



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL SUIT NO. 3 OF 2013

TERRITORIAL WORKS (KENYA) LIMITED PLAINTIFF

-VS-

MERU UNIVERSITY COLLEGE OF

SCIENCE AND TECHNOLOGY DEFENDANT

RULING

1. This suit was commenced by a plaint (*fast track*) lodged in court on 23rd January, 2013. In the Plaint, the Plaintiff claimed from the Defendant payment of Kshs. 6,005,424/75 together with interest at 13% per annum compounded into monthly rests from the 26th June, 2012 till payment in full; damages for loss of business at 10% per annum from 26th June, 2012 and costs of the suit.

2. The dispute arose from a construction contract entered into by the parties on 23rd March, 2010 whereby the Plaintiff was to construct a medical centre (hospital) within the Defendant's premises at Meru.

3. On 25th May, 2017, the court was informed that the parties had settled the matter and the only issue that remained was the payment of costs. The court therefore directed that the issue be canvassed by way of written submissions.

4. While the Defendant filed its submissions, the Plaintiff did not. In its submissions dated 20th March, 2017, the Defendant submitted that there were two issues for consideration, the issue of costs and interest. Referring to the case of **Hussein Janmohamed & Sons vs. Twentsche Overseas Trading Co. Ltd [1967] EA 287**, Counsel for the Defendant submitted that where the successful party is guilty of misconduct or there is some other good reason the court will not award costs to such successful party.

5. It was further submitted that the Plaintiff was in breach of the contract between the parties which had led to the Defendant withholding the sum of Kshs. 6,005,425/75 that provoked this suit. That there was delay in the completion and handing over of the works to the Defendant as per the contract. That the works were substandard which had further led to the dispute. That the matter was referred to arbitration in accordance with the contract but before those proceedings could be finalized, the Plaintiff lodged the current suit.

6. The Defendant concluded that, in view of the foregoing, although the Plaintiff was successful, it was not entitled to the award of costs.

7. The court has considered the entire record and the submissions made on behalf of the Defendant. When it comes to awarding costs in a litigation, this court is guided by **Section 27 of the Civil Procedure Act, Cap 21 Laws of Kenya** which 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.

(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.”

8. In the case of **Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others [2013] eKLR** Mutende J held:-

“In the case of Nedbank Swaziland Ltd verses SandileDlaminiNO.(144/2010) [2013] SZHC30 (2013) Maphalala J. referred 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, who stated as follows:

“It is clear from 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 (Fripp vs Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule 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.”

9. In the case of **Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another [2016] eKLR** Mativo J. held:-

“To my mind, in determining the issue of costs, the court is entitled to look at inter alia (i) the conduct of the parties, (ii) the subject of litigation, (iii) the circumstances which led to the institution of the proceedings, (iv) the events which eventually led to their termination,(v) the stage at which the proceedings were terminated, (vi) the manner in which they were terminated, (vii) the relationship between the parties and (viii) the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of the Constitution. In other words the court may not only consider the conduct of the party in the actual litigation, but the matters which led to the litigation, the eventual termination thereof and the likely consequences of the order for costs.”

10. In this regard, the issue of costs is governed by the fact that it is in the exercise of judicial discretion. That unless for good reason, costs should follow the event. Other considerations may also come into play when deciding who is to bear the costs of litigation.

11. This suit was lodged by the Plaintiff seeking of the balance of the contract sum from the Defendant. However, the Defendant alleges that the Plaintiff did not exhaust the forum of arbitration stipulated in their contract before coming to court. Additionally, that the Plaintiff claimed the sum of Kshs. 6,005,424/75 while it had failed to comply with the timelines set in the contract and also delivered defective work. The Plaintiff has not submitted their point of view, despite this being their case.

12. The parties did not disclose to the court the terms of the settlement. It was not indicated how the complaints of the Defendant were resolved. All that the court knows is that the Plaintiff was paid the claim.

13. The foregoing being the case, it is clear that the court has to look at the conduct of the parties in order to make a determination on the issue of costs. From the record, the Defendant alleged that the dispute was provoked by the Plaintiff’s shoddy work. That the Plaintiff came to this court before exhausting the dispute resolution mechanism agreed to by the parties in their contract by failing to refer the matter to arbitration.

14. Having in mind the foregoing and the fact that exploring alternative dispute resolution mechanism is now a constitutional requirement under **Article 159 of the Constitution**, I am satisfied that the Plaintiff’s conduct is wanting and although successful, it is not entitled to costs. This litigation was unnecessary had the plaintiff struck to the terms of the contract as to the mode of dispute resolution mechanism.

15. Accordingly, the order that commends itself to this court is that each party should bear its own costs. The issue of interest does not therefore arise for consideration.

It is so ordered.

DATED and DELIVERED at Meru this 21st day of June, 2018.

A. MABEYA

JUDGE