



REPUBLIC OF KENYA



**KENYA LAW**  
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**Onyango v Ofula (Environment and Land Appeal E027 of 2022)  
[2024] KEELC 4493 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4493 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIIAYA  
ENVIRONMENT AND LAND APPEAL E027 OF 2022**

**AY KOROSS, J**

**JUNE 6, 2024**

**BETWEEN**

**FRANCIS ONYANGO ..... APPELLANT**

**AND**

**MAURICE ODUOR OFULA ..... RESPONDENT**

*(Being an appeal from the ruling of PM honourable L.N. Sarapai  
delivered on 14/07/2022 in Ukwala PM ELC Case No. 23 of 2020)*

**JUDGMENT**

**Background of the Appeal**

1. Before the trial court, the appellant was the defendant and the respondent was the plaintiff. This appeal impugns an order of costs that the learned trial magistrate made after she found she lacked jurisdiction to entertain the suit.
2. In the trial court, the respondent in a plaint dated 11/06/2020 had sued the appellant for acts of trespass on land parcel no. Uholo/Rambula/983 (suit property) and sought several reliefs. He prayed for orders of permanent injunction, fixing of the boundary between the suit property and Uholo/Rambula/178, and costs of the suit.
3. Concurrent with the claim, the plaintiff filed a notice of motion under a certificate of urgency in which amongst several reliefs, sought injunctive orders.
4. The appellant did not take matters lying down and in opposition, the appellant who was represented by the firm of M/s. Manwari & Company Advocates filed a replying affidavit against the motion deposed on 13/08/2020 and also filed a defence dated 30/08/2020 in which he denied the act of trespass.



5. Most importantly, in his defence, the appellant contended by Section 18 (2) of the [Land Registration Act](#), the trial court lacked jurisdiction as the plaintiff had raised issues that were within the jurisdiction of the land registrar. He urged the court to dismiss the suit with costs.
6. Upon directions from the court on the motion, the motion was canvassed by written submissions of both the appellant and respondent which were respectively dated 30/08/2020 and 7/01/2021.
7. Upon considering the documents as filed, the then learned trial magistrate stated he had satisfied himself the respondent was deserving of the orders sought and, in a ruling, rendered on 10/03/2023, issued injunctive reliefs with costs being in the cause.
8. Thereafter, the suit proceeded to the hearing whereby the plaintiff who was self-represented testified as PW1 and produced documents in support of his case, and his evidence was led by Patrick Ochieng who testified as PW2. Throughout the proceedings, the defendant was represented by counsel Mrs. Gona.
9. On 7/7/2022 when the matter was proceeding for hearing with the plaintiff's case, the issue of the matter being a boundary dispute sufficed, and upon hearing both parties, the court reserved the matter ruling.
10. Accordingly, in a ruling rendered on 14/07/2022, the learned trial magistrate upheld the appellant's objection, stated she lacked jurisdiction, and downed her tools. On a prayer for costs by Mrs. Gona, the trial magistrate ordered each party to bear their respective costs.

### **Appeal to this Court**

11. Aggrieved by a limb of the ruling on the issue of costs, the appellant lodged his memorandum of appeal before this court dated 14/08/2022 which outlined several grounds that faulted the learned trial magistrate on grounds inter alia: failing to award the appellant costs notwithstanding a finding the court lacked jurisdiction; failing to give reasons for declining to award costs; failing to find that being the successful party, the appellant was entitled to costs and lastly, the impugned ruling was unfair, unjust and unlawful in the circumstances.
12. Accordingly, the appellant urged this court to allow the appeal and set aside the order of the trial court which ordered each party to bear their respective costs and instead substitute it with an order granting him costs of the lower court suit. Further, he sought the costs of the appeal.

### **Parties' Submissions**

13. As directed by the court, the appeal was canvassed by written submissions. The appellant's law firm on record filed their written submissions dated 23/02/2024 while Mr. Ochanyo of the law firm of Ms. Jesse David, Ochanyo Kurgat Advocates LL. P who was now seized of instructions from the respondent filed his written submissions dated 8/03/2024.
14. The appellant submitted on the issue of costs and raised the following issues; the exercise of the court's discretion, and whether this court should interfere with the learned trial magistrate's exercise of discretion on the issue of costs. In arguing these issues, counsel relied on the provision of Section 27 (1) of the [Civil Procedure Act](#) and several authorities.
15. On the other hand, the respondent identified a singular issue for determination; whether the appellant's appeal on costs is merited. Counsel similarly relied on Section 27 (1) of the [Civil Procedure Act](#) to buttress his argument and anchored his arguments on several authorities.



16. Later in this judgment as this court identifies the issues for determination and conducts its analysis, it will consider the parties' submissions on the identified issue or issues including provisions of law and authorities that they both relied upon to sustain their respective contestations.

### **Preliminary Issues**

17. The memorandum of appeal was regurgitative and all the grounds were related and could conveniently be condensed into a singular ground; the learned trial magistrate erred in law in not exercising her discretion properly by failing to award the appellant costs of the suit. Be that as it may, the court will proceed to identify the issue or issues for determination.

