Case Number:	Civil Appeal 206 of 2015
Date Delivered:	18 Oct 2018
Case Class:	Civil
Court:	Court of Appeal at Nakuru
Case Action:	Judgment
Judge:	Roselyn Naliaka Nambuye, Sankale ole Kantai, Fatuma sichale
Citation:	Farah Awad Gullet v CMC Motors Group Limited [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nakuru
Docket Number:	-
History Docket Number:	Civil Case 208 of 2011
Case Outcome:	Appeal allowed in part
History County:	Nakuru
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

The information contained in the above segment is not part of the judicial opinion delivered by the Court. The metadata has been prepared by Kenya Law as a guide in understanding the subject of the judicial opinion. Kenya Law makes no warranties as to the comprehensiveness or accuracy of the information.

IN THE COURT OF APPEAL

(SITTING AT NAKURU)

[CORAM: NAMBUYE, SICHALE & KANTAI, JJ.A]

CIVIL APPEAL NO. 206 OF 2015

BETWEEN

FARAH AWAD GULLET..APPELLANT

=VERSUS=

CMC MOTORS GROUP LIMITED...RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nakuru (Hon. H.A. Omondi, J.) Dated 24th September, 2014

in

NAKURU HCC NO. 208 of 2011

****

BETWEEN

FARAH AWAD GULLET..PLAINTIFF

=VERSUS=

CMC MMOTORS GROUP LIMITED................................DEFENDANT

JUDGMENT OF THE COURT

This appeal arises from the Judgment of the High Court, **H.A. Omondi, J,** dated the 24th day of September, 2014, dismissing the appellant's claim for an order compelling the respondent to forthwith and unconditionally release to the appellant, Registration Number Plate and the Log Book for the tractor, New Holland, Engine Number 000628182, and Chasis Number 001193264 (the suit tractor), payment of Kshs 30,000/= per day for loss of profits and /or user, effective 29th December, 2009, interest at Court rates of 14%, costs and any such further and /or other order as the Honourable Court may deem fit and expedient so to grant.

The background to the appeal is that the appellant sued the respondent vide a plaint dated the 29th day of July, 2011, contending that on the 28th day of December, 2009, he entered into a sale agreement with the respondent for the sale of the suit tractor, at an agreed purchase price of Kshs. 800,000 (eight hundred thousand only), which he fully paid. He took delivery of the suit tractor on the 29th day of December, 2009. The respondent undertook to deliver the Registration Number Plate, the Logbook and other attendant documents (the registration items) for the said suit tractor without any unreasonable delay. The respondent breached the said undertaking occasioning loss of user to the appellant both for the intended personal use for his own farming activities and for income generating farming activities from hiring out the suit tractor to other persons, quantified at Kshs **30,000/=** per day effective the 29th day of December, 2009, until the date of compliance.

The respondent filed a defence dated the 25th day of August, 2011, admitting the existence of the aforementioned contract of sale and that the sale/purchase price was paid for in full. The respondent conceded that the registration items had not been delivered to the appellant as at the time the litigation resulting in this appeal was triggered, but shifted the blame to the Registrar of Motor Vehicles, for his failure to promptly register the suit tractor and issue the registration items for onward transmission to the appellant.

At the conclusion of the trial, the trial Judge made findings *inter alia* that the respondent had agreed to facilitate the registration of the suit tractor within a reasonable time; that the suit tractor was required to be registered in terms of the Traffic Act Cap 403, Laws of Kenya, before it could be used on Kenyan roads; that although there was no evidence that the registration items were to be availed within one month of the delivery of the suit tractor to the appellant, a delay of two years, in the delivery of the said documents in the Judge's view was unreasonable; that there was no proof of either efforts or payments made towards the securing of the said registration items within a reasonable time, or alternatively, any follow up made towards the said exercise. The Judge rejected the respondent's attempt to shift the blame on to the Kenya Revenue Authority (KRA) for inaction on account of the respondents' failure to join KRA to the proceedings as a third party so as to shift any liability on them.

