



Oceanfreight (E.A) Limited v Afrofreight Forwarders Limited (Civil Appeal 38 of 2020) [2024] KEHC 10338 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 10338 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 38 OF 2020
F WANGARI, J
MAY 30, 2024**

BETWEEN

OCEANFREIGHT (E.A) LIMITED APPELLANT

AND

AFROFREIGHT FORWARDERS LIMITED RESPONDENT

((Being an Appeal from the Judgement of Honourable F. Kyambia on 7th February, 2020 in Mombasa CMCC No. 1183 of 2006, Mombasa))

JUDGMENT

1. This is an appeal from the judgement of the Learned Magistrate Hon. F. Kyambia, SPM (as he then was) in Mombasa CMMC 1183 of 2006 given on 7th February, 2020.
2. The Appellant being dissatisfied with the said judgement preferred the present appeal and raised four (4) grounds of appeal which are set out as follows: -
 - a. That the Learned Magistrate erred in law and in fact by failing to consider all the material facts that had been placed before him thereby disregarding the evidence and or failing to take into account relevant matters that he ought to have taken into account and as a result arrived at an erroneous decision;
 - b. The Learned Magistrate erred in law and in fact in basing his decision on speculation and not on matters pleaded by the parties thereby arriving at an erroneous decision;
 - c. The Learned Magistrate erred in law and fact in failing to analyze and/or synthesize the evidence before him and arrived at a completely erroneous finding;



- d. The Magistrate erred in law in failing to take into consideration material fact which he ought to have considered and took into consideration extraneous issues which he ought not to have considered and thereby reached a completely erroneous decision.
3. The Appellants thus prayed that the judgement and or decision of Hon. Kyambia delivered on 7th February, 2020 be set aside and costs of the appeal be provided for.
4. This being a first appeal, this court is under a duty to re-evaluate and re-assess the evidence and make its own conclusions. It must, however, keep in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.
5. This was aptly stated in the cases of *Selle vs Associated Motor Boat Company Ltd* [1968] EA 123 and *Peters vs Sunday Post Limited* [1985] EA 424 where in the latter case, the court therein rendered itself as follows: -

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

6. In *Livestock Research Organization v Okoko & another* (Civil Appeal 36 A of 2021) [2022] KEHC 3302 (KLR) (29 June 2022) (Ruling), Justice R. E. Aburili, J. held as follows;

In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that: -

“[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”

Pleadings

7. Through a plaint dated 31st March, 2006, the Respondent stated that it was carrying on the business of clearing and forwarding and was appointed by Kenya Hydraulics Limited to clear a consignment shipped vide bill of lading no. MSCUG0007137 through Mediterranean Shipping Company S.A aboard a motor vessel MSC STEFANIA 727A which belonged to Mediterranean Shipping Company S.A.
8. The Appellant was acting as the local agent of Mediterranean Shipping Company S.A entrusted with all the delivery orders in respect of all consignment aboard motor vessel MSC STEFANIA 727 A including the subject consignment. The Appellant was bound to raise an invoice to the consignee stated. The invoice was for terminal handling charges, container deposit, clearing charges and delivery order fee. Upon payment of the invoice, the Appellant was bound to release the delivery order in respect of the consignment unconditionally to avoid accumulation of any charges from relevant authorities.



