

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 34 OF 2009

JAMES B. KARUGUPLAINTIFF

VERSUS

AGA KHAN HEALTH SERVICES KENYADEFENDANT

RULING

On 29th September, 2017 Njuguna J made an order to the effect that,

“The plaintiff should prosecute the suit within six months from today failing which the suit shall stand dismissed without the necessity of any party applying in that regard. The upshot is that the application dated 17th September, 2015 is hereby dismissed. Costs shall be in the cause. It is so ordered.”

Subsequently the defendant filed a bill of costs dated 20th May, 2019. In a ruling dated 22nd December, 2020 the said bill of costs was struck out with no order as to costs. In that ruling the learned Deputy Registrar cited Section 27 of the Civil Procedure Act which provides as follows,

“27. Costs(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.”

In her ruling aforesaid the Deputy Registrar stated as follows,

**“In my view Section 27 of the Civil Procedure Act provides the general rule which ought to be followed unless for good reason to be recorded. Further, the effect of Section 27 of the Civil Procedure Act is that the Judge or court dealing with the issues of costs in any suit, action, cause or matter has absolute discretion to determine by whom and to what extent such costs are to be paid. The phrase costs in the cause often used and means that the costs of the interlocutory proceeding are to abide by the result of the eventual trial. Costs in the cause is not an order which finally disposes off those costs. It is subject to the final discretion of the judge. Further, it means that only if the party in whose favour the order is made is later awarded the costs of the action will that party be entitled to the costs of the interlocutory proceedings in question. No costs of the aforesaid bill of costs was awarded. This therefore means that the applicant’s party and party bill of costs has no base. The taxing master’s jurisdiction to tax the same is derived from an order of costs issued in a ruling and or a judgment.”
(emphasis added)**

The last sentence in the above extract is instructive. There is no ruling and or judgment on costs that can be attributed to the order given by Njuguna J. With respect I agree with the Deputy Registrar that costs in the cause cannot be the basis upon which a bill of cots may be anchored.

Further to the foregoing, the bill of costs having been struck out there is no order on costs in favour of the defendant upon which judgment may be entered. The defendant was at liberty to appeal the ruling of the taxing master. No such appeal was filed.

My assessment of the record therefore is that, the application before me lacks the foundation to award costs as contemplated under Section 27 of the Civil Procedure Act, even if any discretion were to be exercised in that regard.

Having said so, the order that commends itself is that the application is without merit and the same is hereby dismissed. Each party shall bear their own costs.

Dated, signed and delivered at NAIROBI this 27th day of May, 2021.

MBOGHOLI MSAGHA

JUDGE

In the presence of:

Mr. Kinyanjui for the Plaintiff

Mr. Mohamed for the Defendant/Applicant