

UGANDA / JUDGMENT

Marwaha v Subhakhhan and Another (C.A. 18/1931.) [1931] EACA 5 (1 January 1931)

[1931] EACA 5

COURT

East African Court of Appeal

BEFORE

Barth CJ, Griffin C.J. (Uganda),, Thomas, J. (Kenya)

CASE / FILE NUMBER

C.A. 18/1931.

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COURT OF APPEAL FOR EASTERN AFRICA.

Before SIR J. W. BARTH, C. J. (Kenya), SIR C. GRIFFIN, C. J. (Uganda), and THOMAS, J. (Kenya).

A. M. MARWAHA & Co.

(Appellants) (Original Plaintiffs)

SUBHAKHAN AND ALLADITTA

(Respondents) (Original Defendants).

C. A. \$18/1931\$.

Arbitration under Order of Court-Order XLIII, Civil Procedure Rules, 1927—Power of Court to modify award, particularly as to costs.

\$Held\$ (4-7-31):-Inter alia, that where the arbitrator's award deals with court costs, the judge is not bound thereby.

Figgis, K. C., for Appellants.

Atkinson (for Modera) for Respondents.

On 30th July, 1930, the appellants (as plaintiffs) filed a plaint against the respondents (original defendants) for recovery of Sh. 3,702, the balance due on a contract for the sale of sand and lime, and for an order as to the delivery thereof together with interest and costs and further interest on decretal amount at 6 per cent per annum until payment in full. A defence was filed denying the accuracy of the figures contained in the plaint and counter-claiming Sh. 301/67. Before the suit came on for hearing all matters in dispute were referred to a single arbitrator for determination.

The arbitrator awarded that defendants should be allowed to remove approximately 20 tons of lime then lying at Athi River and that they should pay to the plaintiffs (appellants) the sum of Sh. 503/96 with interest and costs. In his award the arbitrator disposed of the question of costs as follows: "Further, I think that plaintiffs may be remunerated the lower Court's costs, while the defendants be bestowed upon the high 'Court's costs."

On the 7th March, 1931, the trial Judge entered judgment in terms of the award and directed that the costs payable by or to the parties would be in accordance with the arbitrator's recommendation. The plaintiffs (the present appellants) appealed to this Court from the Decree of 7th March, 1931, on the grounds (1) that the trial Judge failed to exercise judicially the discretion vested in him as to costs by Rule 13 of Order XLIII; (2) that the trial Judge, without good cause, ordered in fact that the costs of the action should not follow the event; and (3) that in awarding costs to the defendants on the Supreme Court scale the trial Judge awarded more than was actually claimed by the prayer in the counter-claim.

Figgis, \$K. C., \$ referred to section 11 of the Civil Procedure Ordinance and submitted that as the respondents were awarded a figure of less than Sh. 1,500 they were not entitled to any more costs than they would have been entitled to had they sued in the subordinate Court. He submitted that the trial Judge had not exercised the discretion vested in him by the section, nor had he recorded any reason for homologating the arbitrator's award of costs.

Atkinson submitted that by section 27 of the Civil Procedure Ordinance a trial Judge had an absolute and unfettered discretion and was not obliged to record reasons for his award of costs.

Figgis.—The Court fees in the counterclaim were not paid for on a basis of Sh. 4,500 but of Sh. 361.

SIR J. W. BARTH, C. J.—This is an appeal from an order for costs.

The plaintiffs brought an action for Sh. 3,702 for principal and interest, being the balance alleged to have been due on contracts for the sale of lime and sand to the defendants.

The defendants denied liability and alleged that on balance-Sh. 301/67 were due to them, and they counter-claimed for that \$sum.\$

The matter was referred to arbitration and the arbitrator found that Sh. 805/63 were due to the plaintiff less Sh. 301/67 for defendants' counter-claim. His finding was that the defendants should pay to the plaintiffs Sh. 503/96 with interest thereon at 9 per cent from 17th November, 1928, until payment. The arbitrator made a recommendation that the plaintiff receive costs on the lower Court scale and that the defendants receive costs on the higher Court scale.

The learned Judge allowed costs in accordance with the arbitrator's recommendation.

In my opinion there is no adequate reason given for the Judge's order dealing with the defendants' costs. The bare fact remains that the plaintiffs were successful to the extent of Sh. 503/96, and are entitled to their costs on the Subordinate Court scale on that sum.

The counter-claim has in fact failed as no balance was found. due to the defendants, and I see no reason why the defendants. should have any costs.

In my judgment the appeal should be allowed with costs. the Judge's order as to costs being varied to an order that the plaintiffs get costs on the Subordinate Court scale on the basis. of a claim for Sh. \$503/96\$.

SIR C. GRIFFIN, C. J.-I concur.

THOMAS, J.-This is an appeal from an order of Dickinson, J., as to costs.

The suit was brought in the Supreme Court and claimed Sh. \$3,702\$ in respect of certain contracts for the supply of lime. The defendants by their defence questioned the accuracy of the accounts submitted and alleged that there was a balance of Sh. 301/67 due to them, and for that balance they counterclaimed.

The case was sent to arbitration and the arbitrator found that "the plaintiff should be allowed Sh. 205/63 as stated in point No. 1, and Sh. 600 for point No. 2, i.e. all in all Sh. 805/63 less Sh. 307/67 for defendant's counterclaim as the plaintiff admits all the debit entries. The net amount due to the plaintiff is therefore Sh. \$503/96\$. Finally there should be judgment for the plaintiff for Sh. 503/96 with interest thereon at 9 per cent per annum from the 17th November, 1928, till full payment is made. Further I think that the plaintiff may be remunerated the lower Court costs while the defendants be bestowed upon the high Court costs."

The learned Judge considered that he was bound by the decision of the arbitrator as to costs and made his order accordingly.

By Order XLIII, R.13, the Court may make such order as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and whether the award purports to contain a sufficient provision concerning them or not.

The learned Judge gave only one reason for his decision, viz.: "That if the costs had been left to the Court the plaintiff. would not have been more successful in the matter of costs than he would be if the arbitrator's recommendations are carried into effect."

That applies to the plaintiff's costs only. It would seem. that no reason was given in respect of the defendant's costs in respect of the counter-claim. The Judge, of course, has a discretion, but that discretion must be exercised judicially.

The defence was that on accounts being taken there would be a balance in favour of the defendant, and it was that balance that was counterclaimed. On the taking of the accounts there proved to be a balance in favour of the plaintiff. Whatever language may have been used by the arbitrator it seems to me that the effect of the award is that the plaintiff succeeded and This is shown by the decision on the the defendant did not. taking of the accounts that the plaintiff was entitled to Sh. 503/96. There was no other issue before the Court. There-. fore in my opinion the defendant is not entitled to recover The success of the defendant in resisting the any costs. plaintiff's claim is reflected in the lower scale of costs recoverable by the plaintiff. The plaintiff is entitled to his costs on the lower Court scale. The order of Dickinson, J. must be varied accordingly. The appellant will have the costs of the appeal.

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Prepared on 13 October 2026 · Esheria