9. Sometimes on 15/3/2006, the Respondent received documentation relating to the consignment shipping under bill of lading no. MSCUG0007137 from Kenya Hydraulics Limited. The consignment was aboard motor vessel MSC VIVIANA. The Respondent presented the documents to the Appellant who raised an invoice no. MSIMP9917851 dated 14/3/2006 for Kshs. 87,400/= . This amount was paid on 21/3/2006 and the Respondent was issued with receipt no. MSBAC 103707 in acknowledgement of full payment.
10. It was averred that in total breach of its fundamental obligation under shipment agreement, the Appellant refused and neglected to hand over the release order to the Respondent thus making it impossible for the Respondent to secure clearance and release of the consignment imported vide bill of lading no. MSCUG0007137 belonging to Kenya Hydraulic Ltd. The Respondent maintained that the Appellant was bound to unconditionally release the delivery order in respect of the subject container which could not be cleared without the release order.
11. The Respondent averred that the refusal by the Appellant to release the delivery order unlawfully, the consignment was to accrue several damages among them Kenya Ports Authority (KPA) rent and container demurrage. It pleaded that the continued detention of the delivery order was unlawful and that the Appellant ought to be ordered to release the delivery order of the subject consignment without any further delay.
12. The Respondent then sought for judgement against the Appellant or its agents or principals to be ordered to release the delivery order to the Respondent without further delay and an injunction to issue restraining the Appellant from detaining any delivery order relating to the subject consignment and other consignments to be cleared by the Respondent in future and any special damages incurred as a result of unlawful detention of the delivery order in respect of the bill of lading no. MSCUG0007137 be paid by the Appellant. There was also a prayer for costs and any further relief deemed fit by the court. Contemporaneously with the suit was an application seeking a raft of reliefs among them an order of injunction.
13. Upon service upon the Appellant, it entered appearance under protest and filed a notice of objection on the grounds that the summons served were invalid and thus the whole process was void. The Appellant later on filed its stamen of defence dated 10/7/2006 where it contended amongst other things that the subject consignment was released to the Respondent and since the substrata of the suit had ceased to exist, the Respondent had no justiciable cause of action to agitate and thus the proceedings were misconceived and an abuse of court process. It further averred that under the parties' dealings and documents signed, the Appellant had a right to exercise a lien over the Respondent's consignments.
14. Several other interlocutory applications including one seeking to dismiss the suit for want of prosecution and another seeking leave to amend the plaint were filed. An amended plaint dated 10/3/2008 was filed. It introduced paragraphs 8 (a), 9 (a) and 11 (e) but the reliefs remained the same. To the amended plaint, the Appellant filed an amended defence dated 4/7/2008 which only negated the introduced paragraphs.
15. The plaint was later further amended and the same is said to have been amended on 20/4/2008. The amendment introduced demurrage charges of Kshs. 45,983/= and storage charges of USD 925.45. The matter having gone through the necessary motions, the same was certified ready for hearing.

Respondent's Case

16. The Respondent called two (2) witnesses. PW1, Moses Mwaura, the Respondent's Administration Manager adopted his statement and produced documents in support of the Respondent's claim. In



- brief, he stated that the Respondent incurred losses as a result of the Appellant's actions of withholding the release of a consignment meant for Kenya Hydraulics Limited. The reason for failing to release the consignment was an alleged outstanding container demurrage charges amounting to USD 18,194.00.
17. When they demanded details of the alleged container demurrage charges, they were supplied and upon scrutiny, they noticed that the same were for unrelated old shipments for an entity called A.K. Detergents (U) Ltd, a member of Mukwano Group of Companies and whom the Appellant was dealing with directly. They initiated communication to the Appellant through several correspondences but the Appellant continued to withhold the shipment. This forced them to apply for a court order which was granted on 3/4/2006 and the withheld shipment was eventually released on 5/4/2006.
 18. As a result of the delay, the Appellant occasioned the Respondent KPA late documentation charges/ storage charges amounting to US\$ 925.45 and container demurrage of Kshs. 45,988/= that was offset against their container deposit placed with the Appellant. The matter for the un-related container demurrage charges was sorted out between the Appellant and Cargo Logistics Services Ltd, a member of Mukwano Group of Companies. Based on the foregoing, the Appellant had no reason to hold the shipment in question thus liable for late documentation charges amounting to US\$ 925.45 and container demurrage charges for Kshs. 45,983.00/=.
 19. On cross examination, he stated that there was a gentleman's agreement between it Kenya Hydraulics Ltd. The Appellant was the clearing agent for MSC. He could not tell the relationship between MSC and Ocean Freight. They had an account with Ocean Freight which did not have any issues. As at the time KPA sent the invoices from Ocean Freight, they had already paid KPA. He confirmed that storage charges accrue due to delay while demurrage charges accrue due to delay in return of a container. The given period was fourteen (14) days as per the refund advice.
 20. On re-examination, he stated that his working place was not in issue and that he could not know the relationship between Ocean Freight and Mukwano. Finally, he stated that storage and demurrage charges were directly deducted from its account with KPA.
 21. PW2, Simon Njoroge Ndung'u, the Respondent's Operations Coordinator adopted his witness statement which was more or less the same as PW1. He stated that despite engaging the Appellant's management, they refused to release the cargo. That is when they had to seek a court order and upon being issued with the delivery order, they presented it to KPA. They were charged storage and removal charges to the tune of US\$ 925.45 due to the delay in cargo release. When they returned the container, they were refunded less Kshs. 45,000/= which was due to delay in container return. That was what the Respondent was claiming.
 22. On cross examination, he stated that A.K Detergents (U) Ltd was a mutual client which was part of Mukwano Group and it dealt with the Appellant directly. The Appellant was demanding US\$ 18,000 which was due. According to the guarantee form, they had fourteen (14) days to return the container. The cargo would have been released if no amount was owed. On re-examination, he stated that the payment was not related to the transaction. That marked the close of the Respondent's case.

