Judge's view, she had been improperly joined. The costs so awarded were the ones which the Deputy Registrar of the High Court taxed on 14th July, 2003. There is no evidence that the said order on costs has been set aside, varied or otherwise reviewed. **Kimaru J.**, put it as follows:-

“As it is, there is no suit pending against the 3rd defendant. There is a valid court order awarding costs to the 3rd defendant. The plaintiff cannot seek to set aside the certificate of taxation issued by the Deputy Registrar of this court without first challenging the order that granted jurisdiction to the said Deputy Registrar, to tax the 3rd defendant's party and party bill of costs.”

The appellant was aggrieved and lodged the appeal now before us premised upon some 15 grounds which were canvassed before us together by the appellant in person. In his address to us, the appellant substantially complained that the charge and further charge over the suit property were not enforceable for illegality as, in his view, they contravened the provisions of **Section 35** of the **Advocates Act**. Because of the illegality, so the appellant contended, the 3rd respondent should not have been awarded costs in **HCCC NO. 500 of 2000**. The appellant did not urge the other grounds in his Memorandum of Appeal.

The law on costs is found in **Section 27** of the **Civil Procedure Act** and in numerous pronouncements of this Court and the High Court. The aforesaid section in **subsection (1)**, while giving the court a wide discretion as to costs of a suit, contains the following proviso:

“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.”

In *Devram Nanji Dattani -v- Haridas Kalidas Dawda [1949]*, 16

EACA, 35, the predecessor of this court held that a successful defendant can only be deprived of his costs when it is shown that his conduct, either prior to or during the course of the suit, has led to litigation which, but for his own conduct, might have been avoided. Their Lordships in that case cited with approval, Lord Atkinson’s judgment in *Donald Campell -v- Pollak [1927] A.C. 732* as follows:-

“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.”

The principle in the *Dattani -v- Dawda* (supra) case and that of Atkinson in *Campell -v- Pollak* (supra) above have been applied by our courts including the case of *Kiska Ltd -v- De Angels [1969] EA 6*, where the predecessor of this Court stated, at page 8, as follows:-

“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 reasons for its discretion the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute “good reasons” within the meaning of the rule.”

It is therefore settled that costs of, and incidental to all suits are in the discretion of the court, but where the court decides that any costs shall not follow the event, the court is obligated to state its reasons in writing and where a trial court has exercised its discretion, an appellate court should not interfere unless, the discretion has been exercised unjudicially or on wrong principles. In the instant case the order of *Mwera J.*, awarding costs to the 3rd respondent has not been challenged on appeal nor has it been set aside or reviewed. It therefore remains a valid order of a competent court. It could not be challenged before *Kimaru J.*, as the appellant sought to do in the Notice of Motion which the learned Judge declined as the learned Judge was of concurrent jurisdiction as *Mwera J.* The appellant in ground 11 of his Memorandum of Appeal contends that the learned Judge made the said order in “defiance” of the provisions of **Section 35(1) and (2) of the Advocates Act; Section 58(1) of Registration of Titles Act** and in circumvention of **Mr. Justice Hayanga’s Orders of 9th July, 1997.**

We cannot appreciate how *Mwera J.*, could have considered the provisions of **Section 35(1) and (2) of the Advocates Act and Section 58 (1) of the Registration of Titles Act** as those provisions did not fall for his consideration when the learned Judge considered the 3rd respondent’s Notice of Motion to exit the suit filed by the appellant. The learned Judge found that the suit revolved around loan agreements between the appellant and the 1st respondent to which agreements the 3rd respondent was not a party. The learned Judge further found that the 3rd respondent’s nexus with the suit was her attempt to purchase the suit property at a public auction conducted on the instructions of the 1st respondent and as the auction sale had fallen through and a competent court ordered for refund of the deposit made by the 3rd respondent, the 3rd respondent ceased to be a necessary party in the suit.

The order striking out the 3rd respondent from the suit was in favour of the 3rd respondent and against the appellant and the 1st respondent. Indeed the 3rd respondent was the party who had been brought in by the

appellant. In those premises, the award of costs in favour of the 3rd respondent followed the event and we doubt whether the appellant could have successfully challenged that order on appeal even if he had been minded so to do. We can see no justification for depriving the successful 3rd respondent of her costs.

It is also our considered view that the challenge now made by the appellant with regard to alleged non-compliance with **Section 35(1) and (2)** of the **Advocates Act** and **Section 58(1)** of the **Registration of Titles Act** cannot properly be resolved in this appeal which is from an order refusing to set aside the certificate of taxation issued in favour of the 3rd respondent by the Deputy Registrar of the High Court on 15th July, 2003. The appellant's challenge regarding the said provisions is in the province of the Judge who will try the suit. We have therefore refrained from expressing any view on the said challenge lest we put the trial Judge in a bind.

For the reasons given, we order that this appeal be and is hereby dismissed with costs to the 3rd respondent to be borne by the appellant.

DATED AND DELIVERED AT ANAIROBI THIS 2ND DAY OF OCTOBER, 2015.

M.K. KOOME

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JUDGE OF APPEAL

H.M. OKWENGU

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JUDGE OF APPEAL

F. AZANGALALA

.....

JUDGE OF APPEAL

I certify that this is a true

Copy of the original

DEPUTY REGISTRAR