



REPUBLIC OF KENYA

IN THE HIGH COURT KENYA AT NYERI

CIVIL SUIT NO. 10 OF 2018

HOUSTON MUCHIRI WERU.....PLAINTIFF

VERSUS

GREEN AFRICA INTERNATIONAL.....1<sup>ST</sup> DEFENDANT

JAMII BORA BANK LIMITED.....2<sup>ND</sup> DEFENDANT

RULING

In a suit against the defendants, the plaintiff sought for prayers against them, jointly and severally, set forth in his plaint as follows:

“

*(a) A sum of Kshs. 2,800,000/=;*

*(b) An order restraining the 2<sup>nd</sup> defendant from auctioning L.R. Nos 2279/2 and 3223 until a sum of Kshs. 2,800,000/= is paid in full.*

*(c) Costs of the suit.*

*(d) Interest on (a) and (c) at court rates.*

*(d) Any further or better relief that the Honourable Court may deem fit to grant.”*

Alongside the suit, the plaintiff moved this honourable for an interim injunction to restrain the 2<sup>nd</sup> defendant from disposing of the land parcels referred to, initially pending the hearing and determination of the motion inter partes and ultimately pending the hearing and determination of the suit itself.

When the plaintiff's learned counsel appeared before me ex parte at the first instance on 28 May 2018, I granted the interim order pending the hearing and determination of the motion. Immediately thereafter, the 2<sup>nd</sup> defendant filed a motion dated 29 May 2018 seeking to set aside the temporary injunction on the particular grounds that the realisation of the security had already been sanctioned by a court of coordinate jurisdiction and was imminent. In any event, so it contended, it was prepared to pay the sum of Kshs. 2,800,000/= due to the plaintiff.

Indeed, when the parties appeared before me on 30 May 2018, Mr Mumia, the learned counsel for the 2<sup>nd</sup> defendant urged that the auction slated for that morning ought to proceed because, to quote, him, “*we are ready to settle the claim in full*”. Based on these submissions, I made the following order.

***Considering that the 2<sup>nd</sup> respondent is willing to settle the plaintiff's claim in its entirety I am inclined to discharge the order of injunction issued yesterday the 28 May 2018. Accordingly, the orders issued on 28 May 2018 are hereby discharged on condition that the plaintiff's suit is satisfied in full forthwith and in any event not later than today the 30<sup>th</sup> May 2018.***

And with that the plaintiff's suit was as good as settled.

The point of contention at the moment is whether the plaintiff is entitled to costs. According to Ms Mwai, the learned counsel for the plaintiff, he is so entitled; Mr Mumia, on the other hand, thinks he is not. Both counsel have filed submissions on what they think is the proper interpretation of the law as far as costs are concerned.

Ms Mwai has referred me to **section 27(1)** of the **Civil Procedure Act, cap. 21** which is to the effect that the costs of any action, cause or other matter or issue shall always follow the event unless, for a good reason, the court orders otherwise. As a matter of fact, according to the learned counsel, the court ceases to have any discretion on whether to award costs once a party is successful; in such a case, counsel has urged, he is entitled to costs as a matter of course.

Counsel for the 2<sup>nd</sup> defendant urged that as far as his client is concerned, the question of costs is *res judicata* and cannot be regurgitated afresh; in his view, the payment of the sum of Kshs. 2,800,000/= was in full and final settlement of the plaintiff's claim; in other words, this amount catered for the plaintiff's claim in its entirety inclusive of costs and for this reason, this court cannot recapitulate on the issue of costs again. On this question of *res judicata*, counsel invoked **section 7** of the **Civil Procedure Act** and also cited the decisions in **Kenya Commercial Bank Limited versus Benjoh Amalgamated Limited (2017) eKLR** and **Henderson versus Henderson (1843) 67 ER 313** in support of his submission that the issue of costs was properly before court or ought to have been brought to the attention of the court prior to its order finalising the suit.

In the same breath, counsel argued that having pronounced itself on the determination of the suit, this court is effectively *functus officio* and cannot reopen the case again. In this regard he relied on a string of authorities including **Telkom Kenya Limited versus John Ochanda (suing on his behalf and on behalf of 996 former employees of Telkom Kenya Limited (2014) eKLR; Chandler versus Alberta Association of Architects (1989) 2 S.C.R 848 and Jersey Evening Post Ltd versus Thani (2002) LR 542.**

Counsel for the 2<sup>nd</sup> defendant also cited **paragraph 53** of the **Advocates Remuneration Order** for the position that where a party has not issued a notice of his intention to sue and the defendant pays the amount claimed at or before the first hearing, no advocates costs should be paid except on a special order of the court. He concluded by stating the circumstances of this particular case are such that each party must bear their own costs.

With due respect to the learned counsel for both the plaintiff and the 2<sup>nd</sup> defendant, the order of 30 May 2018 need not have fanned such controversy; I always thought and, I still believe, it is self-explanatory to the extent that much of the submissions made purporting to interpret it and in process wading into other aspects of law such as *res judicata* or *functus officio* with legal authorities to boot which though informative, are not necessarily relevant to the question at hand.

The simple question which the parties, in particular the 2<sup>nd</sup> defendant ought to ask is simply this; what does it mean to "satisfy the plaintiff's claim in full?" In my humble view, one needs look no further than the prayers in the plaint, which I set out verbatim at the beginning of this ruling, to find the appropriate answer to this question. Contrary to the 2<sup>nd</sup> defendant's learned counsel's submission, the plaintiff's 'full claim' or even just 'claim' is not just the amount of Kshs. 2,800,000/= to which he was entitled from the 2<sup>nd</sup> defendant; as I understand it, his claim against the defendants constitute each and every prayer in the plaint including the prayer for costs.

It is instructive to note that by paying the plaintiff the sum of Kshs. 2,800,000/=, the 2<sup>nd</sup> defendant thereby conceded that the plaintiff had a legitimate cause of action against it; certainly, it is this action that ultimately informed the prayers in the plaint including, as noted, the prayer for costs.

My short answer to the 2<sup>nd</sup> defendant is that it proceeded on the wrong presumption that no order for costs had been made; on the contrary, it was made when the plaintiff claim was allowed or rather when the 2<sup>nd</sup> defendant itself undertook and when it was ordered to '*satisfy the plaintiff's claim in full.*' To this extent I am prepared to agree with the learned counsel for the 2<sup>nd</sup> defendant that the question of costs is indeed *res judicata*, but I have to go further and reiterate that it is a question that has been determined in favour of the plaintiff. I need not say anything more than this.

**Signed, dated and delivered in open court this 13<sup>th</sup> day of June, 2019**

**Ngaah Jairus**

**JUDGE**