Appellant's Case

23. The Appellant called one witness, Moses Mwaura Museko. He stated that he was the Appellant's Container Supervisor. He adopted his witness statement dated 15/3/2017 and produced documents in a bundle. He confirmed that the Respondent was a clearing and forwarding agent. The Respondent has a claim against the Appellant since 2006. The shipment was released to the Respondent subject to a court order and that they had fully complied. He stated that the demurrage charges claim by the Respondent is not valid as the cargo had been released to it.



24. On cross examination, he confirmed that the Respondent was invoiced and it paid the invoiced amount. He equally confirmed that the Respondent was not given the release order immediately because there were pending bills. The pending bills were not in relation to the transaction of Kenya Hydraulic Ltd. He confirmed that when there is a delay of cargo at the port, it will attract demurrage charges. The container was not released until the Respondent obtained orders from court.
25. On re-examination, he stated that they did not release the shipment because there were outstanding bills the Appellant wanted the Respondent to pay. They were exercising their right of lien. That marked the close of the Appellant's case.
26. Directions were taken that the appeal be canvassed by way of written submissions. Both parties duly complied by filing detailed submissions and cited various authorities in support of their rival positions. The Appellant's submissions are dated 13/9/2023 while those of the Respondent are dated 8/11/2023.

Appellant's Submissions

27. The Appellant identified four issues for determination as follows: -
 - i. Whether the Respondent proved its claim as pleaded to warrant the court to enter judgement in its favour;
 - ii. Whether the evidence adduced by the Respondent departed from the Respondent's pleadings;
 - iii. Whether the judgement of the trial court should be set aside;
 - iv. Who should be awarded costs?
28. On the first issue, it was submitted that the Respondent's plaint, the orders sought therein were in the nature of special damages. Citing the case of Hahn v Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, the Appellant submitted that though the Respondent had pleaded Kshs. 45,983/= as demurrage charges and US\$ 925.45 as storage charges, it did not tender any evidence to support the claims. No single receipt was tendered as evidence corresponding to the pleaded amounts. In fact, none of the Respondent's witnesses explained to the court how the claimed amounts were arrived at.
29. Consequently, it was the Appellant's submissions that in the absence of proof that the claimed charges were incurred and the same occasioned by the Appellant, the Respondent's claim ought to fail for want of evidence. Section 107 (1) of the Evidence Act was cited to buttress the Appellant's position on the maxim "he who alleges must prove."
30. On the second issue, the Appellant submitted that parties are bound by their pleadings and evidence tendered must be in support of a party's case as pleaded in its pleadings. It was submitted that despite the Respondent producing a total of fifteen (15) exhibits, none of them were related to the subject matter of the proceedings to wit the delivery order with respect to Bill of Lading No. MSCU0007137 relating a 40-foot container no. CARU9215142.
31. None of the exhibits produced showed that indeed the claimed amounts of Kshs. 45,983 as demurrage charges and US\$ 925.45 as storage charges were related to the aforesaid bill of lading or that the said charges were incurred by the Respondent at the instance of the Appellant.
32. Making reference the Respondent's exhibits particularly 13 (a) and 13 (b) which are invoices, the Appellant submitted that they related to a 20-foot container while the delivery order in issue related to a 40-foot container. The receipt and payment voucher produced by the Respondent as exhibits 3 and 15 (a) were also impeached for not indicating the purpose for their issuance.



