Case Number:	Civil Appeal 216 of 2017
Date Delivered:	24 Sep 2020
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Joseph Kiplagat Sergon
Citation:	Victor Ngugi Kariuki v CIC General Insurance [2020] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	Hon E. Wanjala (Miss) (Senior Resident Magistrate)
County:	Nairobi
Docket Number:	-
History Docket Number:	Milimani CMCC no. 4382 of 2015
Case Outcome:	Appeal dismissed
History County:	Nairobi
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.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 216 OF 2017

VICTOR NGUGI KARIUKI...…………….……….………………APPELLANT

VERSUS

CIC GENERAL INSURANCE……....…………...…………RESPONDENT

(Being an appeal from the judgment and decree of Honourable E. Wanjala (Miss.) (Senior Resident Magistrate) delivered on 18th April, 2017 in Milimani CMCC no. 4382 of 2015)

JUDGEMENT

1. Victor Ngugi Kariuki, the appellant herein, lodged a suit against the respondent by way of the plaint dated 10th July, 2014 and sought to be paid the sum of Kshs.1,112,000/ plus costs of the suit and interest thereon.

2. The appellant pleaded in his plaint that he had at all material times taken out an insurance policy with the respondent under which the respondent was to insure the appellant's Equity Agent and a shop located on Plot No. D2-279 at Kayole area in Nairobi.

3. The appellant pleaded that sometime on or about the 15th day of January, 2012 the appellant relocated his business from the abovementioned location to Plot No. M-09 and notified the respondent of the relocation.

4. It was pleaded by the appellant in his plaint that sometime on or about 16th February, 2013 his shop was broken into, the result of which he lost goods valued at Kshs.608,000/ and cash worth Kshs.504,000/ totaling the sum of Kshs.1,112,000/.

5. The appellant stated in his plaint that despite his efforts to claim indemnity from the respondent in respect to the aforementioned assets lost, the respondent denied the appellant's claim.

6. The respondent entered appearance on being served with summons and filed its statement of defence on 8th September, 2015 to deny the appellant's claim.

7. At the hearing of the suit, the appellant testified while the respondent summoned one (1) witness to testify in support of the defence case.

8. Upon considering the material placed before the court and the written submissions filed by the parties, the trial court delivered judgment on 18th April, 2017 in favour of the appellant and against the respondent by ordering the respondent to pay the indemnity of Kshs.1,112,000/ as stipulated in the insurance cover/policy applicable at the time together with interest on the same at court rates from the date of judgment. However, the trial court ordered each party to bear its own costs.

9. Being dissatisfied with the trial court's finding on costs, the appellant lodged this appeal against the same vide the memorandum of appeal dated 9th May, 2017 and put forward the following grounds of appeal:

i. THAT the learned trial magistrate erred in law and fact in refusing to give an order of costs in favour of the appellant without giving any reason.

ii. THAT the learned trial magistrate erred in law and fact in that she did not follow the principles applicable when awarding

costs.

iii. THAT the refusal by the learned trial magistrate to award costs to the appellant was bad in law and prejudicial to the appellant and occasioned a failure of justice.

10. At this court's invitation, the parties filed written submissions on the appeal. The appellant through his submissions dated 23rd June, 2020 argues that it is trite law that costs follow the event in ordinary circumstances and cited the case of **Supermarine Handling Services Ltd v Kenya Revenue Authority [2010] eKLR** where the court had the following say on the subject:

"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. See Section 27 (1) of the Civil Procedure Act.

In the case Devram Dattan v Dawda [1949] EACA 35 it was held,

"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."

11. The appellant submits that despite determining the suit in his favour, the trial court declined to award him costs without providing any reasons and yet such an award was not only sought in the appellant's pleadings but the appellant portrayed proper conduct in the course of the trial proceedings.

