



Achelis Material Handlers Limited v Narok County Government (Civil Case E005 of 2021) [2022] KEHC 14512 (KLR) (27 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14512 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL CASE E005 OF 2021
F GIKONYO, J
OCTOBER 27, 2022**

BETWEEN

ACHELIS MATERIAL HANDLERS LIMITED PLAINTIFF

AND

NAROK COUNTY GOVERNMENT DEFENDANT

RULING

Quest for Cost

1. The court has been called upon to determine whether the defendant is entitled to costs upon the referral application dated 30.5.2022.

Brief important facts

2. The said chamber summons application dated 30/05/2022 specifically sought the following orders; i) that there be a stay of all proceedings herein pending arbitration; ii) that the dispute between the plaintiff and defendant be referred to arbitration; and iii) that the cost of this application be borne by the plaintiff.
3. The plaintiff and the defendant herein entered into an agreement dated 5th September 2016 for the supply of 6 motor graders at a contractual sum of Kshs. 153,000,000/=
4. Clause 11 of the said agreement incorporates an elaborate and tiered dispute resolution mechanisms comprising of amicable settlement and arbitration.
5. On 20/9/2022, this court ordered the matter be referred to arbitration and pleadings herein stayed save on issue of costs.



Analysis and Determination

Applicants gravamen

6. In staying these proceedings and referring the subject matter to arbitration, the defendant insisted that it is entitled to costs of the referral application. The defendant took the view that the plaintiff came to court despite the arbitration agreement, and should be condemned to costs. Mr. Kere, legal counsel for the defendant insisted that the defendant had complied with all timelines for applying as provided in section 6 of the [Arbitration Act](#).
7. The plaintiff thinks otherwise.
8. What does the law say on costs?

The general rule on costs

9. The general rule of law is that costs shall follow the event. See Section 27 of the [Civil Procedure Act](#) which provides as follows: -

“(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 whom 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.”

10. However, the court may depart from the general rule but only for good reason (The Supreme Court in [Jasbir Singh Rai & Others vs Tarlochan Rai & Others](#) {2014} eKLR).
11. The discretion, nevertheless, is exercised judicially and judiciously. See The Halsbury’s Laws of England, 4th Edition (Re-issue), {2010}, Vol.10. para 16: -

“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”

12. What are the exact circumstances of these proceedings?
13. These proceedings relate to a matter which is subject of an arbitration agreement. Upon application filed by the defendant on 30.5.2022, the proceedings were stayed and the matter referred to arbitration in accordance with section 6 of the [Arbitration Act](#). The defendant now insists that it is entitled to costs on the referral application.



Conduct of parties

14. The conduct of parties is relevant consideration in awarding costs. Conduct may be outright manifestations in the manner the party has acted in the course of proceedings. It may also arise or be deduced from compliance or otherwise with court or procedural requirements.

Arbitration Act

15. Under section 6 of the Arbitration Act, ‘A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless...’
16. From the record, it appears that the defendant entered appearance vide notice of appointment of advocates dated 16/3/2022 and filed in court on 17/3/2022. The defendant subsequently applied on 30.5.2022 for stay of proceedings and referral of the matter to arbitration. The defendant only benefitted from the discretion of the court. I do not, therefore, think the defendant stands any high pedestal to insist on costs. This should be the major reason for denying the defendant costs.
17. But there is more. I should state further that, in law, such proceedings as shall have been so stayed remain undetermined. See section 6(2) of the Arbitration that: -
- Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined
18. One further reason. Arbitration proceedings are largely consensual. I should think therefore, that, it is not foolish thought that, proceedings which result into referral of the matter to arbitration should be seen within facilitation-component of arbitration as a consensual engagement between the parties. Many courts in jurisdictions which have adopted Unicitral Model Law on International Commercial Arbitration display a pro-arbitration attitude; upholding the consensual nature of arbitration; and in ordering a stay of court proceedings and referring the matter to arbitration, scarcely award costs in referral suits. It is therefore my view that in the circumstances of this case and the law, award of costs to the defendant is not merited.

Conclusions and orders

19. It is clear the direction the court is taking. In sum, I find the foregoing to be a good and lawful reason to depart from the general rule that costs shall follow the event under section 27 of the Civil Procedure Rules. Needless to state that not all incidents or events which attract costs. I therefore, deny the request by the respondent for costs. Accordingly, each party shall bear own costs of the application dated 30th May 2022.
20. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 27TH DAY OF OCTOBER, 2022.

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F. GIKONYO M.

JUDGE

In the presence of:



1. Mr. Kasaso – CA
2. Waudu for the Plaintiff - absent
3. Kere for the Defendant- absent