33. Based on the above, the Appellant urged the court to make a finding that the evidence that was produced by the Respondent during trial was at variance with its pleadings thus ought to be disregarded. In support of this line of submission, the Appellant relied on the decided cases of Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR and Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, for the proposition that parties are bound by their pleadings.
34. On the third issue, the Appellant submitted that having demonstrated in issues (i) and (ii) above, the Respondent's claim before the trial court was not proved to the required standard or at all and thus the trial court's judgement was clearly erroneous and it is in the interest of justice that the same be set aside and substituted therefore with an order allowing the Appellant's appeal with costs before the trial court and of this appeal.

Respondent's Submissions

35. The Respondent condensed its issues for determination into two broad grounds which are: -
 - i. Whether the Learned Magistrate erred in law and facts by failing to consider all evidence before him in rendering a judgement in favour of the Respondent;
 - ii. Whether the Learned Magistrate erred in fact and law by basing his findings on speculation therefore failing to consider material facts pleaded by parties leading to an erroneous decision.
36. On the first issue, the Respondent reproduced section 107 (1) of the *Evidence Act* and submitted that he who alleges must prove. The Respondent citing the case of EWO (suing as the next friend of a minor CWO) v Chairman Board of Governors Agoro – Yombe Secondary School [2018] eKLR reproduced in detail the two (2) distinct meanings of burden of proof. The case of Abbay Abubakar Haji v Marain Agencies Company & Another [1984] 4 KCA 53 was equally relied upon.
37. The Respondent submitted that one of its prayers was for special damages in respect to demurrage charges of Kshs. 45,983/= and storage charges of US\$ 925.45. In receipt of all the requisite documents relating to the shipped consignment from its client, Kenya Hydraulics Ltd, it presented to the Defendant a bill of lading no. MSCUG0007137 and thereafter an invoice dated 14/3/2006 for Kshs. 87,400 was raised.
38. The amount above Kshs. 87,400/= included a container deposit of Kshs. 76,000/=. The Respondent settled the invoice in full and was issued with a receipt no. 103705 in acknowledgement of payment anticipating an immediate release of the delivery order to facilitate clearance of the consignment from the port. The Appellant however, refused to release the delivery order on grounds that the Respondent had other outstanding container demurrage for another consignment of US\$ 18,282 which they had to settle before the delivery order could be released to them. It only took a court order to compel the Appellant to release the delivery order.
39. PW1 testimony in cross examination was referred in relation to how the claimed amount was arrived at. The Respondent submitted that invoices and cheques were produced and they were never challenged. The Respondent equally delved on the testimony of DW1 who confirmed that they did not issue the delivery order to the Respondent immediately due to some pending bills which were not relating to the transaction of Hydraulic Shipment but for another consignment.
40. The Respondent submitted that the Appellant's allegations that the lower court failed to consider all facts and evidence before him before making a determination are therefore false. Concluding on this issue, the Respondent submitted that the special damages granted by the Lower Court were rightfully



granted as the amount was on extra charges which the Respondent incurred due to the Appellant's refusal to release the delivery order.

41. On the second issue, the Respondent submitted that the Learned Magistrate based his determination on facts, evidence produced before court and the testimonies of both parties' witnesses. It was stated that the lower court while making its judgement stated that after considering evidence adduced and the submissions by both counsel, it was its holding that it was not proper for the Appellant to withhold the delivery order and that the Appellant did not justify its reasons for holding the delivery order. The lower court was satisfied that the Respondent had proved its claim on a balance of probabilities.
42. The decisions in *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLR 526 as quoted in the case of *In the Estate of M'Mugwika Itonga (Deceased)* [2021] eKLR and *Re H and Others (Minors)* (1996) AC 563, 586 on balance of probability were cited. It was the Respondent's submissions that it was able to persuade the court at a higher threshold on probability and after much consideration, the court was satisfied with the evidence produced by the Respondent to warrant a judgement in its favour.
43. The Respondent also pointed out an issue of the lower court having not considered the invoices produced by the Respondent were relating to 20-foot container while the delivery order related to 40 – feet container. It was contended that the Respondent's witnesses did not give evidence on the size of the containers into consideration. To counter this line of argument, the Respondent submitted that this issue was not brought up in the lower court and only made reference during submissions.
44. The Respondent submitted that the lower court did not consider the issue of container sizes while making its determination as it was not an issue during trial and that submissions are not evidence but just arguments in support of facts. Several decisions in support of the position that submissions are not evidence were cited. These included *Erastus Wade Opande v Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007* quoted in *Robert Ngande Kathathi v Francis Kivuva Kitonde* [2020] eKLR and *Nancy Wambui Gatheru v Peter W Wanjere Ngugi HCCC No. 36 of 1993*.
45. Further reliance was placed in the case of *Ng'ang'a & Another v Owiti & Another* [2008] 1 KLR (EP) 749 and the Court of Appeal decision in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another*. In conclusion, the Respondent concluded that the appeal ought to be dismissed with costs.