Turning to the appellant's claim for special damages, the Judge relied on **Virani t/a Kisumu Beach Resort –versus- Phoenix of East Africa Assurance Company Ltd [2004] eKLR 269;** and **Moses Jomo Olengeben -versus Samson Masea & another C.A. NO. 29 of 2004 (UR),** all on the threshold for proof of a special damages claim, and rejected it on account of the appellant's failure to produce either receipts or hire agreements to prove the actual loss he suffered by hiring tractors to plough his *shamba* on the one hand, and/or a statement of income or proceeds generated from the use of a tractor by person(s) engaged in a similar business of hiring out tractors for farming activities at a fee within the Lolgorian area.

On mitigation of loss, the Judge relied on **Kiptoo –Versus Attorney General [2010] 1 E.A 201,** and held that the appellant ought to have mitigated the loss he sustained by returning the then useless tractor upon realizing that the respondent had failed to avail the registration items within a reasonable time.

The Judge also found that the respondent had in law, defaulted on its obligation to avail the registration items within a reasonable time, and on that account ordered the respondent to forth with and immediately deliver to the appellant, the said registration items as prayed for in the plaint. Each party was ordered to bear own costs.

The appellant filed this appeal against the above decision, raising ten (10) grounds of appeal. Ground ten (10) was abandoned at the hearing, while the rest were compressed into five (5) major issues in the appellant's written submissions dated the 5th of May, 2016 and filed in Court on the 6th day of June, 2016. In summary, it is the appellant's complaint that the learned Judge erred both in law and fact in:-

(1) Failing to find that the appellant had proved his claim for special damages as by law required,

(2) Holding that the appellant had failed to mitigate his losses,

(3) Directing the respondent to deliver registration items without affixing a timeline for compliance,

(4) Failing to issue an order for costs in favour of the appellant upon finding that the respondent was guilty of breach and/or violation of the implied terms of the agreement of sale as executed between the parties,

(5) ***Delivering a Judgment that was not only unconscionable but also an affront to the provisions of Article 159 (2) (d) of the Constitution which underlines substantial justice as opposed to procedural technicalities***.

The appeal was canvased by way of written submissions, orally highlighted by the learned Counsel for the parties.

With regard to threshhold for proof of a special damages claim as by law required, the appellant contended that the evidence tendered in support of the claim had met the threshold as by law required as it demonstrated that he suffered loss of user of the suit tractor on account of the respondent's failure to avail the registration items within a reasonable time. Second, that the evidence tendered through his witness who was himself a farmer and knowledgeable of the ploughing charges obtaining at Lolgorian area,

constituted credible evidence on the basis of which the honourable Court should have acted to assess damages for the loss of user.

To buttress the above submissions, the appellant relied on the case of **John Richard Okuku Oloo versus South Nyanza Sugar Company Limited, Kisumu CA No. 278 of 2010 (UR)** in support of his submission that lack of precision in the amount claimed by the appellant was no justification for rejecting his special damages claim; **Moses Njomo Olengeben versus Samson Masese & Another, Kisumu CA No. 29 of 2004 (UR)** to demonstrate that in appropriate instances, oral evidence may be admitted to prove a special damages claim; and, lastly, **Virani t/a Kisumu Beach Resort versus Phoenox of East Africa Assurance Company Ltd [2004] KLR** to support his assertion that evidence tendered on his behalf met the legal threshold for proof of a special damages claim as by law required.

With regard to mitigation of loss, the appellant urged us to fault the trial Judge for applying the doctrine of mitigation of loss against him because, firstly, he had sufficiently demonstrated that he frequented the respondent's offices seeking delivery of the registration items for the suit tractor only to be treated to endless promises by a named employee of the respondent, a position not controverted by the respondent. Secondly, the trial Judge properly appreciated the respondent's failure to notify the appellant of the difficulty it was experiencing in obtaining the said registration items. Thirdly, upholding the trial Judge in the application of the doctrine of mitigation of loss against the appellant would be tantamount to allowing the respondent as a wrongdoer to wriggle out of its obligations to make good to the appellant the damage suffered by the appellant on account of its failure to avail the registration items to the appellant within a reasonable time.

As for the timelines within which to deliver the registration items to the appellant, the appellant urged us to fault the Judge for granting the respondent undue latitude to continue exploiting the appellant.

As for the order on costs, the appellant contended that the Judge having found that the respondent breached the terms of the agreement, resulting in the appellant's failure to make full use of the suit tractor for purposes for which it was purchased, the respondent should have been held responsible to meet the appellant's costs of the litigation.

