REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 84 OF 2011

STANLEY KAUNGA NKARICHIA……APPELLANT

Versus

MERU TEACHERS COLLEGE(Through the

Chairman B.O. G ….....1ST RESPONDENT

JOHN KOOME MUGAMBI…….....….....2ND RESPONDENT

JUDGMENT

Awarding costs of suit

[1] This appeal arises from the order of the trial magistrate that: "*Each party to bear its own costs.*" The appeal carries the following seven(7)grounds of appeal:

> **1. The learned magistrate erred in law and in fact in refusing to give an order of costs in favour of the Appellant.**
>
> **2. The learned trial magistrate erred in law and in fact in that she did not follow the principles applicable when awarding costs.**
>
> **3. The learned magistrate erred in law and in fact in her finding that the Appellant was not entitled to the costs as here was no demand letter served upon the Respondents, whereas this position applied only when the Respondent does not defend the suit against him but instead admit liability from the onset.**
>
> **4. That the learned magistrate erred in law and in fact in that she failed to find that the Respondent had strongly defended his case in which case he is liable to pay the costs.**
>
> **5. The learned magistrate erred in law and in fact in that she failed to award costs to the Appellant nor sufficiently consider the length of time the case had taken together with the hefty expenses incurred on a matter that the Appellant was not to blame.**
>
> **6. That the trial magistrate failed to consider the parties had agreed on liability and had agreed to deal with the issue of quantum only and therefore it was not necessary to produce the demand letter as it was not necessary when dealing with quantum.**
>
> **7. That the refusal by the trial magistrate to award costs to the Appellant was bad in law**

and prejudicial to the Appellant occasioned failure of justice.

[2] The parties agreed that this appeal shall be determined by way of written submissions. The Appellant and the Respondent filed their submission on 27th July 2015 and 27th November 2015 respectively. Essentially, the major bone of contention is that the trial magistrate ought to have awarded costs to the Appellant in line with the applicable principles on costs. All the seven (7) grounds serve this major ground of appeal. Therefore to avoid a dull repetition, I shall handle all the grounds together although eventually I will give a determination of each of those grounds.

Absence of demand letter or notice of intention to sue

Submissions by the Appellant

[3] According to the Appellant, lack of a demand letter would only affect costs in a case where the defendant admits the case without putting up a fight. The Respondents in this case put up a fight which they eventually lost. Such defendant will have wasted the plaintiff's time and resources. The Appellant submitted that the defendant filed defence and denied the claim. They only admitted liability after numerous court attendances. Thus, according to the Appellant, since liability was agreed upon, it was not necessary to produce the demand letters which were in possession of both parties. Similarly, the new rules on filing of documents had not come into force. Again, costs were not subject of the consent judgment on liability, and so, the Appellant urged that the trial court ought to have determined the issue in its discretion under Section 27 of the Civil Procedure Act. The Appellant concluded that the trial court exercised its discretion injudiciously or on wrong principles and gave reasons which were not good reasons in the sense of the law. It does not make a good reason to deny a successful party costs. On that basis, they posit that this court is entitled to interfere with the exercises of discretion by the trial magistrate. See the cases of **Kameshwar Singh vs NebilalMistri (1994) (cited in NBI HCCC. Wambugu –vs- PSC Civil Suit No. 73 of 1971).**

[4] The Appellant also relied on the case of **Goodharg –vs. Hynett (1883)25 Ch.D 182** which was also cited in the Wambugu case (supra) to the effect that the plaintiff must have costs of the action inspite of the fact that no notice before action had been given. To the Appellant, there is no rule that the plaintiff must first apply to the defendant before bringing his action. The Appellant opined that it does not make any difference whether notice was issued or not since the suit was vigorously defended. In sum, the Appellant submitted that;

> ***"a successful party can only be deprived of his costs when it is shown that his conduct, either prior or during the course of the suit has led to litigation which, but for his own conduct might have been averted."***

See the case of **Devram Daltani –vs- Harldas Kalidas Danda (1949)16 EACA 35 cited in Kioka Ltd –vs- De Angelis NBI CA.**They also relied on a number of other cases in the list of authorities. In sum, the Appellant urged that, as costs follow the event the trial magistrate ought to have awarded the Appellant costs. They sought this court to interfere with the exercises of discretion by the trial court and award them costs.