Analysis and Determination

46. I have considered the appeal lodged, the submissions filed both for and against which I have summarized as above, the authorities cited as well as the law and I discern the following issues for determination: -
 - a. Whether the Trial Magistrate erred in entering judgement for the Respondent;
 - b. If the answer to (a) is in the affirmative, what orders should issue?
 - c. Who bears the costs?
47. At the onset, the parties' relationship is not in dispute. Similarly, it is conceded that the Appellant did not release the Delivery Order within the time it ought to have done so. Was it justified in withholding the Delivery Order after it had been paid its invoice sum of Kshs. 87,400/= ? The justification given by the Appellant was that the Respondent was owing some amounts and in withholding the consignment, it was simply exercising its right of lien.
48. However, through its letter dated 23/3/2006, the Respondent clarified that the account which the Appellant was using to justify its right of lien was being handled by another entity and not itself. However, the Appellant through the memo of one T. Castellano dated 30/3/2006 completely shut



the door for any form of negotiation. It required the Respondent to obtain a court order to procure the release of the Delivery Order.

49. DW1 on cross examination confirmed that the pending bill was not in relation to Hydraulic Shipment. He equally confirmed that when there is delay of the cargo at the port, it will attract charges. The Appellant's submissions that there is no evidence that the sum of US\$ 925.35 and Kshs. 45,983/= were paid or incurred cannot be sustained by virtue of exhibits 13 (a) and 13 (b) which are invoices from KPA.

50. There is no dispute that on 30/3/2006, the Respondent bought a banker's cheque for a sum of Kshs. 100,000/= in favour of KPA and were issued with a revenue receipt for a similar amount on 5/4/2006. PW1 confirmed that this amount was a deposit for purposes of processing the release order. This court is alive to the provisions of section 107 of the East African Community Customs Management Act, 2004 which provides as follows: -

107 (1) Where any security is required to be given under this Act, then that security may be given to the satisfaction of the Commissioner either—

- a. by bond, in such sum and subject to such conditions and with such sureties as the Commissioner may reasonably require; or
- b. by cash deposit; or
- c. partly by bond and partly by cash deposit.
- d. any other form of security that the Commissioner may allow.

51. The period within which the consignment ought to have been cleared had lapsed and as such and as confirmed by the Appellant's own witness, it started attracting charges which are clearly captured on the invoices by KPA. The provisions of section 117 of the East African Community Customs Management Act, 2004 therefore came into play. Subsection 2 of the of section 17 provides as follows: -

(2) Goods shall not be exempt from liability to import duties under this section unless the proper officer has given permission for such importation; and the proper officer shall not give such permission—

- a) unless he or she is satisfied that the goods are imported for temporary use or purpose only; and
- b) unless the owner thereof has deposited, or given security for, the amount of the import duty to which the goods would otherwise be liable. (Emphasis added)

52. What are the consequences if the condition for the importation of the goods have been contravened? The answer lies in section 117 (5) of the Act. It provides as follows: -

(5) Where the conditions of the importation of the goods have been contravened then the goods shall become liable to duty, as from the date of their importation and the owner shall be required to pay duty and on payment of the duty any deposit given under subsection (2) shall be brought into account or, if security was given, security shall be discharged.

