



Mumias Sugar Company Limited (In Receivership) v Societe De Promotion Et De Participation Pour Cooperation Economique S.A. (Proparco) (Civil Suit E083 of 2020) [2022] KEHC 11868 (KLR) (Commercial and Tax) (12 August 2022) (Ruling)

Neutral citation: [2022] KEHC 11868 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E083 OF 2020**

**A MABEYA, J
AUGUST 12, 2022**

BETWEEN

MUMIAS SUGAR COMPANY LIMITED (IN RECEIVERSHIP) PLAINTIFF

AND

SOCIETE DE PROMOTION ET DE PARTICIPATION POUR COOPERATION ECONOMIQUE S.A. (PROPARCO) DEFENDANT

RULING

1. On December 13, 2019 arbitral proceedings were lodged by the defendant against the plaintiff before the International Chamber of Commerce (ICC) in Paris, France being ICC Arbitration case No 24965/DDA: Societe De Promotion et de Participation pour la Cooperation Economique SA v Mumias Sugar Company Limited (“the arbitral proceedings”).
2. Before the filing of those proceedings, there were already two (2) petitions for the liquidation of the plaintiff pending before this Court being Insolvency Petition Number E004 of 2019: In the Matter of Mumias Sugar Company Limited and Insolvency Petition Number E007 of 2019: In the Matter of Mumias Sugar Company Limited (“IP No E004/2019 and IP No E007/2019”). As a matter of fact, the defendant had already filed a notice of intention to appear in IP No E004 of 2019.
3. Subsequently, the plaintiff filed this suit against the defendant vide a Plaint dated March 24, 2020. The Plaint was accompanied by a Motion on Notice seeking, inter alia, orders to restrain the defendant from proceeding with the arbitral proceedings pending the determination of the insolvency proceedings.
4. On November 8, 2021, the plaintiff withdrew this suit and prayed for costs. The defendant consented to the withdrawal of the suit but opposed the prayer for costs. The Court directed the parties to file submissions on the issue of costs.



5. The defendant filed its submissions dated December 1, 2021 wherein it submitted that no costs are payable in the instant case. That both the main suit and the application were never heard and no determination had been made thereon to warrant an award of costs in favour of either party.
 6. That in the event the Court is minded to award costs, the same should be in its favour having regard to its impeccable conduct during the pendency of the matter and the facts and circumstances of the matter. That it should not be condemned to costs as the plaintiff had voluntarily withdrawn the suit.
 7. The defendant relied on the case of *Pradipkumar Harjivandas Paunrana v Muniu Thoiti & George Waweru [(As administrators of Arm Cement Plc (Under administration)); National Cement Company Limited (Interested Party)]* (2021) eKLR, in support of its submissions. That the plaintiff was seeking an equitable remedy yet it had come to court with unclean hands. That the plaintiff should compensate it in terms of the Credit Agreement between them.
 8. In conclusion, the defendant urged the Court to apply the case of *Jasbir Singh Rai v Tarlochan Singh Rai & 4 others* (2014) eKLR, and order each party to bear own costs.
 9. On its part, the plaintiff submitted that the suit was necessitated by the commencement of unnecessary, irregular and illegal arbitral proceedings by the defendant at the ICC. That the suit was withdrawn at the request of the defendant. Passages from the Judicial Hints on Civil Procedure, 2nd Edition (Nairobi: Law Africa, 2011), at page 94 Halsbury's Laws of England, 4th Edition Re-Issue (2010), Vol 10, at para. 16 were cited in support of those submissions.
 10. Relying on *Joseph Oduor Anode v Kenya Red Cross Society* [2012] eKLR and *Pacis Insurance Company Ltd v Francis Njeru Njoka* [2018] eKLR, the plaintiff submitted that the withdrawal of the arbitral proceedings rendered the substratum of the suit superfluous hence the plaintiff had achieved the main purpose of its suit and was therefore entitled to costs.
 11. That the alleged costs due to the facility agreement claimed by the defendant were not owing and that the dispute regarding that facility is before the Insolvency Court.
 12. I have considered the rival submissions by Learned Counsel. An order for costs is discretionary. Under section 27 of the *Civil Procedure Act*, costs will always follow the event. A party is at liberty to withdraw or discontinue his suit subject to the discretionary power of the court to order costs.
 13. In awarding costs, the court will consider the purpose for which the suit was filed, whether it was necessary in the first place or it was only intended to annoy the opposite party. The stage at which the withdrawal is made will also be a consideration and the steps so far made in the prosecution thereof.
 14. In the present case, the suit was necessitated by the filing of the arbitral proceedings by the defendant. The defendant knew as at that time there were already insolvency proceedings against the plaintiff pending before the Insolvency Court. The suit was in the premises necessary in my view.
 15. The withdrawal of the suit was said to have been necessitated by the withdrawal of the arbitral proceedings at the ICC. That the present suit therefore would serve no purpose.
 16. Considering the circumstances under which the suit was filed, the fact that the no major proceedings was ever undertaken in this suit and the circumstances under which the suit was withdrawn, my view is that an order for costs would not be in the best interest of any of the parties.
 17. Accordingly, I order that each party do bear own costs of the suit.
- It is so ordered.

DATED and DELIVERED at Nairobi this 12th day of August, 2022.



A. MABEYA, FCIArb

JUDGE