### **Issues for Determination**

18. Being a 1<sup>st</sup> appeal, the power of this court is set out in Order 42 Rule 32 of the [Civil Procedure Rules](#). Being steered by the principles enunciated in the well-cited case of *Mbogo & another vs. Shah* [1968] EA 93, this court will not interfere with the impugned ruling save this court satisfies itself the learned trial magistrate misdirected herself and thus arrived at an erroneous decision or unquestionably exercised her discretion wrongly and occasioned injustice by such erroneous exercise.
19. Turning to the matter in dispute, I have carefully considered the records, rival submissions, provisions of law relied upon, and judicial precedents cited. This court will consider the condensed ground of appeal as the issue for resolution.
20. For clarity, the condensed ground is; that the learned trial magistrate erred in law in not exercising her discretion properly by failing to award the appellant costs of the suit. Further and upon answering the 1<sup>st</sup> issue, the court will consequently answer the related issue of what orders should this court issue including an order as to costs. These two issues will be dealt with together.

### **Analysis and determination**

21. As rightfully submitted by both counsels, the general rule on costs is encapsulated in Section 27 (1) of the [Civil Procedure Act](#) which states: -

“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.”

22. Even if the Supreme Court of Kenya is guided by the [Supreme Court Act](#) and its Rules in issuing awards such as those on costs are not similar as that of this court, the apex had an opportunity in the case of [Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others](#) [2014] eKLR to weigh in on this Section 27 (1) and appreciated the [Civil Procedure Act](#) was the primary law on civil cases. The apex court's decision has been relied upon by both counsels and in this decision, the court concluded thus: -

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails;



but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent to the actual process of litigation...

(22) Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.”

23. In another subsequent decision of *Sonko v Clerk, County Assembly of Nairobi City & 12 others* (Petition 14 (E021) of 2021) [2022] KESC 17 (KLR) (19 May 2022) (Ruling), the apex court in citing Jasbir Singh Rai (Supra) explained the term “costs follow the event”, in the following words: -

“While applying the principle in Jasbir Singh Rai that costs normally follow the event, has an event to which costs would follow materialized?”

24. Evidently from Section 27 (1) of the *Civil Procedure Act* and binding decisions, it is settled law that costs follow the event, and it is only in the circumstances of good reasons that a judicial officer or judge as the case may be, can depart from the rule.

25. Even if in the exercise of discretion the court has absolute and unfettered discretion to award or dissuade from awarding costs, the discretion must be exercised judicially by evidence, reason, and justice and not whimsically or arbitrarily.

26. In his defence, the defendant questioned the trial court’s jurisdiction and during the hearing, Mrs. Gona relentlessly questioned the trial court’s jurisdiction. The issue of jurisdiction had to be dealt with preliminary since it was capable of disposing of the suit. The trial court considered Mrs. Gona’s objection and in the impugned ruling, downed its tools but without giving reasons, ordered each party to bear their respective costs.

27. In the absence of reasons, this court has to revisit the lower court record. In this case, the matter commenced for hearing thus the event materialized when at the appellant’s instigation, the trial court downed its tools and effectively concluded the suit that was before it. Ordinarily, with the event taking place and the appellant being successful, he should have been awarded costs.

28. However, that was not so and as earlier stated, there were no reasons advanced in the ruling to justify why the learned trial magistrate departed from the trite law that costs follow the event.

29. That being so, as an appellate court, this court has to interfere with the learned trial magistrate’s decision if it is wrong. The decision of the learned trial magistrate is not new and when confronted with an analogous circumstance in the persuasive decision of *Joseph Oduor Anode v Kenya Red Cross Society* [2012] eKLR which was cited with approval in *Jasbir Singh Rai* (Supra), the court stated thus: -

“...whereas this Court has discretion when awarding costs, that discretion must, as usual, be exercised judicially. The first point of reference, with respect to the exercise of discretion is the guiding principles provided under the law. In matters of costs, the general rule as



adumbrated in the aforesaid statute is that costs follow the events unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words where the Court decides not to follow the general principles the Court is enjoined to give reasons for not so doing. In my view it is the failure to follow the general principles without reasons that would amount to arbitrary exercise of discretion and not the other way round.” Emphasis.

30. In the absence of giving reasons for departure from the norm that costs follow the event and in drawing from the outcome of *Joseph Oduor Anode (Supra)*, I must agree with the appellant’s counsel and find the learned trial magistrate exercised her discretion in an arbitrary manner.
31. Having considered the record and bearing in mind each case has to be considered on its unique circumstances, the appellant was not guilty either by omission, neglect, vexation, or oppressiveness to warrant denial of costs and there is no evidence of special circumstances that would deny him his fees such as familial relations between him and the respondent.
32. The respondent was pursuing his personal interests over the suit property in a claim of trespass and sought a determination of the suit property’s boundary.
33. The appellant did point out to him that the court lacked jurisdiction to entertain the suit. Consequently, the least he could have done was withdraw the suit or even consider negotiating with the appellant for him to withdraw the suit with no orders as to costs. None of which he did. Therefore, it can only be concluded he was the author of his own misfortune.
34. It is observed the appellant must have incurred great expense by instructing an advocate to represent him and prepare a defence and protect his interests. Further, he must have spent copious amounts of time when he visited the private chambers of the law firm on record for him. In the absence of good reasons, I must find he was entitled to the costs of the suit.
35. Accordingly, and for the reasons stated above, the result is that the appeal is allowed and the impugned ruling dated 14/07/2022 is partly substituted with an order awarding the appellant costs of the suit. Since costs follow the event and being the successful party, the appellant is awarded the costs of this appeal.

Orders accordingly.

**DELIVERED AND DATED AT SIAYA THIS 6<sup>H</sup> DAY OF JUNE 2024.**

**HON. A. Y. KOROSS**

**JUDGE**

**6/6/2024**

Ruling delivered virtually through Microsoft Teams Video

Conferencing Platform in the Presence of:

Mr. Mogi for the appellant

Mr. Ochanyo for the respondent

Court assistant: Ishmael Orwa