12. It is the view of the appellant that the trial court had no justification to deny him costs upon considering the above factors and relied on the holding by the court portrayed in the case of **Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR** that a successful party is ordinarily entitled to an award of costs unless his or her conduct leads the trial court to conclude that an award of costs is not attractive or that the circumstances of the suit would not attract an award of costs.

13. In its submissions dated 27th July, 2020 the respondent argue that an award of costs is purely a matter of the court's discretion as denoted in the **Halsbury's Laws of England 4th edition Re-Issue (2010), Vol. 10, para. 16** thus:

"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 award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice."

14. The respondent went ahead to contend that the parties herein entered into a consent filed on 11th September, 2017 thereby marking the suit as fully settled and the terms of which are binding upon the appellant. In making this specific submission, the respondent borrowed from the reasoning of the Court of Appeal in the case of **Flora N. Wasike v Destimo Wamboko[1988] eKLR** upon entry, the terms of a consent are binding upon the parties to it and a party cannot renege from the consent unless and until it is varied and/or set aside.

15. In the end, the respondent urged this court to dismiss the appeal.

16. I have considered the rival submissions and authorities cited on appeal. It is noted that the appeal lies purely against the learned trial magistrate's finding on costs. I will therefore address the three (3) grounds of appeal together under that head.

17. I wish to first make a finding on an issue raised in the respondent's submissions touching on whether the record of appeal is defective for failure to include a complete set of exhibits or the consent order entered into.

18. Upon my perusal of the record of appeal, I established that notwithstanding the fact that it may not have included all the

documentation that was presented before the trial court, this factor would not in itself render it defective since I note that the appellant annexed the crucial documents to the record such as the pleadings, trial court proceedings, judgment and decree. I therefore decline to render the appeal defective.

19. On the subject of costs, upon my study of the pleadings, I note that among the reliefs sought in the plaint was a prayer for costs of the suit. At the stage of final submissions, the appellant reiterated the prayer for an award of costs. Upon analyzing the material and evidence placed before it, the learned trial magistrate found that the appellant had proved his case against the respondent and awarded him the sum of Kshs.1,112,000/. As earlier noted, however, the learned trial magistrate ordered the parties to bear their respective costs.

20. I also looked at the consent order which constituted part of the lower court record, dated 5th September, 2017 and filed in court on 11th September, 2017 to the effect that the suit be marked as fully settled. The same was eventually adopted as an order of the court on 19th September, 2017 going by the lower court proceedings.

21. From the lower court record, it is apparent that the consent followed an application for a stay of execution pending appeal filed by the respondent with the intention of appealing against the judgment of the learned trial magistrate and to my mind, the consent was a means of compromising the application for a stay of execution.

22. There is nothing to indicate that the consent order has been varied and/or set aside. There is also nothing to indicate that the order was intended to exclude costs since if this was the case, it would have been clearly stipulated therein. In my view, the costs had been compromised in the consent order and pursuant to the finding of the learned trial magistrate in her judgment.

23. In view of the foregoing, I concur with the reasoning of the respondent that the appellant cannot be heard to now challenge the finding on costs since he is bound by the terms of the consent order marking the matter as ‘fully settled’ which in my mind can be understood to include the costs of the suit, in the absence of any contrary facts or evidence. I associate myself with the rendition by the Court of Appeal in the case of **Flora N. Wasike v Destimo Wamboko [1988] eKLR** thus:

“…Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them .... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court ....; or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement.”

24. The appellant has not sought to challenge the consent order and he is therefore bound by its terms. Moreover, the appellant has not argued that the consent order was intended to exclude the costs of the suit. In the circumstances, this court is unable to step in and interfere with the finding on costs.

25. Consequently, the appeal is hereby dismissed. Upon considering the nature of this appeal, I find that a fair order on costs is to order each party to bear its own costs of the appeal.

Dated, signed and delivered online via Microsoft Teams at Nairobi this 24th day of September, 2020.

………………….

J. K. SERGON

JUDGE

In the presence of:

………………………………. for the Appellant

……………………………… for the Respondent

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