



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAHURURU**

**CIVIL CASE NO. E002 OF 2021**

**DGM.....PLAINTIFF**

**-VERSUS-**

**EWG.....DEFENDANT**

**RULING**

1. The instant matter was originated via Originating Summons under *Matrimonial Property Act No. 49/2013*. The parties are husband and wife and are yet to divorce.

2. Due to the aforesaid factor (marriage subsistence). The Respondent raised a Preliminary Objection on grounds that the said was premature thus the Applicant to pre-empt the Preliminary Objection. A notice to discontinue the suit which was confirmed by a court order and thus suit stood discontinued.

3. This attracted the submissions on issue of costs. The parties agreed to file submissions to canvass the same.

4. The Defendant filed but Plaintiff is yet to file his submissions.

**DEFENDANT'S SUBMISSIONS:**

5. *Order 25 Rule 3 of the Civil Procedure Rules* provides that upon request in writing by any defendant, the Registrar shall sign judgment for costs of a suit which has wholly been discontinued and any Defendant may apply at the hearing for the costs of any part of the claim against him which has been withdrawn.

6. The said order however does not indicate and or give justifications that where parties are related in one way or another is in this case being married prior, that a party is not entitled to costs and or pay the other party upon discontinuance.

7. *Section 27 of the Civil Procedure Act* provides that costs should follow the enemy unless the court for some good reason orders otherwise. The Applicant herein has only raised the ground that they are family and hence the Applicant ought not to be condemned to pay costs. First and foremost, by virtue of the fact that there is already an ongoing Divorce Cause, the parties are clearly and obviously estranged to each other and as such, they can no longer be deemed as "family".

8. While exercising its discretion as provided for under *Section 21*, the court is among other issues called upon to look at the following factors; The subject of the suit, circumstances which led to the institution of the proceedings, events which constituted to the termination, stage at which they were terminated and the relationship between parties and the need for reconciliation amongst the parties.

9. The subject suit herein is matrimonial property which at this stage the court has no jurisdiction with the pending divorce cause. The issue of injunction has already been dealt with as evidenced by the ruling annexed in the Originating Summons.

10. It would appear as though the Applicant was trying to appeal against the orders indirectly by instituting the summons herein. The circumstances are in light to the ruling delivered before the lower court and proceedings were terminated after submissions on the objection raised were filed and served.

11. Nonetheless, the costs sort herein are not in a bid to punish the Applicant but rather for compensation for the trouble the Respondent has gone through defending the suit and prosecuting the case and restore her position as it were prior to the institution of proceeding against her. See the case of *Rosemary Wairimu Munene Ex-parte Applicant v Ihururu Party Farmers' Cooperative Society J.R. No. 4/2014* as cited in the case of *Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another [2016] eKLR*.

12. The parties are yet to reconcile and as such remain estranged and there is no room for reconciliation in future.

13. Having been caused to participate in the suit, the Respondent incurred expenses and also time. It would only be fair that she is compensated of the same. It is now settled law that instruction fees are earned the moment a defence is filed and in this case a Preliminary Objection was filed as way of defending the summons. Subsequent progress of the matter is irrelevant. One so the Respondent did not participate in having the suit discontinued.

14. A look at the Originating Summons, the Applicant has also sought for costs, thus he felt she was entitled to, but now that the reverse is true, he feels that the Respondent is not entitled to such costs yet she is the one who jumped ship to prosecute her knowing very well there was another suit pending before another court touching on the same issue. Equity begets equity. See the case of Cecilia Karuru Ngayu (supra).

15. Also in the case of JWA v AHL (2009) eKLR where the Petitioner was condemned to pay cost and RPM and PKM (2015) eKLR in which the Respondent was also condemned to pay cost while as the said suits were between two parties previously married to each other.

16. The Applicant had objected to costs being awarded on the grounds that the parties are still married but separate.

## **DETERMINATION**

17. **Order 25 Rule 1 & 2 of the Civil Procedure Rules which provides:**

**“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)**

**(1) Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn, upon the filing of a written consent signed by all of the parties.**

**(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) The provisions of this rule and rule 1 shall apply to counterclaims.”**

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. In the case of Party of Independent Candidate of Kenya & another vs Mutula Kilonzo & 2 others (2013) eKLR which cited with approval the words of Murray C J in Levben Products vs Alexander Films (SA) (PTY) Ltd 1957 (4) SA 225 (SR) at 227 that it stated:

**"It is clear from authorities that the fundamental principle underling the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion ...But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at...In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so."**

19. The main issue for determination regards who shall bear the costs of the suit. The defendant relies on Section 27 of the Civil Procedure Act which is instructive and therefore necessary to reproduce hereunder.