53. The testimony of PW1 that the cargo docked on 12/3/2006 and with an allowance of seven (7) days, the same ought to have been cleared by 20/3/2006. However, the Appellant refused to release the delivery order despite having been paid in full and this necessitated the Respondent to incur charges since it was in breach of section 117 (5) of the East African Community Customs Management Act, 2004. They were entitled to recover this sum from the Appellant. The fact that no receipts were issued



to confirm payment of this sum, the court takes judicial notice of the role of the Commissioner of Customs under section 60 1 (a) of the *Evidence Act*.

54. On the amount of Kshs. 45,983/=, it is not in dispute that a sum of Kshs. 76,000/= was made to the Appellant. However, despite having been the party that occasioned the delay in return of the container, it only refunded the Respondent a sum of Kshs. 30,012 as evidenced by the refund advice dated 24/4/2006 and cheque number 010252 dated 27/4/2006 which were all produced as exhibits. I therefore do not find the Appellant's submissions on the issue of pleadings being plausible. The authorities cited on matters pleadings though espousing the correct position of the law do not come in aid of the Appellant.
55. To wrap up on this part, was the Appellant entitled to exercise its right of lien? In *Republic v Lucas M. Maitha Chairman, Betting Control and Licensing Board & 4 others Ex -parte: Interactive Gaming and Lotteries Limited* [2015] eKLR, G.V. Odunga, J (as he then was) held as follows: -
- “...With respect to the exercise of the right to a lien, a general lien and a particular lien are both categories of a legal lien and a lien is a right at common law in one man to retain that which is rightfully and continuously in his possession belonging to another until the present and accrued claims of the person in possession are satisfied... It is therefore clear that a lien is a possessory right as opposed to a proprietary right. Where therefore a person who would otherwise have a right of a lien over a property legally loses possession thereof it has been held that the lien is lost...”
56. To answer the above question, it is imperative to find out whether indeed such a right existed in favour of the Appellant against the Respondent. If it existed, then the Appellant was fully entitled to act as it did. The converse is also true. A review of the correspondences and in particular the letter dated 23/3/2006 and the handwritten response by Captain T. Castellano dated 30/3/2006 leaves no doubt that had the Appellant taken steps to act on the issues raised by the Respondent in its letter of 23/3/2006, it would have realized that lien did not lie as against the Respondent but a third party by the name Cargo Logistics Services Ltd.
57. It therefore follows that no such right of lien existed in favour of the Appellant against the Respondent for a sum of US\$18,194. I think I have said enough to demonstrate that the Learned Trial Magistrate appreciated the issues at hand and arrived at the correct conclusion which I hereby uphold.
58. On the second issue, having found as above, the only order lending itself is one of dismissal which I hereby do order.
59. On the issue of costs, a careful reading of Section 27 of the *Civil Procedure Act* indicates that it is trite law that they follow the cause or event as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18th Edition, 2011 reprint 2012 at 540. It is that costs must follow the event unless the court, for some good reasons, orders otherwise. The import is that a successful party is entitled to costs unless he or she is guilty of any misconduct or there exist some other good reasons and or cause for not awarding costs to the successful party.
60. However, the court retains discretion whether to grant them or not. Furthermore, this discretion must be exercised judiciously and courts should not deprive a plaintiff/defendant of his or her costs unless it can be shown that they acted unreasonably. The *Halsbury's Laws of England*, 4th Edition (Re-issue), [2010], Vol.10. para 16, notes 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”

61. Any departure from this trite law can only be for good reasons which the Supreme Court in *Jasbir Singh Rai & Others vs Tarlochan Rai & Others* [2014] eKLR noted includes public interest litigation since in such a case, the litigant is pursuing public interest as opposed to personal gain. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR the court noted as follows:

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Costs follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

62. I have said enough to show that award of costs is intertwined with the court’s exercise of discretion. The Respondent being the successful party, I award it the costs of the appeal.

63. Flowing from the above, I proceed to make the following disposition: -

- a. The appeal lacks merit and the same is hereby dismissed;
- b. The Respondent is awarded costs of the appeal;
- c. The file is hereby closed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 30TH DAY OF MAY, 2024.

F. WANGARI

JUDGE

In the presence of:

Ms. Osewe Advocate h/b for Ms. Ndambuki Advocate for the Appellant

Ms. Mwangi Advocate h/b for Mrs. Maina Advocate for the Respondent

Mr. Barille, Court Assistant

