



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND ADMIRALTY DIVISION
COMMERCIAL CASE NO. 690 OF 2010

WINNIE NYAKIO WAINAINA (THE WIDOW AND PERSONAL REPRESENTATIVE OF GEORGE
WAINAINA NGUGI T/A CHIPPERS PUB & RESTAURANT)PLAINTIFF/ APPLICANT

VERSUS

MUSIC COPYRIGHT SOCIETY OF KENYA.....DEFENDANT/ RESPONDENT

RULING

Background

1. Through the Notice of Motion application brought under *Order 25 Rule 1, Order 51 Rule 1 and Section 3A of the Civil Procedure Act*, dated 25th January, 2021, the Applicant sought the following orders:

- a. That this Honourable Court does grant the orders that the matter be marked as compromised.
- b. That each party bear their own costs.

2. The application is premised on the grounds that the matter has been compromised therefore there is no pending issue for determination by the Court. Annexed to application is the supporting affidavit of **Winnie Nyakio Wainaina**, the widow and personal representative of the Plaintiff. She deposed that the Plaintiff died on 30th June 2019, before the completion of the suit; that she substituted the Plaintiff for purposes of completion of the suit by application for substitution dated 15th October 2019, allowed on 4th December 2019; that preceding the Plaintiff's death, the parties recorded consent in court on 30th March 2011 to the effect that the Defendant delivers two television sets to the Plaintiff and that other matters in the Plaintiff's application dated 14th October 2010 regarding trespass on the Plaintiff's business premises, harassment and intimidation of the Plaintiff and demand for proceed payment and levies from the Plaintiff were to proceed for *inter partes* hearing; that the television sets were returned on 13th July 2011; that since the Plaintiff is deceased and the goods returned there is no other pending issue for the court to determine as the pending issues relate to the goods and the deceased in his personal capacity.

3. In response, the Defendant filed a Replying Affidavit sworn by **Milcah Kulati**, its Chief Executive Officer on 2nd March 2021. She deposed, among others, that prior to the Plaintiff's demise on 30th June 2019, the Plaintiff had not taken any steps to prosecute the suit from 25th May 2011 to March 2014; that this prompted the Defendant to file an application dated 11th March 2014 to dismiss the Plaintiff's suit for want of prosecution; that the application was allowed and the suit was dismissed on 13th May 2014; that the Plaintiff applied to reinstate the suit on 15th July 2014; that on 30th August 2018, the Court directed the Plaintiff to show cause why the suit should not be dismissed for want of prosecution; that the Plaintiff filed a replying affidavit on 13th September 2018; and that the notice to show cause against the Plaintiff had not been heard.

Submissions

4. On 26th April 2021, the application came before this court for hearing and disposal by way of oral submissions. **Ms Nereo** acting for the Plaintiff submitted that under **Section 27 (1) of the Civil Procedure Act** it is provided that costs follow the event. However, Court has discretion to award the costs. She therefore sought that each party pays their costs on the grounds despite the service of a demand letter dated

13th December 2010 upon the defendant, there was no action and this prompted the Plaintiff to file the suit to prevent the Defendant from disposing the seized goods. She further submitted that the Defendant satisfied one of the prayers in the Plaint through the return of the television sets by a consent recorded by the parties on 30th March 2011 the same were delivered to the Plaintiff on 13th July 2011. It was her contention that therefore, the Plaintiff partially succeeded in the matter. She cited the case of **Benjamin Nzyoki Mbindyo & 2 others v James Nzeki Kilonzo [2020] eKLR** where the Court noted that the Court should fully and partially indemnify a successful party.

5. On her part, **Ms Wanjiru** holding brief for **Ms Mwenesi** for the Respondent conceded to prayer 1 of the application. She however contended the defendant is entitled to costs of the suit for the trouble undertaken to appear in court and defend the application. She submitted that Plaintiff's conduct is a matter to be taken into consideration and that prior to his demise on 30th June 2019, the Plaintiff had taken no steps to prosecute the suit from 25th May 2011 to March 2014. She added that this prompted the Defendant to file an application dated 11th March 2014 to dismiss the Plaintiff's suit for want of prosecution which was allowed by the Court. Moreover, she contended that the Defendant was unnecessarily brought to court and that the Plaintiff did not taken a hearing date for the application to reinstate the suit for 2 years.

