



**Seabridge Forwaders Limited v Kenya Airport Parking Services Limited (Appeal E055 of 2021)
[2022] KEHC 16020 (KLR) (Commercial and Tax) (25 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 16020 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
APPEAL E055 OF 2021
A MSHILA, J
NOVEMBER 25, 2022**

BETWEEN

SEABRIDGE FORWADERS LIMITED APPELLANT

AND

KENYA AIRPORT PARKING SERVICES LIMITED DEFENDANT

RULING

1. The appellant being dissatisfied with the ruling in COMMSU No E804 of 2021 delivered by Hon Mr EM Kagoni wherein the court issued final orders of a mandatory injunction; the appellant lodged the instant appeal together with an application seeking stay of execution of the order pending either the hearing and determination of the application or the appeal; The appellant also included a prayer for costs;
2. The parties then entered into negotiations and whilst the negotiations were ongoing the amount claimed was paid and the goods were released; the appellant opted to withdraw the appeal as the appeal had now been overtaken by events; the only issue that the parties were unable to agree on was that of costs.
3. On March 30, 2022 the court directed the parties to file short written submissions on the issue of costs. Hereunder are the parties respective written submissions.

Appellants' Case

4. The appellant herein filed this appeal challenging the entire decision and order of the Milimani Magistrate's Court Commercial(COMMSU) Suit No E804 of 2021 by Hon EM Kagoni which had granted an order directing the appellant to release cargo it was ostensibly holding as lien for its charges owed and admitted by the respondent arising out of the provision of logistics services.



5. The appeal was filed and stay orders issued *ex parte*. The directors of the 2 parties then began engagements culminating into an informal agreement whereby the appellant would upon payment of Kshs 1,500,000 release the withheld goods and parties would deliberate on the balance. The amount was paid and goods released thereby rendering this appeal as being overtaken by events.
6. It was the appellant's submission that the attempt to withdraw the appeal with no orders as to costs was not agreeable to the respondent and as a result the court directed that the issue of costs be canvassed in submissions.
7. Section 27 of the *Civil Procedure Act* provides that costs will follow the event. The loser pays the costs to the winner. Or where a party decides to unilaterally withdraw a matter for reasons not attributable to the actions of the respondent, then the party withdrawing ought to cover the costs of the other party.
8. The determination on the costs is absolutely at the discretion of the court and like all judicial discretions, must be exercised judiciously depending on the facts of each case. In the case of *Cecilia Karuru Ngayu vs Barclays Bank of Kenya & another* [2016] eKLR the court held that: -

“To my mind, in determining the issue of costs, the court is entitled to look at *inter alia* (i) the conduct of the parties, (ii) the subject of litigation, (iii) the circumstances which led to the institution of the proceedings, (iv) the events which eventually led to their termination, (v) the stage at which the proceedings were terminated, (vi) the manner in which they were terminated, (vii) the relationship between the parties and (viii) the need to promote reconciliation amongst the disputing parties pursuant to article 159 (2) (c) of the Constitution.....”
9. Based on the memorandum of appeal and even from the fact that even the duty judge had issued stay orders, the appeal was not frivolous. Both parties participated in the events that led to the appeal being overtaken by events. The appellant ought not be punished with costs in the circumstances especially in light of the fact that there is still a dispute in the lower court to be determined or agreed upon.
10. In addition, the appeal had not progressed and the respondent had only filed a 1 page grounds of opposition. Little resources have therefore been used in the appeal. The appellant urged that the withdrawal be with no orders as to costs.

Respondents' Case

11. The respondents contention was that it was entitled to costs of the withdrawn appeal and the application for the reason; that the appellant had filed the instant appeal to challenge the orders of the lower court requiring it to release the respondents goods that had been unlawfully held by the appellant in the purported exercise of a right of lien.
12. As a consequence, thereof the respondent retained the services of its advocates to defend the appeal and had issued instructions to oppose the application and a response had been even filed; the appeal came up for mention on several occasions and the respondent through its advocates was in attendance up to the March 30, 2022 when the appeal was withdrawn.
13. In view of the above the appellant could therefore not run away from paying the respondents costs incurred to defend the appeal and the application for stay pending appeal. The appeal came up for mention several times and the respondent attended court, through its advocates, until the appeal was eventually withdrawn on March 30, 2022.



