



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KABARNET**

**HCCC NO. 2 OF 2017**

**(FORMERLY ELDORET HCCC NO. 15 OF 2014)**

**SAMSON K.A. TIM.....PLAINTIFF**

**VERSUS**

**D.M. MACHAGE.....RESPONDENT**

**RULING**

1. By Notice of Withdrawal dated 10/9/18 expressed to be brought under Order 25 Rule 1 of the Civil Procedure Rules 2010, the Plaintiff's Counsel Mr. Kipkoech B. Ngetich of M/S Gordon Ogola, Kipkoech & Co. Advocates gave notice in the suit as follows:

*“Take Notice that the Plaintiff herein has withdrawn the suit against the defendant herein wholly with no order as to costs.”*

2. Of course, the issue of “order as to costs” is **for the determination of the Court, and as it looked out the defendant objected to the “no order as to costs”** provision and claimed his costs of the withdrawn suit, which objection is the subject of this ruling.

3. Costs of a suit or other proceedings are always in the discretion of the Court in terms of 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.***

*(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.”*

**The Principle**

4. It is a settled principle of costs that costs follow the event, meaning that the successful party takes the costs unless the Court for sufficient reason orders otherwise. In considering this exercise of the discretion, the Court may properly take into account the length of time that the suit or proceedings has been going in Court before the withdrawal or other determination; the nature of the relief sought; the steps taken in the proceedings; the stage of hearing of the suit or proceedings; the need to promote access to justice by indigent suitors; and other sufficient reason in the interest of justice.

5. The plaintiff's suit herein was filed on 14/4/2014 by way of a Plaint seeking among other reliefs “(a) An order compelling the defendant to adequately compensate the plaintiff from arbitrary torture and subsequent illegality throwing plaintiff into cold police cells; (b) General damages for legal fees incurred in defending Criminal suit; and (c) aggravated punitive and exemplary damage for reputation.”

It is noteworthy that the suit had a markedly private law element for damages for malicious prosecution.

6. The defendant filed his defence dated 9/6/2014 on the same date.

### **Chronology of events in the suit**

7. The plaintiff amended his Complaint on 23/6/14 and on 15/7/2014 filed a Reply to Defence dated 14/7/14. By Notice dated 17/12/2014, the plaintiff appointed M/s Cheptumo & Co. Advocates to represent him in the suit, which firm later by Notice of Motion dated 10/7/2018 applied to cease acting for the plaintiff. On 12/7/18 plaintiff filed Notice of Intention to Act in Person dated 12/7/18 together with List of Documents dated 12/7/18 (with copies thereof). The defendant filed witness statement dated 9/7/16 and a Notice of Preliminary Objection through his Counsel M/s Nyamwega Osoro & Co. Advocates dated 19/7/18. The plaintiff then filed Supporting Documents in opposition to the defendant's Preliminary Objection, dated 16/7/16, and grounds of opposition to the Preliminary Objection of the same date. The defendant then filed written submissions on direction by the Court on the Preliminary Objection on 10/8/2018.

On 11/9/2018, a week before the date fixed for the highlighting of submissions on the Preliminary Objection on 18/9/2018, the plaintiff filed the Notice of Withdrawal of the Suit, the subject of this ruling on costs.

### **Determination**

8. I have considered the pleadings in the suit, the progression of the suit and submissions on the issue of costs upon withdrawal of the suit filed by the parties, respectively on 22/1/19 and 1/2/2019. I have noted the decisions cited by the parties, namely ***Cecilia Karuru Ngayu v. Barclays Bank of Kenya & Anor*** (2016) eKLR, (Matiwo, J) and ***Morgan Ain Cargo Ltd v. Everest Enterprises Ltd*** (2014) eKLR (Gikonyo, J.).

9. The plaintiff's submissions in urging a "no order as to costs" re-opens the very issue that were the subject of the withdrawn suit as he alleged wrongful conduct of the defendant as a presiding Magistrate of the Court at Eldama Ravine Law Courts. That issue is not properly before the Court, the suit having been "*wholly withdrawn.*"

10. The Court must consider the suit was withdrawn on the eve of the hearing of a Preliminary Objection to the suit, only 7 days before hearing date, after a long time of pleading, with plaintiff amending his complaint once and the defendant in his defence having filed his Defence and witness statement as well as Preliminary Objection in readiness to the hearing of the suit.

11. I do not see, in terms of the wording of section 27 of the Civil Procedure Act, a "*good reason*" to order against the general principle that "*costs shall follow the event.*" Once withdraw the suit wholly, the suitor must as a general rule pay to the defendant the costs of the suit. I do not see a good reason in this suit to depart from this general rule.

### **Orders**

12. Accordingly, for the reasons given above, the Court makes an order as follows:

(1) The costs in the withdrawn suit shall be paid by the plaintiff to the defendant.

(2) Such costs shall be agreed between the parties and failing agreement taxed by the Taxing Officer of the Court.

*Order accordingly.*

**DATED AND DELIVERED THIS 30<sup>TH</sup> DAY OF APRIL 2019**

**EDWARD M. MURIITHI**

**JUDGE**

### **Appearances:**

M/S Gordon Ogola, Kipkoech & Co. Advocates for the Plaintiff.

M/S Nyamwega Osoro & Co. Advocates for the Defendant.