6. **Ms Wanjiru** relied on the case of **Canyon Properties Limited & 3 others v Eliud Kipchirchir Bett & 2 others [2017] eKLR, Mombasa Civil Appeal No. 96 of 2016** where the Court of Appeal stated that in declining to award costs to the appellants, while appreciating that the main suit had not been listed for hearing, the High Court ought to have considered the fact that there were appearances and actual prosecution of some applications in court which must have involved preparations on the part of counsel. She therefore sought that costs be awarded as per the Bill of Costs dated 10th June 2014 which will only cover the work done up to the withdrawal of the suit.

7. In a brief rejoinder, **Ms Nerea** urged that the Plaintiff is not condemned to pay costs or that the court orders that each party pays its own costs considering that the Plaintiff had a cause of action and that the conduct of the Plaintiff since the substitution has shown willingness to settle the suit in good faith.

Analysis and Determination

8. I have considered the application, the grounds in support thereof, the rival affidavits, the submissions and the law. **Order 25 of the Civil Procedure Rules** provides for withdrawal of suits as follows:

“Order 25-WITHDRAWAL, DISCONTINUANCE AND ADJUSTMENT OF SUITS”

1. Withdrawal by plaintiff {Order 25, rule 1}

At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.

2. Discontinuance {Order 25, rule 2}

(2)Where a suit has been set down for hearing the court may grant the plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just.

3. Costs {Order 25, rule 3}

Upon request in writing by any defendant the registrar shall sign judgment for the costs of a suit which has been wholly discontinued, and any defendant may apply at the hearing for the costs of any part of the claim against him which has been withdrawn.”

9. The withdrawal of the suit is not in contention. Therefore, the issue for determination is whether or not this suit should be withdrawn against the Defendant with or without costs. This Court's discretion in the determination of such an application is provided for under **Section 27 of the Civil Procedure Act** which provides as follows:-

“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. The High Court in **Rosaline Njeri Macharia vs. Daima Bank Limited [2012] eKLR**, set out the factors that the court can take into consideration in deciding whether to award costs as follows:-

a. The nature of the allegations a plaintiff has made against a defendant.

b. The nature of the claim and the likelihood of success.

c. The nature of liability that would attach against a defendant if he does not defend the claim.

d. The nature of the defence, if any, filed by the defendant and

e. The stage at which the suit is being withdrawn or discontinued.”

11. Although the general rule is that costs follow the event, the Court is ultimately guided by the ends of justice. In this respect, the Supreme Court in *Jasbir Singh Rai & 3 others vs. Tarlochan Singh Rai & 4 others [2014] eKLR* aptly stated that:

“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... Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the applicant.” (Emphasis added).

12. In the circumstances of this case, the record shows that the matter had not been fixed for hearing for determination of the pending issues as at the date of withdrawal of the suit. It is also evident that the Plaintiff did not take the necessary steps to set down the suit for hearing from 25th May, 2011 to March 2014.

13. Thereafter, on 4th July, 2019, the Plaintiff’s advocate informed the Court of the Plaintiff’s death and his widow applied for substitution by an application dated 15th October, 2019. She elected to have the matter withdrawn but when the Defendant’s advocates raised the issue of costs, the Plaintiff’s advocates by a letter dated 23rd September, 2020 stated that their client was not in a position to settle the costs and will proceed to prosecute the matter. It is also worth noting that the notice to show cause why the suit should not be dismissed for want of prosecution against the Plaintiff had not been heard before his demise on 30th June, 2019 and has not since been set down for hearing thereafter.

14. Nonetheless, it is clear from the record that that the parties settled the issue concerning the seized television sets by consent and the television sets were returned to the Plaintiff. Therefore, the Plaintiff was partially successful.

15. Therefore, in the circumstances and for the reasons I have given above, the suit is marked as withdrawn with each party bearing own costs.

16. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MAY, 2021

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Miss Nerea for the Plaintiff/ Applicant.

2. Ms. Wanjiru h/b for Ms. Mwenesi for the Defendant/Respondent.