



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 394 OF 2018

SEMA HEALTH PRODUCTS LIMITED..... PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY (K) LIMITED.....1ST DEFENDANT

TAIFA AUCTIONEERS.....2ND DEFENDANT

RULING

1. **Sema Health Products Limited**, the plaintiff, filed this case on 26th October 2018 against **Housing Finance Company (K) Ltd**, the 1st defendant, and **Taifa Auctioneers**, the 2nd defendant. The plaintiff in filing its plaint hereof simultaneously filed an interlocutory Notice of Motion application dated 19th October 2018. The plaintiff by that application sought an order of injunction to restrain the 1st defendant exercising its statutory power of sale through the 2nd defendant who is an auctioneer.

2. The defendants filed, in response to that application a replying affidavit with many annexures and a preliminary objection. It may well be that the preliminary objection filed by the defendants was instrumental in leading the plaintiff on 30th October 2018 to withdraw the Notice of Motion application. On that date the defence counsel did not object to that withdrawal but prayed for costs, presumably of the now withdrawn application. **Justice Tuiyott**, before whom the withdrawal was made the following order:

“The application dated 19th October 2018 is hereby marked as withdrawn. I make no order on costs.”

3. Subsequently by a Notice of withdrawal dated 26th June 2019 the plaintiff withdrew this suit against the defendants. That Notice of withdrawal was adopted by court, in the absence of parties, on 16th September 2019. No order was made in regard to the costs of the suit on that occasion.

4. The defendants by their letter dated 9th October 2019 requested this court to grant them the costs of the withdrawn suit.

ANALYSIS

5. I have considered the matter. The court is bestowed with discretion to award costs under Section 27(1) of the Civil Procedure Act. That section 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.”

6. the case **Republic v Commissioner for Co-operative Development & Another Ex parte Water Resources Management Authority (2018) eKLR** that discretion was discussed when the court stated:

“18. When all things are equal, however, the only consideration is the “event”. As was held by the Supreme Court of Uganda in Impressa Ing Fortunato Federice vs. Nabwire [2001] 2 EA 383:

“The effect of section 27 of the Civil Procedure Act is that the Judge or court dealing with the issue 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; of course like all judicial discretions, the discretion on costs must be exercised judiciously and how a court or a judge exercises such discretion depends on the facts of each case.”

7. The judge in that case **Republic v Commissioner for Co-operative** (*supra*) further considered the type of order that a judge could make under that discretion and stated:

“19. I associate myself with the decision of Kampala High Court in Re Ebuneiri Waisswa Kafuko (Deceased) Kampala HCMA No. 81 of 1993 in which it was held that:

“The Judge in his discretion may say expressly that he makes no order as to costs and in that case each party must pay his own costs. If he does not make an order as to costs, the general rule is that he shall order that the costs follow the event except where it appears to him in the circumstances of the case some other order should be made as to the whole or any part of the costs. “

8. I stated above that the learned judge made no order on costs when the interlocutory application was withdrawn by the plaintiff. What that would mean is that the defendants were not awarded costs in respect to that interlocutory application.

9. On the plaintiff filing the Notice of withdrawal of the suit which was adopted by the court on 16th September 2019 there had not been, up to that date, any further filing of any documents by the defendants nor any further attendance in court by the defendants. That is since 30th October 2018 at the withdrawal of the interlocutory application when the court declined to order for costs to be paid by the withdrawing party, the plaintiff. It follows that the defendants are not entitled to any costs because there had been no action on their part from the date they were denied costs for the withdrawn interlocutory application. I have also noted that all the summons are still in the court file which means that the defendants to date have not been served with the summons and consequently were not obligated to file a defence. No defence has been filed this far. There are no costs due to the defendants since from the date the court made an order, on 30th October 2018, denying them costs of the withdrawn application they have not filed further documents nor appeared before court. It would be in futility to grant defendants costs they have not earned.

CONCLUSION

10. Following the above finding the defendants request for an order for costs is denied. I order this file to be henceforth closed.

DATED, SIGNED and DELIVERED at NAIROBI this 18th day of JUNE 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the plaintiff:

For the defendant:

ORDER

This decision is hereby virtually delivered this 18th day of June, 2020.

MARY KASANGO

JUDGE