14. In the case of *Catherine Kavata Musuva —vs- Safaricom Investment Cooperative Society Limited* [2021] eKLR, the court stated thus;

“Having filed the appeal, served the same on the respondent; who retained the services of an advocate, who not only filed documents in the appeal but also appeared in court upon listing the appeal for mention, the appellant cannot, therefore, run away from paying costs; even though the appeal had not been set down for hearing at the time of the withdrawal.”

15. In view of the above, the appellant cannot run away from paying the costs of the respondent incurred to defend this appeal and the application for stay pending appeal. Costs must follow the event.

Issues for Determination

16. The court has carefully considered the written submissions by the parties herein and has framed only one issue is for determination;
- a. Whether the respondent is entitled to costs of the suit?

Analysis

17. The appellant withdrew the present appeal on March 30, 2022 but the respondent however prayed for costs. The prayer for costs was opposed thereby necessitating the present application.

18. By virtue of section 27 of the *Civil Procedure Act*, it is trite law that the issue of costs is a discretionary award that is awarded to a successful party. Section 27 provides: -

“(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.”

19. Costs are at the discretion of the court, yet, follow the event. (See the *Halbury’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.”

20. The issue that this court has to settle is whether or not the act of withdrawal of the appeal and subsequent application are events within the phrase “costs follow the event.” It is not in dispute that the lower court granted an order directing the appellant to release cargo that it was holding under a purported lien. After filing the appeal and the application the appellant and the respondent began discussions and engagements culminating into a formal agreement whereby the appellant would upon



payment of Kshs 1,500,000/- release the withheld goods and the parties would deliberate on the balance plaintiff and the defendants have agreed to settle the case.

21. Did the filing of the appeal, the application and the various steps taken by the parties, the resolution and withdrawal of the appeal amount to an event as envisaged under section 27 [Civil Procedure Act](#) cited above?

22. Justice (Retired) Richard Kuloba in *Judicial Hints of Civil Procedure* stated as follows: -

“The words “the event” means the result of all the proceedings to the litigation. The event is the result of the entire litigation. It is clear however, that the word “event” is to be regarded as a collective noun and is to be read distinctively so that in fact it may mean the “events” of separate issues in an action. Thus the expression “the costs shall follow the event” means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it. An issue in this sense need not go to the whole cause of action, but includes any issue which has a direct and definite event in defeating the claim to judgement in the whole or in part”

23. At page 101 of the same book, Kuloba elaborated as follows: -

“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 plaintiffs right to 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”

24. The issues raised in the appeal relate to the restraining order and the lien arising from the respondent’s default in repayment of an amount which it indeed acknowledged that it is indebted to the appellant;

25. Looking at the appeal filed herein, the same is found to be in its infancy stage as the record of appeal is yet to be filed and served and the appeal has not been admitted; nevertheless, the same was served upon the respondent and it duly instructed its counsel to make preparations to defend it.

26. The appellant went ahead and filed the notice of motion dated July 8, 2021 under certificate of urgency which application was duly served upon the respondent and directions were taken; before the withdrawal the court record reflects that the respondents counsel made court attendances on several occasions whilst the parties engaged in negotiations culminating in a partial settlement of the matter.

27. Going by the afore-going and the withdrawal of the appeal does not necessarily mean there is no successful party, and the withdrawal is therefore is not a bar to costs. In the exercise of the court’s discretion, this court is satisfied that the respondent is entitled to costs only on the application as no substantive appeal had been filed for it to act on.

Findings and Determination

28. For the foregoing reasons this court makes the following findings and determination;

i. The court finds that the respondent is only entitled to costs of the application.



ii. The respondent be and is hereby awarded costs of the application.

Orders accordingly.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 25TH DAY OF
NOVEMBER, 2022.**

HON. A. MSHILA

JUDGE

In the presence of;

Amuga for the Respondent

No appearance by the Appellant

Lucy-----Court Assistant

