



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL NO E042 OF 2021

KAYSER INVESTMENT LIMITED.....1ST APPELLANT

JHK MORAN AUCTIONEERS.....2ND APPELLANT

=VERSUS =

CHINYA DEVELOPMENT CO. LTD.....RESPONDENT

[Being an Appeal against the Order of Hon. A. Muma (Vice Chairperson)

delivered on the 10th day of June 2021, in the Tribunal Case No. E107 of 2021]

BETWEEN

CHINYA DEVELOPMENT CO. LTD.....APPLICANT/ TENANT

=VERSUS =

KAYSER INVESTMENT LIMITED.....1ST RESPONDENT/ LANDLORD

JHK MORAN AUCTIONEERS.....2ND RESPONDENT

JUDGMENT

1. The Appellants moved the Court vide a Memorandum of Appeal dated 18th June 2021. The appeal is set against the ruling made on 10th June 2021 by Hon. A. Muma (Vice Chairperson) in **Business Premises Rent Tribunal Case E107 of 2021**. The Appeal is raised on the following ground:

That the learned Vice Chairperson erred in law and facts in dismissing the Appellants prayers for cost.

2. The Appellants sought for the following prayers:

i. The Appeal be allowed and the orders of Hon. A. Muma (Vice Chairperson) delivered on 10th June 2021, on cost be set aside.

ii. Costs of this Appeal and the cost for the reference be awarded to the Appellants.

3. Pursuant to the Court's directions issued on 14th December 2021, the Court directed that this Appeal be heard together with **Nairobi ELC Appeal No. E043 of 2021**. The matter was set for hearing on 24th January 2022. During the hearing of the Appeal, **Learned Counsel Mr. Ataka** attended and made oral submissions for the Appellants while **Learned Counsel Mr. Cheboi** attended on behalf of the Respondent.

4. Counsel for the Appellants submitted that it was within the Tribunal's jurisdiction to award costs particularly those of exemplary nature where a suit was found to be frivolous. Counsel highlighted that the Tribunal failed to give reasons for denying them costs.

5. It was further submitted that pursuant to **section 12 of Landlord and Tenant (Shops, Hotels and Catering Establishments) Act**, the

Tribunal had powers to award costs. Counsel further stated that the Respondent had misled the Tribunal when they approached it ex-parte and got orders. It was also submitted that the Reference had been filed by an unqualified person and this was evident from the record.

6. The Appellants contended that while a party is entitled to withdraw a reference filed before the Tribunal, the same is subject to costs. It was further contended that while costs are at the courts discretion no reasons were given as to why the same were not awarded.

7. It was further submitted that, prior to the request for withdrawal of the reference, the Appellants had filed an application seeking to discharge the exparte orders and strike out the suit which was considered defective having been drafted by an unqualified person.

8. In support of their submissions, the Appellants relied on the Court of Appeal case of *Farah Awad Gullet v CMC Motors Group Limited [2018] eKLR* and urged this Court to allow the Appeal.

9. The Respondent opposed the appeal while submitting that the Appellate Court will not interfere with a decision of the trial court on costs unless it was exercised wrongly.

10. It was the Respondent's submission that the as per the record, the matter was withdrawn voluntary and it never went through a hearing process. The parties did not go through an entire litigation and the dispute was not resolved by the Tribunal since the event came to an end when the Reference was withdrawn and hence the Appellants were not entitled to costs.

11. It was further argued that even if the principle of costs following the event was to be considered, there was no event in this matter warranting a party to be entitled to costs. For these reasons, the Respondent prayed for dismissal of the Appeal and non-interference with the Tribunal's orders as to costs.

12. I have considered the parties oral submissions and the entire record of appeal. The single issue for determination is whether or not costs ought to have been awarded to the Appellants upon the withdrawal of the Reference at the Tribunal.

13. Costs of a suit or other proceedings are always in the discretion of the Court in terms of **section 27 of the Civil Procedure Act**, which 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.

(2) The Court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

14. It is a settled principle of costs that costs follow the event, meaning that the successful party takes the costs unless the Court for sufficient reason orders otherwise. In considering this exercise of the discretion, the Court may properly consider the length of time that the suit or proceedings has been going in Court before the withdrawal or other determination; the nature of the relief sought; the steps taken in the proceedings; the stage of hearing of the suit or proceedings; the need to promote access to justice by indigent suitors; and other sufficient reason in the interest of justice.

15. In other words, the court may not only consider the conduct of the party in the actual litigation, but the matters which led up to litigation, the eventual termination thereof and the likely consequences of the order for costs. See *Hussein Janmohamed & Sons Vs. Twentsche Overseas Trading Co. Ltd [1967] EA 287* and *Mulla (12thEdn) P. 150.*

16. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In *Morgan Air Cargo Limited v Evrest Enterprises limited [2014] eKLR*, the court noted that: ***“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost 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 couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”***

17. Furthermore, this discretion must be exercised judiciously and courts should not deprive a party of his or her costs unless it can be shown that they acted unreasonably. The *Halsbury's Laws of England, 4th Edition (Re-issue), {2010}, Vol.10. para 16,* notes that:

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”.

18. In the proceedings before the Tribunal, the request to have the suit withdrawn with no orders as to costs was made on 10th June 2021. At that point in time, the Appellants had already taken steps and efforts in defending the suit. The Appellants had already filed an Application dated 20th May 2021 seeking to set aside the orders issued on 11th May 2021 and to strike out the entire suit. It is evident that the Appellants had already incurred costs.

19. I do not see, in terms of the wording of section 27 of the Civil Procedure Act, a “good reason” to order against the general principle that “costs shall follow the event.” Once withdrawn the suit wholly, the suitor must as a general rule pay to the defence. This therefore calls for an interference with the decision of the Tribunal.

20. Having considered the Parties’ submissions and evidence within the record of appeal. I therefore find that the appeal is merited. I allow the appeal and make the following orders:-

i. The Appeal is allowed by setting aside the orders of the Business Premises Rent Tribunal as delivered on 10th June 2021. It is substituted with an order that the Reference in Tribunal Case No. 106 of 2021 and 107 of 2021 stands withdrawn with costs.

ii. Costs of this Appeal are awarded in favour of the Appellants.

iii. The orders issued herein to be applied in Nairobi ELC Appeal No. E043 of 2021.

21. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF FEBRUARY 2022

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Ataka for the Appellants.

N/A for the Respondent.

Court Assistant; Caroline Nafuna.