



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO 353 OF 2014

BRITISH –AMERICAN ASSET MANAGERS LIMITED1ST PLAINTIFF

BAAM ADVISORY LLP 2ND PLAINTIFF

VERSUS

EDWIN HAROLD DAYAN DANDE.....1ST DEFENDANT

ELIZABETH NAILANTEI NKUKUU 2ND DEFENDANT

PATRICIA NJERI WANJAMA..... 3RD DEFENDANT

SHIV ARORA4TH DEFENDANT

CYTONN INVESTMENTS MANAGEMNT LIMITED5TH DEFENDANT

ACORN PROPERTIES LIMITED 6TH DEFENDANT

ACORN INVESTMENTS LIMITED 7TH DEFENDANT

EDENVALE DEVELOPMENT LLP 8TH DEFENDANT

STARLING PARK PROPERTIES LLP 9TH DEFENDANT

CRIMSON COURT DEVELOPMENT LLP 10TH DEFENDANT

SINOPIA PROPERTIES LLP11TH DEFENDANT

MIKADO PROPERTIES LLP12TH DEFENDANT

ACORN GROUP LIMITED13TH DEFENDANT

CRESCENT PROPERTIES LLP14TH DEFENDANT

SPRING GREEN PROPETIES LLP15TH DEFENDANT

RULING

The plaintiffs instituted several cases against the defendants herein jointly and severally. In all there were fifteen defendants. At the institution of these suits, a restraining order was issued by the court prohibiting the defendants from several actions to protect the interests of the plaintiffs.

In the pendance of the suits a consent was entered into between the plaintiffs and the 6th to 15th defendants to withdraw the suits and each party to bear their own costs. The 1st, 2nd, 3rd, 4th and 5th defendants did not endorse the said consent for reasons that they demanded payment of costs by the plaintiffs. That being the case, an order was made for the plaintiffs and the 1st, 2nd, 3rd, 4th and 5th defendants to file submissions on the costs.

It is the position of the 1st, 2nd, 3rd, 4th, and 5th defendants that they are entitled to costs consequent to the withdrawal of the suits against the 1st, 2nd, 3rd, 4th and 5th defendants in Civil Case No. 354 of 2014.

On the other hand the plaintiffs submit that the said defendants are not entitled to any costs whatsoever in view of the role they played prior to the institution of the suits. Section 27 (1) of the Civil Procedure Act, Cap 21 Laws of Kenya provides as follows,

“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.”

In their respective submissions both counsel have addressed the issue and cited some authorities.

The plaintiffs’ cause of action was prompted by an alleged transfer of funds attributed to the 1st, 2nd, 3rd, 4th and 5th defendants to the other defendants in what was termed to be fraudulent. The 6th to 15th defendants agreed to release the said funds to the plaintiffs leading to the compromise withdrawing the said suits.

It is the plaintiffs’ position that the 1st to 5th defendants were the architects of the said transfer of funds and therefore they should not be entitled to any costs following the withdrawal of the suits. On the other hand the 1st to 5th defendants submit that the withdrawal of the suits and the agreement between the plaintiffs and the 6th to 15th defendants, including the clause that each party bears its own costs, is not and cannot be binding on the 1st to 5th defendants.

Where a suit is compromised, it does not mean that there is a successful or losing party. The discretion of the court is therefore called in to determine the issue of costs. Where however, a party is successful, as Section 27 of the Civil Procedure Act provides, the costs shall follow the event. Where also a defendant succeeds in the dismissal of the plaintiff suit the same principle applies.

The plaintiffs admit that no demand letter was issued before the institution of these suits. There is however a plausible explanation. That is, had such a demand been made, considering the nature of the cause of action, this would have triggered a transfer of funds the detriment of the plaintiffs.

When all factors are considered in these cases, the plaintiffs would not have instituted these suits had it not been for the actions of the 1st to the 5th defendants. The return of the funds by the 6th to 15th defendants to the plaintiffs is a confirmation that the transfer of those funds by the 1st to 5th defendants was in itself spiced with fraud. It is ironic therefore that the 1st to 5th defendants claim to be entitled to costs in this case.

In **Civil case No. 179 of 2013 Morgan Air Cargo Limited Vs. Everest Enterprises Limited**, a partial judgment was recorded by consent by the parties. The costs however became an issue. Gikonyo J said in part as follows,

“The consent filed herein did not compromise on costs as that item was left out of the compromise and was to be agreed at a later date. It is the failure to agree on costs that parties ask the court to make a determination on the issue.”

It is generally accepted that a successful party cannot be deprived of his costs. However, intervening circumstance may deny him such an order. The award of costs is a matter of the discretion of the court, and should not be considered as a matter of course. Gikonyo J in the case cited above said as follows,

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “costs follow the event” was driven by the fact that there could be no “one- size- fit- all” situation on the matter. That is why section 27 (1) of the Civil Procedure Act is coached the way it appears in the statute; and even all literally works and judicial decisions on costs have recognised this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

In the instant case it may well be argued, and rightly so, that the plaintiffs succeeded in all these suits. I say so because all the monies alleged to have been transferred at the instance of the 1st to 5th defendants, to the rest of the defendants have been recovered and suit compromised.

For those reasons I find, if anything, it is the plaintiffs who are entitled to costs. However, considering the order recorded between the plaintiffs and the 6th to 15th defendants that each party shall bear their own costs. I adopt the said order with regard to the 1st to 5th defendants and hold that they are not entitled to any costs from the plaintiffs. This matter shall therefore be put to rest on those terms.

Dated, signed and delivered at Nairobi this 15th Day of December, 2016.

A. MBOGHOLI MSAGHA

JUDGE