

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI COMMERCIAL COURTS)

MISC CAUSE NO. 324 OF 2014

In the Matter of an Application for Leave to Institute Proceedings against the Official Receiver

AND

In the Matter Of Companies Act, (Cap 486)

BY

DIPCHEM EAST AFRICA LIMITED.....APPLICANT

Versus

KARUTTURI LIMITED (IN RECEIVERSHIP).....RESPONDENT

RULING

Costs

[1] The Defendant is claiming costs of this application for leave to institute proceedings against KARUTTURI LIMITED (IN RECEIVERSHIP). The application was withdrawn after realizing that there are several petitions for winding-up the company. I have considered all the submissions of parties and the law applicable. I hereby state that, I do not wish to reinvent the wheel. The phraseology, "Costs follow the event" has been sufficiently explained by courts as well as eminent writers. Perhaps I should merely re-state the law and make my decision on the circumstances of the case. See the literary work by Kuloba J (as he then was), *Judicial Hints on Civil Procedure* 2nd edition at page 99 that;

"The words "the event" mean the result of all the proceedings to the litigation. The event is the result of 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 judgment in the whole or in part.

[2] Therefore, Costs are awarded as a matter of discretion by the court. But, the discretion of the court is, however, exercised judicially and judiciously; not capriciously; not whimsically but upon defined legal principles. As a general rule, the object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. Costs are, thus, a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action. Costs should not be made merely as a penal measure unless it is meant to purge non-compliance or non-adherence by the party with orders of court or requirements under the law. Nonetheless, costs will be denied where the successful party in the suit is guilty of misconduct or omission or neglect, or

vexatious or oppressive conduct. See the decision by the Supreme Court in the case of **Jasbir Sign Rai & 3 others v TarclochanSignh Rai & 4 others [2014] eKLR** that; costs are not to penalize the losing party but to compensate the successful party for trouble taken in prosecuting a suit. The legal policy behind these rules is that, it is the right of an aggrieved party to come to court to have his rights vindicated and to be able to recover all costs which have been occasioned by the party on the wrong.

[3] With the law well cast, is this case deserving of costs? The Applicant withdrew the application for leave to institute proceedings, which was a prudent action after the applicant became aware of the unfolding events around the company. Nevertheless, one of the reasons given is devoid of merit. It is true that, the company is not in liquidation. Also, as a matter of law, appointment of receiver manager is registered in the companies Registry as a matter of public notice to all who will be dealing with the company concerned. Thus, I agree with the Defendant that this fact was readily available to or would have been given by the company had the Applicant made a demand. Failure to make a formal demand for payment of a debt will have implications on costs. Nothing much was really done in this application, but, that fact should not deprive the Defendant costs. The law is that a party will not be deprived of costs merely because the suit was not contested or did not go to trial or was a short stunt in court; or not much or little or no resistance was offered in the suit. Accordingly, the Defendant is entitled to costs, except I hereby award only thrown away costs since the application was withdrawn before it was even fixed for hearing. It is so ordered.

Dated, signed and delivered in open court at Nairobi this 27th day of May 2015

F. GIKONYO

JUDGE