Respondents' submissions

[5] The Respondents argued that costs are in the discretion of the court and not a matter of right. However, the trial court will consider all the circumstances of the case including any omissions in procedure as well as conduct ofthe parties. And the main aim of awarding costs is to reimburse the successful party for amounts expended in the case. The Respondents further asserted that a successful party may be denied costs by the court but the court must in such case give explicit reason for so doing. To the Respondent, the trial court gave explicit reason fornot awarding costs namely, that no notice of intention to sue was issued. That is one of the grounds on which costs may be refused. The Respondents cited literary works by *Mulla* on the *Code of Civil Procedure, 17th Edition, Kuloba J in Judicial Hints on Civil Procedure,* as well as cases of **Supermarine Handling Services Ltd *vs.* KRA CA No. 85 of 2006,**

Jasbir Singh Rai & 3 others *vs*. Tarclochan Singh Rai & 4 others. Supreme Court Petition No. 4 of 2012, and **Joseph Oduor *vs* Kenya Red Cross Society [2012] eKLR** in support of their said position. They therefore beseeched court not to interfere with exercise of discretion by the trial court.

DETERMINATION

[6] On my part, the law is that, the appellate court will not interfere with the exercise of discretion by trial court on costs, except (1) where the discretion was not exercised judicially or was exercised on wrong principles, or (2) where the trial court gives no reasons for the decision and the appellate court is satisfied that the decision was wrong; or (3) where reasons are given, the Appellant court considers those reasons not to constitute "*good reason*" within the meaning of section 27 of the Civil Procedure Act. There are ample judicial decisions as well as eminent works on this subject which I do not wish to multiply except I am content to refer to the case of **Supermarine Handling Service Ltd (Supra)** for it summarizes the applicable law on this matter.

[7] Applying the above test, was the reasons given by the trial magistrate "*good reason*" to depart from the general rule that costs follow the event? The trial magistrate stated the following on costs:

> ***"As pointed out by counsel for the defendant, plaintiff did not adduce evidence to show there was service of demand and Notice of Intention to sue….Each party to bear its own costs".***

The Respondents in paragraph 10 of their defence categorically denied service of demand and notice of intention to sue. They stated that for that reason, the Appellant is not entitled to costs of the suit. They also submitted on this aspect and more specifically that the Appellant did not prove notice to sue was issued and served.I take the following view of this point. It has never been the law that a defendant should always have notice of intention to bring suit against him before action is filed in court. There are cases which, by their very nature or due to obtaining circumstance, it is impractical to issue a notice of intention to sue or issuing such notice of intention to sue will only be to the detriment of the interests of the Plaintiff and justice. For instance in trade-marks and patent rights cases or where *Anton Piller* orders or ex parte temporary injunctions are the subject of the suit, issuance of notice of intention to sue will militate against the very core of the litigation. So, where there is a possibility that by giving notice of intention to sue, the defendant may dissipate or destroy evidence, or blow away the substratum of the plaintiffs' cause of action, the law does not place an necessity to issue a notice` of intention to sue before an action is commenced; it will be overlooked. And in such circumstances, it will be injudicious to deny a successful suitor his costs of suit merely on the basis that Notice of Intention to sue was not given. But in all other cases, I should think that Notice of Intention to sue ought to be given unless the plaintiff's interests are likely to be harmed by prior communication with the opposite party. However, I should also state here that absence of or failure to issue notice of intention to suit is just one of the considerations that the court must take into account in awarding costs. If a court makes it the sole determinant factor, then, the said court must give good reason to deny the successful party his costs. On this, I am really content with the elaborate discourse on costs by **Chanan Singh J** in the case of **Wambugu vs Public Service Commission [1972] EA 296.**

[8] As a matter of general principle, costs follow the event and the successful party will always have costs of his success unless the court has good reason to order otherwise. These words *"the events"* mean the result of the entire litigation. See *Judicial Hints on Civil Procedure (supra).*The result of the entire litigation was that the suit was defended, although, only the Appellant testified in respect of the injuries sustained, and the Defendant did not call any witnesses. It be noted that a party is not disinherited of the title of successful party merely because the suit was not opposed or he met no or little resistance. The Appellant was, therefore, the successful party in these proceedings. The trial magistrate, however, found that failure or absence of a demand and notice of intention to sue denied the Appellant costs of the suit. Was the reason given good reason in the sense of the law as to support departure from the general rule on costs? Or was the discretion exercised on wrong principles or capriciously?

