REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 11 OF 2013

JOSEPH GIOCHE KURIA…….. APPELLANT

VERSUS

KIIRU TEA FACTORY…….RESPONDENT

(Being an appeal from the ruling and order in Nyeri Chief Magistrates' Court Civil Case No. 178 of 2012 (Hon. S.Okato) on 1st February, 2013)

JUDGMENT

This appeal arises out of an order by the magistrates' court ordering the appellant (the plaintiff) to pay the respondent (the defendant) costs of the suit despite the fact that the appellant had, apparently, succeeded in his claim against the respondent.

In the suit, the plaintiff had sued for the sum of **Kshs. 176, 345/=** which he claimed was due and owing from the defendant for deliveries of green leaf tea to the defendant factory. In the defence filed on its behalf, the defendant denied the allegations against it as set out in the plaint but still admitted owing the plaintiff the sum of **Kshs. 216, 388.05/=** which, in its own words, was ready and willing to pay; in fact this sum was subsequently paid but during the pendency of the suit.

When the parties appeared before the learned magistrate on 23rd November, 2012, the plaintiff's counsel informed the court that the claim had been settled and all he was looking for now was the costs of the suit. Counsel for the defendant interjected and submitted that the issue of costs ought go for trial; counsel also sought to know whether the plaintiff was still intent on pursuing the prayer in his plaint for a declaration that the defendant had no right to withhold the plaintiff's payment for green leaves delivered. Without much ado, the plaintiff's counsel immediately abandoned that particular prayer in the plaint. It is then that the court directed parties to file written submissions on the issue of costs.

In his ruling, the learned magistrate found for the defendant and held that since there was no evidence that the defendant had been served with a notice of the plaintiff's intention to sue and the defendant would have certainly paid the sum claimed had such a notice been served, the plaintiff was not entitled to any costs; instead, so the learned magistrate held, it is the defendant which was entitled to costs payable by the plaintiff.

It is against this learned magistrate's decision that the appellant appealed. In his appeal the appellant has faulted the learned magistrate on the grounds that:-

1. The learned magistrate erred in law and in fact in considering irrelevant matters and thereby arriving at the wrong conclusion;

2. The learned magistrate erred in law and in fact in failing to understand the plaintiff's claim and the import of the parties submissions and so arrived at the wrong conclusion;

3. The learned magistrate erred in law and in fact in holding that that the demand notice had not been served when there was no basis upon which to arrive at such finding;

4. The learned magistrate erred in law and in fact when he ordered the plaintiff to pay costs when there was no basis for such a finding; and,

5. The learned magistrate erred in in failing to exercise his discretion judiciously and failed to consider the legal principle that costs follow the event.

It is clear that when the defendant was served with summons to enter appearance, the memorandum of appearance was not only entered on its behalf but also a defence contesting the plaintiff's claim was subsequently filed; however, despite the denial the defendant in paragraph 4 of its defence said:-

> ***"4. The company only admits that the plaintiff has been delivering green leaf to it and that it has not paid the plaintiff the sum of Kshs. 216, 388.05 to date which is not the sum claimed. It is, however, ready and willing to pay to the plaintiff the said sum of Kshs. 216, 388.05, though not claimed."***

In these circumstances, one can legitimately conclude that the plaintiff's claim was contested except that in its defence filed to contest the suit the defendant made what would properly be regarded as admissions as understood **under order 13 rule 1** of the **Civil Procedure Rules;** this rule provides that:-

> ***1. Any party to a suit may give notice by his pleading, or otherwise in writing, that he admits the truth of the whole or part of the case of any other party***.

The defendant admitted in its pleading that it owed more than what the plaintiff was seeking and thus it is deemed, in the context of this rule, to have admitted the whole of the plaintiff's claim.

The defendant went further than admit, the sum of **Kshs. 216, 388.05/=** which as noted is obviously more than what the plaintiff had bargained for and for avoidance of any doubt the defendant amended its defence to plead that this sum had been paid to the plaintiff.

The question that was before the magistrates' court and which has now been escalated to this court is, who between the plaintiff and the defendant should bear the costs of the suit in these circumstances?