Opposing the appeal, the respondent relied on **Harilal & Co. & Another versus the Standard Bank Ltd [1967] E.A 512** in support of its submissions that the appellant failed to call evidence to prove the existence of a trade usage in the Lolgorian area of hiring out tractors at Kshs. 30,000/= daily as a basis for his claim of loss of user at that rate. The case of **Waweru versus Ndiga [1983] lKLR 236,** was cited for the proposition that the appellant's claim for special damages for loss of user fell into the category of special damages, which by law are required not only to be pleaded but also to be specifically proved, and could not in the circumstances be claimed as general damages. And lastly, **Moses Jomo Olengeben versus Samson Masea and another** (supra) to support their contention that the appellant's oral testimony on loss of user fell short of the acceptable limit approved by the Court in the said **Moses Jomo Olegeban** case.

In support of the trial Judge's application of the doctrine of mitigation of loss against the appellant, the respondent relied on the case of **Kiptoo –versus Attorney General (2010) 1 E.A 201,** and urged us to affirm the trial Judge's finding that the appellant failed to take all reasonable steps to mitigate the loss he sustained having admitted on cross-examination that he did not take any reasonable steps to mitigate the loss he allegedly sustained.

As for the timeline within which to avail and/or deliver the registration items, the respondent submitted that ground seven (7) of the appeal was spent and of no consequence as the respondent complied with the trial Judge's directive on that issue on the 13th August, 2015, long before the hearing of the appeal.

As for the order on costs, the respondent relied on the provision of section 27 (1) of the Civil procedure Act Cap 21 Laws of Kenya in support of their submissions that the Judge exercised her discretion judiciously when she ordered each party to bear own costs as she took into consideration the circumstances of the case, especially, the fact that the appellant's claim had only partially succeeded as against the respondent.

In reply to the respondent's submissions, the appellant reiterated that the Court having found that the respondent was in breach of its obligations under the contract of sale of the suit tractor, it should not have withheld costs from him; that he mitigated his loss in the manner alluded to above and; that his complaint on the Judge's order on the timelines within which the respondent was to deliver the registration items to the appellant was well founded, considering the respondent's past uncontroverted default in providing the same within a reasonable time.

This is a first appeal. Our mandate is to re-appraise; re-assess and re-analyze the evidence on the record before us and arrive at our own conclusions on the matter and give reasons either way. (See the case of **Sumaria & Another versus Allied Industries Limited [2007] 2KLR1).** We are also reminded that we should be slow in moving to interfere with a finding of fact by a trial Court unless it was based on no evidence, or based on a misapprehension of the evidence or the judge had been shown demonstrably to have acted on a wrong principle in reaching the finding he/she did. (See also **Musera versus Mwechelesi & Another [2007] 2KLR 159**).

We have considered the record in the light of the rival submissions and principles of law relied upon by the parties in support of their opposing positions. In our view, the issues that fall for our determination are as follows:

(1) Whether the trial Court erred in rejecting the appellant's special damages claim,

(2) Whether the trial Court erred in finding that the appellant failed to mitigate his loss,

(3) Whether the trial court granted undue latitude to the respondent for the delivery of the registration items,

(4) Whether in the circumstances of this appeal, the Judge exercised her discretion judiciously when she ordered each party to bear own costs.

The trial Judge when rejecting the appellant's special damages claim held as follows:

"… so for the Plaintiff to prove that he incurred the pleaded losses, it was imperative for him to produce receipts for the actual loss he suffered by hiring tractors to plough his shamba and/or statement of income generated from the use of tractors by persons, in such business. Such a statement in my view would assist the Court to determine what loss the plaintiff sustained albeit as an estimate thereof."

Considering the above holding in the light of the now crystalized principle of law that special damages must not only be specifically pleaded but also proved, we agree with the trial Judge's holding that it was not sufficient for the appellant to merely state the loss that he had allegedly suffered, and throw the resulting figure to the Court, and then ask the Court to allow it. He was obligated in law first of all to prove that there existed a trade usage in the Lolgorian area, of hiring out tractors for ploughing activities at the rate claimed, and secondly, to call witnesses to demonstrate the existence of such a trade practice in the said area. (See **Harilal & Co. and another** (supra).)

