



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 445 OF 2017

PRIME LABS E.A LIMITED.....PLAINTIFF

VERSUS

KWIKFILL PETROLEUM COMPANY LIMITED..... 1ST DEFENDANT

ALFRED KANYINGI KAIRU2ND DEFENDANT

RULING

1. This suit herein has been compromised by way of a consent and the only issue in contention is costs.

2. Prime Labs E. A Limited (The Plaintiff of Prime Labs) sued Kwikfill Petroleum Company Limited (The 1st Defendant or Kwikfill) and its Director, Alfred Kinyanjui Kairu (The 2nd Defendant or Kairu) in respect to an investment made by Prime Labs in the Petroleum business of Kwikfill. In the Plaintiff dated 26th October 2017 and filed on 6th November 2017 Prime Labs sought the following prayers:-

- a. Refund of capital being Kshs.29,900,000.00.
- b. Accrued dividends up to the month of October 2017 being Kshs.31,440,000.00.
- c. Dividends of Kshs.3,620,000.00 from November 2017 till payment in full.
- d. Costs of this suit and interest thereon.
- e. Interest on (a), (b) and (c) above at the contractual rate till payment in full.
- f. Such other or further relief as this Honourable Court may deem just to grant.

3. The compromise was a two-step process. First, the Plaintiff had obtained judgment in default of the filing of Defence by Defendant. This forced the Defendants to file an application to set aside the default judgment. That application was settled by a consent order of 5th April 2018 in the following terms:-

1. Judgment on admission be and is hereby entered in favour of the Plaintiff against the Defendants for Kshs.17,000,000 (Kenya Shillings Seventeen Million).
2. The Defendants to pay Auctioneers charges to be agreed on by the Defendants and auctioneers and in default the same to be assessed.
3. There be stay of execution for 45 days from the date hereof.
4. The Defendants to file and serve its statement of Defence, list of witnesses, witness statements and bundle of documents within 30 days therefore.
5. The Plaintiff be at liberty to execute against the Defendants in default of order (3) above.

6. The terms of this consent compromises the Notice of Motion dated 12th March 2018.

7. Mention on 17th May 2018 to confirm compliance.

4. On 2nd April 2019, the matter was due for main hearing but instead parties entered the following consent;

1. The balance of the principal amount being Kshs.12,900,000 (Twelve Million Nine Hundred Thousand) be paid by the Defendants within 30 days from the date hereof. The other claims by the Plaintiff set out in paragraphs (b) and (c) of the prayers in the Plaint of 26th October 2017 are hereby abandoned.

2. The question as to who should bear the costs is left to Court.

3. In default of compliance with order (1) above execution to issue.

4. Mention on 8th May 2019.

5. The law on costs in Civil Proceedings is not controversial and starts with the provisions of Section 27 of The Civil Procedure Act which reads:-

S. 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.

6. Two issues that deserve further discussion emerge from these provisions. The discretionary nature of an award of costs and the meaning to be assigned to the term “the event” appearing therein.

7. There is consensus by the parties that the espousal of the meaning of “the event” by Justice (Retired) Richard Kuloba in Judicial Hints on Civil Procedure 2nd Edition is a useful way forward. This is what he states:

“The words “the event” mean the result of all the proceedings to the litigation. The event is the result of the 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 judgement in the whole or in part”

8. That the award or non-award of costs is a matter of Judicial discretion has been emphasized time and time again, and the Supreme Court in Jasbir Singh Rai & 3 others –Vs- Tarlochan Singh Rai Petition No. 4 of 2012 [2014] eKLR restated it emphatically as follows:-

“[18] It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, 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.

[22] Although there is eminent good sense in the basic rule of costs – that *costs follow the event* – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the *judicial discretion*. It follows, therefore, that costs do not, in law, constitute an *unchanging consequence* of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, *whether or not the circumstances merit an award of costs to the applicant*”.

9. From the above discussion one can observe that, save for good reason, costs on any action, cause or matter or issue follow the event. This means that whilst the award or none award of costs is in the discretion of the Court, the general rule is that costs follow the event unless there is good reason to depart from that convention. As whether such good reason exists will depend on the circumstances of each case. Factors to

be considered include the conduct of the parties before, during and after litigation and the motive for commencing and maintaining litigation.

10. Although the term “costs follow the event” has been commonly construed to mean that costs follow the success of an action, section 27 itself includes cause, matter or issue within the meaning of event. Indeed, Justice Kuluba alludes to this. Therefore, while a party may succeed generally in suit, the adversary may succeed in a cause of action or issue or matter within the suit. In which event even the party which fails in the main litigation may still be entitled to costs of a particular issue it has succeeded on. It is therefore not uncommon for Court to grant partial costs where victory has not been outright.

11. In the matter at hand Prime Labs sought damages under 3 heads although all premised on the same cause of action being breach of what was said to be a Business Partnership agreement . The heads of prayers were however separated as follows:-

- a. Refund of the capital sum of Kshs.29,900,000.
- b. Accrued dividends upto the month of October 2017 being Kshs.31,440,000.
- c. Dividends of Kshs.3,620,000 from November 2017 until payment in full.

12. The prayers therefore have two separate portions. The refund of capital injected and a claim for dividends. The other is for interest on these amounts and costs.

13. As is clear the compromise reached by the parties in the two consents left the Plaintiff successful only on the claim for capital refund. As a matter of fact, the latter consent was categorical that the Plaintiff was abandoning the entire claim on dividends. The effect would be that while the Plaintiff can be said to have succeeded on the cause of action, it was only partially successful on the prayers it sought. It had complete success on the refund of capital but it abandoned the other 2 prayers resulting in a failure of the claim for dividends.

14. The consents themselves do not explain why the Plaintiff abandoned the claim and it would be inappropriate for the Court to second guess. What is explicit is that the Plaintiff abandoned more than half the sums it had sued for. Whilst this matter had been prepared for hearing, it was compromised before main hearing commenced. Further, on my count there were seven Court appearances and the second consent was entered in the seventh session. There were then two Court appearances after.

15. Considering that the sessions leading to the compromise of the suit were not so involved and that in the end the Plaintiff let go more than half the claim, this Court is inclined to hold that while the Plaintiff may have had substantial success in the cause it brought to Court it failed substantially in one important matter, the claim for Dividends.

16. In my discretion each side should bear its own costs. It is so ordered.

Dated, Signed and Delivered in Court at Nairobi this 25th Day of October 2019.

F. TUIYOTT

JUDGE

PRESENT:

Ndinda for Odoyo for Plaintiff

No Appearance for Defendant

Court Assistant: Nixon