



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CIVIL CASE 759 OF 2012

LEO INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

FIDELITY COMMERCIAL BANK LIMITED1ST DEFENDANT

DISCOVERY HEALTH EAST AFRICA LIMITED2ND DEFENDANT

RULING

1. The subject of this ruling is the application by the plaintiff for costs following the settlement of the suit by the parties. The background facts of the case are that, the plaintiff instituted this suit against the defendants, vide a plaint dated 10th December 2012 and filed on 11th December 2012. The plaintiff was seeking for orders, inter alia that; the 1st defendant be compelled to discharge the charge dated, 4th April 2008, over the plaintiff's parcel of land known as; L.R. No 209/518/7 (herein "the suit property"), as the plaintiff had fully repaid the loan.
2. The plaintiff filed the plaint alongside an application and upon considering the same, the court issued interim orders of injunction, barring the 1st defendant from exercising the statutory power of sale over the suit property.
3. However, the 1st defendant, filed a defence denying the plaintiff's claim. Subsequently, the 1st defendant also filed a suit; High Court Civil Suit No. 4 of 2013, against the 2nd defendant seeking to; recover the amount advanced to it and guaranteed by its directors.
4. On 20th April 2016, the 1st defendant executed the discharge of charge and further charge and the same registered, on 27th June 2016, thus fully discharging the plaintiff's property. As that was the basis of the plaintiff's suit, the suit and the prayers sought therein, become overtaken by events, as the suit was consequently marked as settled. Hence the claim for costs.
5. The plaintiff submitted that, section 27 of the Civil Procedure Act, 2010 provides that, an award for costs, is at the discretion of the court. However, the proviso thereto, provided that "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."
6. That, in considering the interpretation and application of these provision of the law, the court should take note of the reasoning in the cases of; *Cecilia Karuru Ngayu v Barclays Bank of Kenya Limited & Another, Civil Case No. 17 of 2014; Nairobi* and *Stanley Kaungu Nkarichia v Meru Teachers College & Another, Civil Appeal No. 84 of 2011*.
7. The Plaintiff further submitted that, in the view of the circumstances herein that, the suit herein was necessitated by the conduct of the 1st defendant of attempting to sell the plaintiff's property and considering that, the plaintiff had to protect its interest for the last seven (7) years, it is only fair and just that the 1st defendant be condemned to pay costs of this suit to the plaintiff.
8. That, in any event, the filing of a suit against the 2nd defendant and its directors, is a clear testimony that the plaintiff had illegally and unlawfully attempted to move as against the plaintiff's property. It is trite law that, a party should not suffer a loss without a remedy.
9. However, the defendant submitted that, while the general rule is that costs follow the event, the court will be called upon to exercise discretion in awarding costs or declining to do so. Reliance was put on the case of; *Jasbir Singh Rai & Others v Tarlochan Rai & Others*

(2002) eKLR. That the 1st Defendant had legitimate interest in the suit property and therefore had to defend its interest.

10. Further, while the plaintiff relies on the fact that, the suit was settled in its favour, the plaintiff has not brought to the attention of the court the terms of any such settlement. The onus was on the plaintiff to place before the court clear terms of the settlement. Thus the court has been denied the proper tool with which to make appropriate orders as to costs. The Respondent relied on the case of; Elite Intelligent Traffic System Limited v HFC Limited; Hassan Zubeid & 2 Others (Interested Parties) (2019) eKLR. That, in the absence of the terms of settlement between the parties the court, ought to invoke its discretion in denying costs as prayed for by the plaintiff.

11. I have considered the arguments and submissions of the parties and I find that, the statutory provisions that govern award of; costs are stipulated under section 27 of the Civil Procedure Act, (cap) 21 laws of Kenya, that: -

“ (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 the 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 .

(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.”

12. These provisions set down principles that, costs are awarded at the discretion of the court and follow the event, unless with good reason the court declines to award the same. In that regard, the Halsbury’s Laws of England states 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 them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice.”

13. In the case of; Party of Independent Candidate of Kenya vs Mutula Kilonzo & 2 others, citing the decisions in the cases of; Nedbank Swaziland Ltd verses Sandile Dlamini No. (144/2010) [2013] SZHC30 (2013) Maphalala J, referring to the holding of Murray C J, in the case of; Levben Products VS Alexander Films (SA) (PTY) Ltd 1957 (4) SA 225 (SR) at 227, the court held that:

*“It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is a 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 come to the conclusion arrived at. In the second place the general rule is 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.**”*

14. The key word herein is “event”. The Black’s law dictionary, defines the word “event” by stating that, “in reference to judicial and quasi-judicial proceedings, the “event” means the conclusion, end, or final outcome or result of a litigation; as, in the phrase “abide the event,” speaking of costs or of an agreement that one suit shall be governed by the determination in another. An event is that which follows from the cause, and is called an “event” because it eventuates from causes. A new matter always produces various events.”

15. In the same vein, Hon. Justice Kuloba (Rtd) in the text on Judicial Hits on Civil Procedure, 2nd edition at page 99 states that;

“That 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. Thus the expression “the 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 that, 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. An issue in this sense need not go to the whole cause of action, but includes any issue which has a direct and definite event in defeating the claim to judgment in the whole or in part.”

16. Similarly, the court considering the issue of costs in the case of; Jasbir Singh Rai & Others vs Tarlochan Rai & Others (2002) eKLR cited by the 1st Defendant, observed that; **“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” (emphasis mine).**

17. In order to fully appreciate the facts of the matter herein, it calls for evidence of what transpired in the two subject suits referred to herein and in particular, the circumstances under which this suit was settled and in particular, the terms of settlement. This evidence was not availed, save to state that, the case was settled following the discharge of the charge and further charge.

18. The issues unresolved in the mind of the court are inter alia, what provoked the filing of the suit, if it was an alleged default on repayment of the sum advanced, how was that resolved, when did the action that informed the filing of the suit take place, and when was the

suit filed thereafter, but more critically, what caused the suit to remain unresolved for over seven years? How was the case filed by the 1st Defendant resolved (if at all) after the alleged settlement? Finally, did the Defendant have a right to defend the suit.

19. Taking into the account the aforesaid, I find that, based on the legal principle that, costs follow the event and the suit having been settled in favour of the Plaintiff, I hold that, the plaintiff is entitled to costs. However, in the absence of the above guiding factors and to balance the scale of justice, I shall award the Plaintiff 50% of the costs only.

20. The upshot is that, the application for costs is allowed save that the costs payable is capped at 50%. No costs are awarded for this application.

21. Those then, are the orders of the court.

Dated delivered and signed on this 22nd day of May 2020

GRACE L NZIOKA

JUDGE

In the presence of:

Mr. Kiche for the 1st defendant

Mr. Mwangi for the plaintiff

Delivered by virtual communication