20. **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.”**

21. A careful reading of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book The Code of Civil Procedure, 18th Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise.

22. Additionally, the provision provides for ‘costs of and incidental to all suit’ which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book Judicial Hints on Civil Procedure, 2nd Edition, 2005 at 95 notes that the words ‘the event’ means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under section 27 remains at the discretion of the court.

23. In Republic v. Rosemary Wairimu Munene (Ex parte Applicant) v. Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review Application No. 6 of 2004 Mativo J. held that the issue of costs is the discretion of the Court and is used to compensate the successful party for the trouble taken in prosecuting or defending the case and not to penalize the losing party. This position was adopted by the court in Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & Another [2016] eKLR which has been cited with approval by both parties in their submissions.

24. The import is that a successful party is entitled to costs unless he or she is guilty of any misconduct or there exists some other good reasons and or cause for not awarding costs to the successful party.

25. In Reid, Hewitt & Co v Joseph, AIR 1918 Cal 717 and Myres v Defries (1880) 5 Ex D 180, the house of Lords noted that: -

**“The expression ‘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 where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.”**

26. The drift therefore is that it is not on every issue that success will bring a right to the costs. As Kuloba notes in Judicial Hints (supra), in case of total success, the successful party may be deprived of the costs of a separate issue on which he was unsuccessful.

27. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In Morgan Air Cargo Limited v Evrest Enterprises Limited [2014] eKLR the court noted that;

**“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the Civil Procedure Act is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”**

28. Furthermore, this discretion must be exercised judiciously and courts should not deprive a plaintiff/defendant of his or her costs unless it can be shown that they acted unreasonably. The Halsbury’s Laws of England, 4th Edition (Re-issue), [2010], Vol.10. para 16, notes that:

**“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” (Emphasis added).**

29. Any departure from this trite law can only be for good reasons which the Supreme Court in Jasbir Singh Rai & Others vs Tarlochan Rai & Others [2014] eKLR noted includes public interest litigation since in such a case, the litigant is pursuing public interest as opposed to personal gain.

30. The court must therefore ask itself what factors should be taken into consideration when determining the costs of suit. This issue was addressed by the learned judge in Morgan Air Cargo Limited v Evrest Enterprises Limited (Supra) to include:

- a. the conduct of the parties
- b. the subject of litigation
- c. the circumstances which led to the institution of the proceedings
- d. the events which eventually led to their termination
- e. the stage at which the proceedings were terminated
- f. the manner in which they were terminated
- g. the relationship between the parties and
- h. The need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of the Constitution.

31. Noteworthy, the list is not exhaustive. In other words, the court must be guided not only by the conduct of the parties in the actual litigation, but also other matters including likely consequences of the order for costs.

32. This court agrees with the defendant that it has no fault at all in the plaintiff’s misadventure in filing premature suit in terms of the indicators set above. The blame lies square on here shoulder who like a doctor ought to have known whether she was administering the right dose in her client’s situation and circumstances. The misadventure occasioned defendant some expenses and legal fees.

33. In the instant suit the plaintiff provoked the PO which made her to retreat or surrender thus conceding defeat which rendered the defendant to proclaim the status of a victor thus the successful party in terms of the provisions of **Section 27 supra**.

34. The court has not shown any cause why it should deny victor the costs. The fact that they are husband and wife does not amount to reason for denying the costs to the victor and especially there being an already an ongoing Divorce Cause, and the parties are clearly and obviously estranged to each other and as such, they can no longer be deemed as “family”.

35. Thus the court in exercise of its discretion finds that though the defendant never labored much in the matter rather than filing PO and service and the appearance in court which was virtual thanks to the covid -19 pandemic, **the court will award One third of costs and on the lower scale**.

**DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 21<sup>ST</sup> DAY OF OCTOBER, 2021**

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**CHARLES KARIUKI**

**JUDGE**