[9] The foregoing questions will be answered by looking at the facts and circumstances of this case. I

must admit that there is an element of carelessness on the part of the Appellant in the way the issue on costs was handled. First, the Respondent in paragraph 10 of the Defence categorically denied that demand and notice of intention to sue was ever given. They also went ahead to state that, therefore, the Appellant is not entitled to costs of the suit. This issue was also submitted upon by the Respondents in the lower court. Without any doubt, absence or failure to serve demand and notice of intention to sue became one of the issues for determination by the court. Hitherto, the Appellant has not seen any need to adduce evidence in that respect. His reasons, at least from the submissions filed in this appeal were:-

"Since the parties had agreed to deal with the issue of quantum only, it was not possible or necessary to produce demand letter which were with both parties."

It is regrettable that the Appellant can state that the demand letter was issued and was in possession of both parties at the time of the prosecution of the primary suit as well as this appeal but he saw no need of tendering them in evidence. There was also no request to adduce additional evidence in this appeal in accordance with Order 42 rule 27, 28 and 29 of the Civil Procedure Rules. And, notably, a demand letter is not a matter about which the court can take judicial notice of. In fact, nothing would have been easier than to produce the demand and notice of intention to sue.

[10] In addition to the foregoing, the Appellant ought to have known that this case is not in the category of cases where issuance of a demand and Notice of Intention to sue would harm the Appellant's interests by communication of intention to sue to the opposite party. Nor is it in a special class of cases on patent rights and trademarks.

[11] The foregoing notwithstanding, it is instructive to observe that the Respondents did not straight away admit the claim. It seems, however, that parties entered into negotiations after the suit had been filed. I see that when this matter came up for hearing for the first time on 7th October, 2010, Mr. Gitonga who was holding brief for M/s. Nelima for plaintiff informed the court that parties are negotiating a settlement. As part of those negotiations, the plaintiff was referred for a second medical examination. Ultimately, on 31.3.2011 parties recorded consent judgment on liability and agreed that assessment of damages by the court be done on 26th May 2011. The matter was surely heard on the appointed date. Therefore, the nuances that the suit may have been avoided were it not forthe Appellant's conduct in not issuing a demand and notice of intention to sue does not hold sway. The mere fact that a demand may not have been issued- and even if it was, none was produced in court- is not, alone, a good reason to deny a successful party his costs of the suit. The omission to produce the demand letter may have been inadvertent or careless act; this is most regrettable. But the overall impression of this case is that the Appellant was not moved by mala fides or impropriety in not producing the demand letter. There is every possibility that he was under false impression that in view of the consent on liability there was no need of producing the demand letter.The suit was also defended by the Defendant and continued on assessment of damages on the understanding of the parties. There is nothing which shows that issuance of notice of intention to sue would have made the suit unnecessary. In totality, the Appellant was the successful party to whom costs ought to be awarded. Other than just stating that: *"As pointed out by counsel for the defendant, plaintiff did not adduce evidence to show there was service of demand and Notice of Intention to sue…''*;there was absolutely no reason given by the trial magistrate which would deny the successful party costs of the suit. In the circumstances, the trial magistrate did not exercise discretion judicially; she did not take into account the relevant factors; she did not apply the correct principles of law; she did not give any reasons to depart from the general principle of law that costs follow the event, and eventually her decision was wrong. This court is, therefore, entitled to interfere with her discretion on costs. I have given enough reasons that the Appellant was the successful party and mere fact that a demand letter was not issued or was by inadvertent or otherwise not produced in evidence will not justify an order to deny him costs of the suit. He is entitled to a recompense of expenses he has expended in this litigation. Accordingly for those reasons, I set aside the order of the trial magistrate in which she ordered that:' *'Each party to bear its own costs"*.In lieu thereof, I award costs of the suit in the lower court to the Appellant. It is so ordered.

Dated, Signed and Delivered in open court in Meru this 25th day of February, 2016

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F. GIKONYO

JUDGE

In the presence of:

Rimita Advocate for appellant

Non appearance for respondent

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F. GIKONYO

JUDGE