



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**COMMERCIAL CASE NO. 29 OF 2017**

**METRO PLAZA LIMITED ..... PLAINTIFF**

**VERSUS**

**DUBAI BANK KENYA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**(In liquidation)**

**SEO AND SONS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**BANK OF AFRICA KENYA**

**LIMITED ..... INTERESTED PARTY/APPLICANT**

**R U L I N G**

1. By its Motion on Notice dated 9/7/2020, the interested party applied to withdraw from this suit but with no order as to costs. The application was brought under **sections 1A, 1B and 3A of the Civil Procedure Act and Order 1 Rule 10 (1) of the Civil Procedure Rules**.
2. On 22/7/2020, Learned Counsels for the plaintiff and the 2<sup>nd</sup> defendant were agreeable to the applicant's withdrawal from the suit but with costs. The court directed that the issue of costs be canvassed by way of written submissions.
3. This suit was instituted by a plaint dated 20/1/2017. In it, the plaintiff prayed for, *inter alia*, a permanent injunction to restrain the 1<sup>st</sup> defendant from dealing with the property known as **LR. No. 209/2379 — City of Nairobi** ("the suit property"); the nullification of any charge over the suit property and any sale thereof.
4. Being one of the depositors & creditors of the 1<sup>st</sup> defendant, the applicant claimed that it stood to be prejudiced by the plaintiff's attempt to interfere with the 1<sup>st</sup> defendant's exercise of its statutory power of sale over the suit property. That this was because the 1<sup>st</sup> defendant was indebted to the applicant to the tune of Kshs. 48,180,000/- and that the 1<sup>st</sup> defendant was and still is in liquidation.
5. The applicant contended that, any restraint upon the 1<sup>st</sup> defendant would have scuttled the efforts of the

Kenya Deposit Insurance Corporation's ("KDIC") of recovering the assets of the 1<sup>st</sup> defendant. That it would have affected the settling of the claims of the depositors & creditors of which the applicant was one of them. That this is what informed its joinder in this suit as an interested party.

6. The applicant averred that, the 1<sup>st</sup> defendant had since successfully sold the suit property by public auction on 24/1/2017. Further that on 15/12/2017, the Court of Appeal lifted the suspension of the liquidation of the 1<sup>st</sup> defendant in its judgment in ***Kenya Deposit Insurance Corporation v. Richardson & David Limited & Another [2017] eKLR***.

7. In the premises, the applicant was confident about the settlement of its claims against the 1<sup>st</sup> defendant the aforesaid liquidation process that had been allowed by the Court of Appeal.

8. It was submitted for the applicant that ***section 27 of the Civil Procedure Act***, gives the court discretion to order costs. The case of ***Richard Brian Wekesa v Board of Management Njiiri School & 3 others [2016] eKLR***, was relied on in support of that submission.

9. That the term "event" in ***section 27*** aforesaid connoted the entire litigation which is not the case here. The case of ***Little Africa Kenya Limited v Andrew Mwiti Jason [2014] eKLR*** was cited in support of that submission.

10. It was therefore submitted that the suit had not been determined. The outcome was therefore unknown. That the suit had remained unconcluded for over three years now without any apparent cause or justification. That in the premises, the "events" arising from separate issues in the suit are relevant. That these were; the sale by public auction of the suit property on 24/1/2017, the dismissal of the plaintiff's injunction and contempt applications dated 20/1/2017 and 6/2/2017, respectively. That in the premises, the applicant had been successful and no order as to costs should be made.

11. For the plaintiff, it was submitted that the applicant was a busy body meddling in this suit. It did not have any special interest over and above the other unsecured creditors and its intention was to place obstacles to the plaintiff's claim. That costs would not have been incurred were it not for the unmerited challenge to the sale process by the applicant. That although the plaintiff's application for contempt was struck out, the appellant had appealed against that decision to the Court of Appeal.

12. It was further submitted that by joining the suit, the applicant had subjected the plaintiff into unnecessary costs by having to make copies to serve it. That the applicant had not filed any witness statement or evidence because it was apparent to it that it had no basis for participating in the suit hence its decision to withdraw therefrom. It was therefore urged that an order for costs be made.

13. I have considered the record and the submissions of Learned Counsel. The only issue for determination is whether or not to order costs upon withdrawal by the applicant from these proceedings.

14. ***Section 27 of the Civil Procedure Act***, 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".***

15. In ***Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai 7 4 others [2014] Eklr***, the Supreme Court

held: -

***“So the basic rule on attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the Suit”.***

...

***It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation”.***

16. In **Council of Governors v Senate & Another [2014] Eklr**, the Supreme Court observed: -

***“A party who moves the Court to make such an order for costs has an obligation to lay a firm basis by giving sufficient reasons why he should be awarded costs.”***

17. From the foregoing, it is clear that award of costs is in the discretion of the Court. However, like all other discretions, it must be exercised judiciously. The general rule is that costs follow the event unless for good reasons to be recorded.

18. The applicant joined these proceedings because it felt that it had an interest in the disposal of the suit property. It is not in dispute that the 1<sup>st</sup> defendant was indebted to it in the sum of Kshs. 48,180,000/-. It was an unsecured creditor of the 1<sup>st</sup> defendant. The sale of the suit property was in its interest as it would have enabled the 1<sup>st</sup> defendant to pay its debts including that of the applicant.

19. In this regard, I find that its participation and opposition to the injunction sought by the plaintiff was merited. It was not an abuse of the court process as contended by the plaintiff. It was within the right and interest of the applicant to seek that the sale of the suit property proceeds unhindered.

20. I do not agree with the contention that, since the applicant did not have any special right and interest over and above the other unsecured creditors its joinder was misconceived. I have always known the law to be that equity aids the diligent. That whoever has a right and interest, independent of others, is entitled to seek its enforcement at all costs. He does not have to wait for those who have like rights or interests to take action for him to join the fray.

21. As regards the applicants conduct during the proceedings, I find the same to have been reasonable and judicious. It enjoined itself to the suit almost immediately the same was filed. It filed responses and submissions in opposition to the plaintiff’s application seeking to stop the sale the suit property. The record shows that the applicant’s counsel actively participated in the proceedings in court.

22. As already stated, the general rule under section 27 of the Civil Procedure Act, costs follow the event. In Judicial Hints on Civil Procedure 2<sup>nd</sup> Edn; the writer notes:-

***“The words “the event” mean the result of all the proceedings to the litigation. The event is the result of 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.....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.”***

23. In the present case the applicant was successful in opposing the grant of injunction. Further, it successfully opposed the plaintiff’s application for contempt. It can be safely said that in both instances, the applicant was successful.

24. Since the subject matter of the suit that was of interest to the applicant has been sold, I do not see how it is unreasonable for the applicant to withdraw from the suit. The applicant has succeeded in what it sought to get. That being the case, I see no reason why it should be condemned to costs.

25. The submission that its joining the suit increased the plaintiff’s expenses has no basis. The plaintiff well knew that when it lodged the suit to bar the exercise of the statutory power of sale of the 1<sup>st</sup> defendant, there would be costs and expenses appurtenant thereto. The joinder of the applicant having been warranted, the plaintiff cannot complain about it.

26. In view of the foregoing, I am satisfied that the application for withdrawal from the suit has merit and I allow the withdrawal with no order as to costs.

It is so ordered.

**DATED and DELIVERED at Nairobi this 28<sup>th</sup> day of January, 2021.**

**A. MABEYA, FCIArb**

**JUDGE**