We also agree with the trial Judge's opinion that a tractor making Kshs 30,000.00 per day would have attracted either the opening of a bank account to handle the proceeds from the farming activities of the magnitude portrayed by the appellant or alternatively, the keeping of some tangible record to that effect. Production of bank statements, receipts or some other tangible record as the case may be either for money paid out by the appellant for hiring other people's tractors to plough his land for him, or alternatively from a person from the locality who was himself/herself engaged in the activities of hiring out ploughing tractors at a profit would have sufficed as sufficient proof. We therefore affirm the trial Judges findings that the evidence adduced by the appellant fell short of the threshold for the proof of a special damages claim as by law required. (See **Hahn versus Singh [1985] KLR 716.)**

The appellant has invited us to cure the above default by invoking Article 159 (2) (d) of the Constitution of Kenya, 2010 in his favour. The parameters for the invocation of this provision have now been delineated by case law. In **Jaldesa Tuke Dabelo versus IEBC & Another [2015] eKLR**, the court held *inter alia,* that:

"rules of procedure are hand maidens of justice and where there is a clear procedure for redress of any grievance, prescribed by an Act of Parliament that procedure should strictly be followed as Article 159 of the Constitution was neither aimed at conferring authority to derogate from express statutory procedures for initiating a cause of action"

In **Raila Odinga and 5 Others versus IEBC & 3 Others [2013] eKLR** the Supreme Court stated that the essence of **Article 159** of the Constitution is that a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties depending on the appreciation of the relevant circumstances and the requirements of a

particular case. In **Lemanken Arata versus Harum Meita Mei Lempaka & 2 Others eKLR** it was stated that the exercise of the jurisdiction under Article 159 of the Constitution is unfettered especially where procedural technicalities pose an impediment to the administration of justice. Lastly in **Patricia Cherotich Sawe versus IEBC & 4 Others [2015] eKLR** it was stated that **Article 159(2) (d)** of the Constitution is not a panacea for all procedural short fall as not all procedural deficiencies can be remedied by it.

We have considered the above threshold in the light of the appellant's argument. We find nothing in the case law assessed above to suggest that Article 159 (2) (d) of the Constitution of Kenya, 2010, operates to uproot crystalized principles of law, such as the one highlighted above on proof of a special damages claim. There is therefore no justification for us to disturb the Judge's rejection of the appellants' special damages claim for the reasons given.

On mitigation of loss, we agree with the Judge's finding that it is now a well settled principle of law that a party seeking redress in damages either for breach of contract or in tort has a duty to mitigate his loss. See **Lord Haldarne in British Westing House Electric and Manufacturing Company versus Underground Electricity RYS Company of London [1912] A.C 673 at 689** where observation was made on that requirement as follows:

"the law imposes a duty on the plaintiff to take reasonable steps to mitigate the loss caused by the breach of contract, and debars him from claiming compensation for any part of the damage which is due to his/her neglect to do so."

The above position was adopted by the Court in **Kiptoo versus Attorney General [2010] IEA201.** In the light of the above principle, we agree with the position taken by the trial Judge that the law required the appellant to take all reasonable steps to mitigate the loss consequent on the respondent's failure to fulfill its contractual obligation towards him of providing the registration items within a reasonable time. (See also **African Highlands Produce Limited versus Kisorio, KLR [2001] 172.)**

In support of his contention, that the trial Judge should not have applied the doctrine of mitigation of loss against him, the appellant has relied on the Judge's findings that the respondent's delay in the provision of the registration items to the appellant was unreasonable; that no payments were made by the respondent towards the securing of the said registration items; that there was no proof of any follow ups efforts made by the respondent to quicken the processing of the said registration items; and also that the Judge rejected the respondent's attempt to shift the blame onto KRA for the failure to avail the said registration items within a reasonable time.

In light of the above uncontroverted factors, it is our finding that the trial Judge should have in the circumstances of this appeal applied this doctrine in favour of the appellant and called upon the respondent to meet the consequences of its default in fulfilling its obligation under the contract of sale of the suit tractor to the appellant within a reasonable time.

With regard to the time line within which the registration items were to be delivered to the appellant following the trial Judge's directive in the impugned Judgment, it is our finding that this is now a non-issue following the appellant's failure to controvert the respondent's assertion that it complied with the trial Judge's directive as directed in the impugned Judgment on the 13th August 2015. There is therefore no need for us to interrogate this issue any further or draw out any conclusions on the same.

