



REPUBLIC OF KENYA



**Githinji & another v Wafula & another (Civil Appeal E415 of 2022)
[2025] KEHC 10944 (KLR) (Civ) (24 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 10944 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E415 OF 2022

JM OMIDO, J

JUNE 24, 2025

BETWEEN

DENNIS GITHINJI 1ST APPELLANT

WAKONYO GITHINJI 2ND APPELLANT

AND

VITALIS WAFULA 1ST RESPONDENT

MARGARET WAFULA 2ND RESPONDENT

*(Being an Appeal from the Judgement and Decree of Hon. A.N. Ogonda,
Senior Resident Magistrate delivered on 31st May, 2022 in Milimani CMCC
No. 1501 of 2018 Vitalis Wafula & another v Dennis Githinji & another)*

JUDGMENT

1. This appeal emanates from the judgement and decree of Hon. A.N. Ogonda, Senior Resident Magistrate, delivered on 31st May, 2022 in Milimani CMCC No. 1501 of 2018, Vitalis Wafula & another v Dennis Githinji & another.
2. The trial court rendered its brief judgement as follows:

The Plaintiff has filed suit seeking from the Defendants the sum of Ksh.4,100,000/- (being balance of the principal amount advanced on the sum of Ksh.2,600,000/- and interest thereon in the sum of Ksh.1,500,000/-) together with interest at court rates and costs of the suit.

The only issue left for the determination by the court is the payment of costs as the Defendants have since paid the sum of Ksh.4,100,000/-. From the evidence on record, the



money was borrowed in the year 2015. According to the Defendant, there was no time period set for the repayment of the loan.

Additionally, the Plaintiff was holding onto the title documents as security, and if the security documents had been returned to him (the 1st Defendant) he would have been able to dispose of the same and repay the debt using the proceeds of the sale.

The Plaintiffs on the other hand had indicated in their pleadings that they doubted that the said parcels of land were in existence and if they were, they may not have fetched enough money to settle the debt.

I am not convinced after considering the evidence adduced in court and the pleadings, together with the submissions filed, that there was no time limit set for the repayment of the debt. The debt was repaid after this suit was filed, and I agree with the Plaintiffs, that the pressure of having this court case is the reasons why the debt was eventually settled.

The 2nd Defendant failed to give evidence and I find that the Plaintiff had reason to join both Defendants to this suit.

I have considered the authority cited by the Defendants' Advocates in their submissions – Morgan Air Cargo Limited v Everest Enterprises Limited [2014] eKLR together with the provisions of Section 27 of the *civil Procedure act*. The Defendants shall bear the costs of the suit jointly and severally. Costs to be assessed by the Executive Officer.

3. With profound respect, the manner in which the Appellants have drafted and compiled their documents in this appeal is most unsatisfactory. A number of their documents, including the Record of Appeal indicate on their face the court before which the appeal is filed as the Court of Appeal instead of the High Court. Further, the Memorandum and Record of appeal indicate that the appeal is preferred from the ruling and order of the lower court delivered on 31st May, 2022 yet what is on record as having been rendered on that day is a judgement, from which a decree would ordinarily issue.
4. There is more! The decree or order appealed from is not part of the record. It would seem that the Appellants did not extract the same as is the requirement under Order 42, Rule 13(4)(f) of the Civil Procedure Rules. The judgement that was delivered on 31st May, 2022 is also incomplete as there is a page missing.
5. What I will say is that parties must be meticulous in preparing documents that are intended for filing in court. Seriousness must be exhibited through the documents that parties file.
6. Notwithstanding the foregoing, the grounds raised in the Memorandum of Appeal dated 9th June, 2022, upon which the Appellants seek to upset the judgement and decree herein are as follows:
 - a. The Honourable Magistrate erred in law and in fact in finding that there was a case made out by the Plaintiffs against the Defendants without evidence to that effect being placed before the court.
 - b. The learned Magistrate erred in law and in fact by finding that the Appellants should pay costs of the suit.
 - c. The Honourable Magistrate erred in law and in fact in finding that the 2nd Plaintiff and the 2nd Defendant were properly sued in the suit.
 - d. The Honourable Magistrate erred in law and in fact in finding that there was a time frame for payment of the amount.



- e. The Honourable Magistrate erred in law and in fact in finding that if the security was liquidated, it was not sufficient to repay the principal amount.
 - f. The Honourable Magistrate erred in law and in fact in finding that filing of the suit pressured the Defendants to pay the sum due.
7. The Appellant proposes that the appeal be allowed and the decision of the trial court on costs be set aside and be substituted with an order that the Respondents bear the costs of the suit in the lower court. The Appellants further seek that the Respondents be ordered to pay the costs of this appeal.
 8. This court directed that the appeal proceeds by way of written submissions and gave the parties herein timelines for filing their submissions. Both parties filed their respective submissions.
 9. I have considered the grounds of appeal as set out in the Memorandum of Appeal, the submissions by the parties herein and the record of the lower court. The single issue for determination, as discernible from the material before me is whether the learned trial Magistrate reached the proper finding that the Appellants bear the costs of the suit before the lower court.
 10. From the record of the lower court, the suit, save for the issue of costs was settled when the Appellants paid to the Respondents the entire amount that the Respondents were claiming for. The settlement was done after the suit had been filed. In my view, although there was payment done by the Appellants to the Respondents of the entire amount, the Respondents were the successful parties in the matter.
 11. Section 27 of the [Civil Procedure Act](#) provides as follows:

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- (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.
12. In the case of Republic v Rosemary Wairimu Munene (Ex parte Applicant) v Ihururu Dairy Farmers Co-operative Society Ltd JR Application No. 6 of 2004 the court held that the issue of costs is the discretion of the Court and is used to compensate the party who is successful in the matter and not to punish the unsuccessful party.
 13. The text in Halsbury's Laws of England, 4th Edition (Re-issue), [2010], Vol.10. para 16, states as follows:

The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice.
 14. From the above, costs are awarded by a court in exercise of its discretion and would ordinarily follow the event.



15. I have said above that in my persuasion, the Respondents were the successful parties, noting that the amount that was being claimed from the Appellants was only paid well after the Respondents had filed the suit before the lower court.
16. It is then my finding that the learned trial Magistrate properly and judiciously exercised her discretion in determining the issue of costs and cannot in the premises be faulted. The Appellants have not provided reasons as to why I should interfere with the trial court's discretion.
17. To that end, I find that the appeal herein lacks merit and I proceed to dismiss it in its entirety. The costs of the lower court will be assessed before the said court.
18. With respect to costs of the appeal, Section 27 of the *Civil Procedure Act* dictates that costs ought to follow the event. To that end then, the Appellants will bear the Respondents' costs of the appeal, which I will proceed to assess at Ksh.15,000/- as the same was only in respect of the issue of costs.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 24TH DAY OF JUNE, 2025.

JOE M. OMIDO

JUDGE

For Appellant: Ms. Mwangi.

For Respondent: No appearance.

Court Assistants: Mr. Ngoge & Mr. Juma.

