



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI HIGH COURT
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO 485 OF 2012

THOMAS NJUGUNA MATU.....1ST PLAINTIFF

JANE WAMBUI MULWA.....2ND PLAINTIFF

VERSUS

LILIAN WAMBUI MATHU.....1ST DEFENDANT

DR. ERASTUS FRED.....2ND DEFENDANT

CONSOLIDATED BANK LTD.....3RD DEFENDANT

RULING

1. The issue for determination arises out of a consent that was entered between the Plaintiffs and the 1st & 2nd Defendants on 15th October 2015. By entering that consent, the parties agreed to compromise the suit, and that the same was effectively withdrawn as against the 1st and 2nd Defendants. In the consent, however, the issue of costs was not addressed, and hence on 25th February 2015, the parties asked the Court to deliberate and make a finding on this issue.

2. The matter proceeded by way of submissions. The Plaintiff filed their submissions on 4th March 2015. They submitted that Section 27(1) of the Civil Procedure Act was instructive on the issue of costs, and that they, follow the event, which in this case, they contended was the result of the entire litigation. They submitted that the event culminated with the 1st and 2nd Defendants settling the claim as set out in the Plaintiff, and that therefore, they were entitled to costs.

3. They relied on the determinations made in *Rose Kaume & Another v Stephen Gitonga Mbaabu & Another* (2016) eKLR and *Morgan Air Cargo Ltd v Everest Enterprises Ltd* (2014) eKLR. With regards to issues of costs in compromised suits. They contended that they were successful litigants, and that therefore, should be awarded costs.

4. The 1st and 2nd Defendants also relied on the provisions of Section 27(1) of the Civil Procedure Act in their submissions filed on 15th March 2015. They submitted that the issue of costs was discretionary, and that the Court would either award or deny the successful litigant costs; (see **Republic v Kenya National Highway Authority & 2 Other ex-parte Kanyingi Wahome (2015) eKLR**). It was further submitted

that the consent only settled the application dated 27th July 2012, and that the main suit was pending hearing and determination, and that the issue of costs therefore, was premature.

5. On its part, the 3rd Defendant made its submissions on 23rd March 2016. It was submitted that in the case of **Rufus Njuguna Miringu & Another v Martha Muriithi & 2 Others (2012) eKLR**, it was reiterated that where a suit was settled by a consent, then each party was supposed to bear its own costs. However, they further submitted that the consent sought to enforce the Plaintiffs and 1st & 2nd Defendants' contractual obligations to the 3rd Defendant, and that therefore, they should, joint and severally, be liable to pay the 3rd Defendants costs.

6. They further relied on the case of **Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others (2014) eKLR** where it stated that the rule of costs was not invariable, and that the Court would, and should, consider the circumstances of the case while being guided by the principles of justice. Further, it was submitted that the circumstances of the case demonstrated that the 3rd Defendant was deserving of costs as the Plaintiffs and the 1st & 2nd Defendant had been in breach of their contractual obligation to it.

7. The basic rule in attribution of costs is that costs follow the event, and as is succinctly set out under the provisions of Section 27(1) of the Civil Procedure Act. It is imperative to bear in mind the steps taken by the parties since the inception of this suit so as to appreciate whether or not the event has taken place.

8. In considering such steps, the Court would also be guided by the merits and principles enunciated by Mativo, J in **Muhito Mwinyenderi Building Co Ltd & Another v Johnstone Githua Gatherer & Another (2015) eKLR** where he reiterated as follows;

“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.[11] 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 he likely consequences of the order for costs. [12]”

9. In **Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin (1997) 186 CLR 622** it was reiterated that the general principle in relation to costs where proceedings are determined without a hearing on the merits, and where it cannot be said that one party has simply capitulated, is that the Courts make no order as to costs with the intent that each party bears its own costs, unless it can be seen that one party has acted unreasonably in bringing or defending the proceedings (see also *Harkness v Harkness* (No 2) [2012] NSWSC 35).