As for costs, it was correctly submitted by the respondent that the discretion of the Court to grant or withhold costs is enshrined in section 27 of the Civil Procedure Act. It provides *inter alia* as follows:-

Sec.27(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 who 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.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such"

In the **Party of Independent Candidates of Kenya versus Mutula Kilonzo & 2 others, HC EP No. 6 of 2013**, the High Court had this to say on the issue of costs:-

"It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs is a matter in which the trial judge is given discretion …. But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, is a rule which should not be departed from without the demonstration of good grounds for doing so."

In **Richard Kuloba, Judicial Hints on Civil Procedure, 2nd Edition, page at page 101,** the author authoritatively states as follows on the issue of costs:-

"The law of costs as it is understood by Courts in Kenya, is this, that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part-no omission or neglect, and no vexatious or oppressive conduct is attributed to him, which would induce the Court to deprive him of his costs- the Court has no discretion and cannot take away the plaintiff's right of costs. If the defendant, however innocently, has infringed a legal right of the plaintiff, the plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course".

In the light of the above threshold, it is our finding that the position in law is that costs are at the discretion of the court seized of the matter with the usual caveat being that such a discretion should be exercised judiciously, meaning, without caprice or whim and on sound reasoning (see **Githiaka versus Nduriri [2004] 2KLR**). Secondly that a Court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

The jurisdiction of the Court to either award costs or interfere with an award of costs made by the Court appealed from is donated by Rule **31** of the rules of the Court. It provides as follows:

"31. On any appeal the Court shall have power, so far as its jurisdiction permits, to confirm, reverse or vary the decision of the superior court, or to remit the proceedings, to the superior Court with such directions as may be appropriate, or to order a new trial, and to make any necessary incidental or consequential orders, including orders as to costs".

Our construction of this Rule is that as a general rule, an award of costs on appeal follows the event, and a successful litigant will be awarded costs so as to recoup the costs he has undergone in the course of the litigation. In **John Kamunya and another versus John Ngunyi Muchiri & 3 others** [2015] eKLR, the Court reviewed a number of its own decisions on the subject which we find prudent to reflect here in as well. In **Supermarine Handling Services Ltd versus Kenya Revenue Authority** [2010] eKLR (Civil Appeal 85 of 2006) the Court stated *inter alia,* that:

"Costs of any action, cause or other matter or issue shall follow the event unless the Court of Judge shall for good reason otherwise order … Thus, where a trial Court has exercised its discretion on costs, an appellate Court should not interfere unless the discretion has been exercised injudiciously 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 reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the rule".

In that appeal, the Court drew inspiration from the pronouncements of the Court in **Devram Dattan versus Dawda [1949] EACA 35** where it was held that:

"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 the 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".

In the light of all the above, we agree with the position held by the Court in the above pronouncements that an award of costs is therefore an exercise of the Court's discretion, and as has been alluded to above, the Court of Appeal, in interfering with the

exercise of discretion of the trial Judge appealed from, ought to satisfy itself that the exercise of that discretion either way was improper and therefore warrants interference.

In **James Koskei Chirchir versus Chairman Board of Governors Eldoret Polytechnic [2011] eKLR** (Civil Appeal No. 211 of 2005), the Court held *inter alia,* that:

"Notwithstanding the provisions of section 27, above costs is generally a matter within the discretion of the Court. The Court did not, however, explain why it denied the appellant his costs before the trial Court. In absence of any explanation in that regard we think that the learned Judge of the Superior Court erred in denying the appellant the costs of the suit before the trial Court".

Where there is sufficient reason why a trial Court awarded costs, then the appellate Court will not interfere with that award as was the case in S.K. Njuguna & another versus John Kiarie Waweru & another [2009] eKLR (Civil Appeal No. 219 of 2008) where the Court stated that:

"We reiterate that the issue of costs is in the discretion of the Court and in this appeal, we are satisfied that there were justifiable reasons why the appellants herein were ordered to pay the costs although the Election Petition against them was dismissed."