My first stop in a bid to find a solution to this question is **section 27 (1) of the Civil Procedure Act**; this provision of the law provides as follows:-

27. Costs

> ***(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.***

Essentially, according to this provision of the law, the court seized of any suit has a wide discretion to determine the extent of the costs payable and to whom between or amongst the parties to the suit those costs should be paid; however, this discretion is subject to the proviso that costs will always follow the

event unless for good reason the court orders the contrary.

The appellant succeeded in his claim and in fact received more than what he conceived; the success of his suit, in my view, is the event that the costs ought to have followed.

Counsel for the defendant thought otherwise; in his view, the moment the defendant made the payments, the plaintiff should have withdrawn his suit. This argument does not appeal to me to be viable because there was an aspect of the plaintiff's suit that was yet to be resolved inspite of the defendant's payments - there was the unresolved question of costs of the suit which had been captured as item (c) in the prayers in the plaint. A unilateral withdrawal of the suit would not have resolved this question and I suppose it is for this reason that the court directed the parties to present their views on this issue when the matter came before it on 23rd November, 2012.

On his part the learned magistrate took a different dimension on this question and not only denied the plaintiff his costs but also ordered him to bear the burden of these costs. Although this question had neither been raised by the defendant in its submissions nor argued by the parties, the court on its own motion held that, it was not pleaded and there was no evidence that the notice of intention to sue had been served upon the defendant before the suit was instituted against him. The learned magistrate, in my view, misdirected himself in this respect and came to the wrong conclusions; I would also agree with counsel for the appellant that the learned magistrate came to the wrong conclusions by considering matters which were not in issue. And even if this particular question was argued out, **paragraph 7** of the plaintiff's plaint states the defendant had *"refused, failed and or neglected to pay"* the amounts due to the plaintiff.

The question whether or not to pay costs either because a claim has been contested or a notice of intention to sue has been issued or whether a successful party is entitled to costs has been considered in several decisions before; it would be ideal to consider some of these decisions at this point.

Laxmibai versus Radhabai (1917), 42 Bom. 327, a decision cited with approval in **Wambugu versus Public Service Commission (1972) E.A 296,** was a case between two women both of whom claimed to be widows of one person. The defendant is said to have lost throughout but the trial judge, regarding the plaintiff to be more at fault, ordered the costs to come out of the estate. On appeal, the High Court upset this order as a violation of the established principle that, in the absence of misconduct, a successful party must not be burdened with costs of the unsuccessful party.

The other case considered in the *Wambugu* case (supra) was **Goodhart versus Hyett (1883), 25 Ch. D. 182** where North J held that the plaintiffs must have costs of the action inspite of the fact that no notice before action had been given. In that case the claim was denied but both parties called witnesses; the learned judge said of the question of notice at page (192-193):

> ***"I am very sorry to find that an action of this kind commenced without any communication to the defendant but there is no rule that a plaintiff must first apply to the defendant before bringing his action…an application to the defendant could not have defeated the plaintiffs' object…all parties might have benefited by coming to an arrangement … it seems to me very probable that that the suit would have been avoided altogether.***
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> ***"Under these circumstances I have felt very much disposed, if I could, to say that there ought to be no costs of the action. I do not think I can do that…"***

Although the judge in *Wambugu case* cited several cases, with approval, where costs were ultimately allowed to the successful party regardless of whether notices of demand were issued or irrespective of whether the cases were contested or not, he held that considering the peculiarity of the circumstances of the case before him, he would have the contesting parties bear their own costs. The learned judge, however, held that in his opinion, the fact that the respondent did not contest the case is not in itself a ground for refusal of costs but it is only a factor that can be taken into account if other good reason exists.

On my part and for purposes of determination of this appeal I would say that these decisions are

consistent with **section 27** of the **Civil Procedure Act** which is clear that costs will always go to the successful party unless for "good reason" the court thinks otherwise. I have not found such "good reason" as why the plaintiff should have been ordered to pay the defendant the costs of the suit; neither have I seen any reason as to why the appellant should not have been awarded the costs. And in the absence of these reasons I have a reason to allow the appellant's appeal with costs. I will also order that the costs of the suit in the court below be paid to the appellant.

Dated, signed and delivered in open court this 15th May, 2015

Ngaah Jairus

JUDGE