10. It was further enunciated that in rare cases, it may be appropriate to make an order for costs without a contested hearing on the merits, if the court can be almost certain that one party or the other would have won.

11. In the instant circumstances, the Plaintiffs and the 1st & 2nd Defendants entered into an agreement where they would borrow certain facilities from the 3rd Defendant, secured by charges created over their properties. It was the Plaintiffs claim that the 1st & 2nd Defendant defaulted in making remittances to the 3rd Defendant, who had then issued a statutory notice on 21st May 2012 demanding the repayment of the amounts due from the Plaintiffs and the 1st & 2nd Defendants.

12. In a follow up to this demand notice, the Plaintiff instituted a suit on 27th July 2012, and which thereafter made an application on even date, seeking the Court to stop the notice issued by the 3rd Defendant. In the Plaintiff, the Plaintiff sought prayers for the property of the 1st & 2nd Defendant to be

realized first in satisfaction of the outstanding loan amount as they were the defaulters, that the 3rd Defendant apportion the loan account respectively to the Plaintiffs and the 1st& 2nd Defendant, and/or in the alternative, the 3rd Defendant to sell the 1st& 2nd Defendants property to realized the amount due and owing as apportioned by the 3rd Defendant.

13. Before the Defendants moved to defend the suit, and as neither had filed a response to the Plaintiffs, the Court issued directions on 14th August 2012, in terms that the Defendants were to file and serve their respective replying affidavits to the application by the Plaintiffs dated 27th July 2012, and further, that there were in place *status quo* orders pending the hearing and determination of the said application.

14. On 26th September 2012, a consent was recorded and in which the 1st Defendant was required to pay Kshs 16,500,000/- to the 3rd Defendant, which consent was complied with on 3rd October 2012. On 5th February 2013, the Court recorded a further consent by the parties, where the 3rd Defendant was required to compute and submit the amounts due from the 1st& 2nd Defendants, and for the same to be paid by the 1st& 2nd Defendants within forty five (45) days with compliance of the same to be established by 24th April 2013.

15. It was in the 3rd Defendant's replying affidavit sworn on 23rd November 2013 where it was reiterated that it was the 1st& 2nd Defendant who had defaulted in making remittances to settle the outstanding amount owing, and that the Plaintiffs had been diligent in their remittances and repayment of the loan account.

16. In following up on the consent recorded on 5th February 2013, the parties, exclusive of the 3rd Defendant, recorded another consent on 15th October 2015, in which the 1st& 2nd Defendants were required to clear the outstanding arrears accrued within twenty one (21) days, whilst the Plaintiffs were to continue remitting Kshs 420,000/- per towards the loan account.

17. This consent, by design, compromised the suit, as the 1st& 2nd Defendant were apportioned the repayment of the loan due to them. By the same consent, the Plaintiffs were to continue servicing the loan account, which had been apportioned to them. The 3rd Defendant, although not a party to the consent, did not raise any objections to the consent being recorded and adopted by the Court.

18. Neither of the Defendants filed a substantive Defence to the claim filed by the Plaintiff, and as such, the compromise instituted through the consent orders had in effect apportioned liability upon the 1st and 2nd Defendants. They are the losers in this matter, and therefore, liable to pay costs, to both the Plaintiffs and the 3rd Defendant.

19. The 3rd Defendant had commenced recovery proceedings against the Plaintiffs, which recovery proceedings have been effectively quashed by the aforesaid consent order. It therefore follows that, the recovery proceedings may only be effected as against the 1st& 2nd Defendant in the event that they default in the repayments of the loan facilities as per the consent.

20. As it stands therefore, the Plaintiffs are entitled to cost of the application and the suit. These costs are liable from the Defendants 1 & 2, both jointly and severally. The costs of the 3rd Defendant shall be borne by the 1st& 2nd Defendants.

It is so ordered.

Dated, Signed and Delivered in Court at Nairobi this 27th day of May, 2016.

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C. KARIUKI

JUDGE