See also **Margret Ncekei Thuranira versus Mary Mpinda & another [2015] eKLR** where the principles on the discretion to award or withhold costs were summarized as follows:

"22. On the issue of costs, rule 31 of the Rules of this Court enjoins us at the end of our determination to make any necessary, incidental or consequential order including orders as to costs. In Devran Dattan versus Dawda [1949] EACA 35, it was held that the decision as to whether the successful litigant has a right to recover his costs should be left to the discretion of the Judge who tried the case, a position reiterated in James Koskei Chirchir versus Chairman Board of Governors Eldoret Polytechnic [2011] eKLR (Civil Appeal No. 211 of 2005) when this Court ruled that notwithstanding, the provision of section 27 of Civil Procedure Act, costs are generally a matter within the discretion of the Court. See also the decision in the case of Super Marine Handling Services Limited versus Kenya Revenue Authority [2010] eKLR (Civil Appeal No. 85 of 2006) for the proposition that 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. Herein, the learned trial Judge properly exercised his discretion in awarding costs to the respondents. We find no good reason to interfere with the exercise of that discretion as the costs therein had followed the event considering that the respondents were the victorious party".

Applying the above threshold to the rival arguments herein on the issue of costs, it is our finding that jurisdiction exists for us to intervene and either affirm or interfere with the award of costs made by the trial court, save on condition that the threshold for such interferences as laid by the case law assessed above is satisfied.

In **Edward Sargent versus Chotabha Jhaverbhat Patel [1949] 16EACA 63**, it was held that an appeal does lie to an Appellate Court against an order made in the exercise of judicial discretion, but the Appeal Court will interfere only if it be shown that the discretion was exercised injudiciously. The principles that guide the appellate court in the exercise of this mandate were set by the predecessor of the Court in **Mbogo & Another versus Shah [1968] E.A. 93,** where it was held at page 96 that:-

"An appellate Court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate Court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice"

In the light of the above principles, the factors we are enjoined to consider when deciding whether to interfere or otherwise with the award of costs made by the trial court resulting in this appeal are not limited to the conduct of the parties in the actual litigation, but also to matters which triggered the litigation, and the contribution of the party in whose favour the order of costs was withheld, to the causation of those factors. In the instant appeal, the matter that triggered the litigation was the respondent's failure to avail the registration items for the suit tractor within a reasonable time. It is not disputed that the said registration items were provided on the 13th day of August, 2015 long after the litigation resulting in this appeal had been initiated and concluded. The impugned Judgment

of the Court was delivered on the 24th day of September, 2014 being a period of four (4) years and nine months from the date of the agreement of sale of 28th December, 2009. The said Judgment contained a directive for the registration items to be delivered immediately but as already highlighted above, it was not until almost a year later on the 13th day of August, 2015, when that directive was complied with. In the circumstances demonstrated above, it cannot be said that the appellant had no good reason for initiating the litigation resulting in this appeal.

The above conduct on the part of the respondent coupled with our earlier finding that the appellant took steps to mitigate his loss afford sufficient basis for us to interfere with the trial Judge's exercise of discretion in withholding costs from the appellant, notwithstanding, that the appellant had not wholly succeeded on his claim both at the trial and now on appeal. The trial Judge's failure to take into consideration the factors that triggered the litigation and the fact that it is the respondent which substantially contributed towards the causation of those factors in our view resulted in a misjustice to the appellant with regard to the issue of cost. We therefore find sufficient justification for us to interfere with the trial courts order on costs.

The up shot of the above assessment is that the appellant has partially succeeded on his appeal. We therefore partially allow the appeal, set aside the trial Judges finding on the mitigation of loss and substitute therewith a finding that on the facts as demonstrated on the record the appellant sufficiently mitigated his loss. We also set aside the order on costs and substitute it with an order that the appellant who has substantially succeeded on his appeal as against the respondent will have three-quarter costs on appeal and costs in the court below. The order dismissing the appellant's special damages claim is affirmed.

Dated and delivered at Nakuru this 18th Day of October, 2018.

R. N. NAMBUYE

………………...………………...

JUDGE OF APPEAL

F. SICHALE

………………………………….

JUDGE OF APPEAL

S. ole KANTAI

…………………………………

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

While the design, structure and metadata of the Case Search database are licensed by Kenya Law under a Creative Commons Attribution-ShareAlike 4.0 International, the texts of the judicial opinions contained in it are in the public domain and are free from any copyright restrictions.
Read our Privacy Policy | Disclaimer