



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI COMMERCIAL AND TAX DIVISION**  
**INSOLVENCY CAUSE NO. 14 OF 2018**  
**IN THE MATTER OF THE INSOLVENCY ACT, 2015**

**AND**

**IN THE MATTER OF ARM CEMENT PLC (UNDER ADMINISTRATION)**

**BETWEEN**

**PRADIPKUMAR HARJIVANDAS PAUNRANA.....APPLICANT**

**AND**

**MUNIU THOITI & GEORGE WAWERU**

**[(AS ADMINSTRATORS OF ARM CEMENT PLC (UNDER ADMINISTRATION)].....RESPONDENT**

**AND**

**NATIONAL CEMENT COMPANY LIMITED.....INTERESTED PARTY**

**R U L I N G**

1. By an application dated 11/7/2019, the applicant sought, *inter alia*, orders for temporary and permanent injunction to restrain the respondents from selling, offering for sale, transferring and/or dealing in any manner whatsoever with the assets of ARM Cement PLC (Under Administration) (“ARM”). He also sought to restrain in any way, the proceeding with or undertaking any further acts in furtherance of the proposed sale of the cement and non-cement assets and the business of ARM to National Cement Company Limited.
2. He obtained those orders ex-parte on 12/7/2019 which were extended up-to 19/9/2019. In the intervening period, the respondent challenged the said orders vide an application dated 24/7/2019 and sought their discharge.
3. On 16/10/2019, the applicant withdrew his said application, which the parties consented to but could not agree on the issue of costs. That is the issue that was canvassed by way of written submissions which were hi-lighted before me on 23/11/2020.
4. Counsel for the applicant submitted that, in as much as costs follow the event, in terms of **section 27 of the Civil Procedure Act**, the court has discretion with good reason to depart from the same. That the withdrawal of the application was not for the sole benefit of the applicant but for all creditors. That the withdrawal was caused by the sale of the assets by the administrators two days before the hearing of the subject application. In the premises, the applicant saved the court time as the conduct of the administrators had removed the substratum of the case.
5. For the respondent, it was submitted that an expense was incurred in the application. That the application was complicated but was withdrawn mid-way and costs should follow the event. That the sale of the assets occurred after the injunction lapsed. That costs were incurred because of the unmerited challenge to the sale process.
6. Counsel submitted that there is no reason to depart from the principle in **section 27 of the Civil Procedure Act**. Counsel relied on the cases of **Pacis Insurance Company Ltd v Francis Njoka [2018] eKLR** and **Peter Muriuki Ngure v Equity Bank (K) Ltd [2018] eKLR** in support of the submission that costs follow the event.

7. Counsel for the interested party submitted that the interested party did not oppose the withdrawal of the application on condition that the applicant bore the costs of the suit. That the Capital Markets Authority had absolved the respondents and the interested party of any collusion on their part as had been imputed by the applicant. That the interested party was an innocent party who had only successfully sought joinder in order to protect its proprietary rights. The cases of Cecilia Karuru Ngayu v. Barclays Bank of Kenya & Another [2016] eKLR, Republic v. Senior Principal Magistrate, Mombasa & 3 others Ex-Parte Nicholas Katumo Peter [2014] Eklr and Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 Others [2014] Eklr were cited in support of those submissions.

8. It was further submitted that since the interested party was absolved from any wrongdoing by the Capital Markets Authority, a determination that is binding on the applicant by reason that he is the one who invoked that Authority's jurisdiction, the interested party is entitled to the costs of the suit. In the premises, it was urged that the applicant should bear the costs of the suit.

9. I have considered the record and the rival submissions of the parties. *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. (Underlining mine)*

*(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.*

10. In Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai 74 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."*

11. In John O. Ochanda v. Telkom Kenya Limited, Appln No. 25 of 2014, Ibrahim, SCJ held: -

*"I do hold the view that a prospective appellant is at liberty to withdraw a Notice of appeal at any time before the Appeal has been lodged and any further steps taken. No proceedings have commenced strictly. I am also of the view that just like under the Civil Procedure Rules or Court of Appeal Rules, the right to withdraw or discontinue proceedings or withdraw a Notice of Appeal respectively ought to be allowed as a matter of right subject to any issue of costs which can be claimed by the respondents, if any." (Emphasis provided)*

12. From the foregoing, it is clear that the applicant was entitled to withdraw his application, subject however to an order as to costs. That was to be at the discretion of the Court. In the case of Council of Governors v Senate & another [2014] Eklr, the court held that "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."

13. The respondent and the interested party submitted in detail about the chronology of the suit and the conduct of the applicant since the filing of the application until its withdrawal. It is common knowledge that the applicant withdrew the application after the injunctive orders he had obtained, lapsed for reason of his non-compliance of securing the guarantee ordered on 5/9/2019.

14. It is also not in dispute that the applicant's attempt to extend the injunctive orders vide its application dated 16/9/2019 in an attempt to extend the injunctive orders of 12/7/2020, was dismissed. In this regard, there was no longer in force any injunction barring the respondent from dealing with the assets of the Company as it deemed fit.

15. In this regard, it cannot be said that the withdrawal of the subject application on 16/10/2019, was occasioned by sale of the assets of the Company by the respondent. The applicant having failed to post the security ordered, the respondent was entitled to deal with the assets as it deemed fit. The sale of the assets cannot therefore be termed wrongful.

16. In this regard, the applicant had no alternative but to act as he did, just withdraw the application as its continued prosecution was not advisable or tenable. By the time of the withdrawal, the substratum of the suit had gone. There was nothing to litigate on.

17. As a result of the suit, the respondent and the interested party, who in all fairness were inconvenienced by the said application, incurred costs. There are pleadings on record to justify that position. I am satisfied that the respondent and the interested party incurred costs in getting up and defending the application.

18. In this regard, the applicant should bear the costs of the respondents and the Interested Party. Such costs to be agreed or taxed by the Taxing Master/Officer of the Court.

It is so ordered.

**DATED** and **DELIVERED** virtually this **18<sup>th</sup>** day of **February, 2021**.

**A. Mabeya, FCI Arb**

**JUDGE**