REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 43 OF 2015

KAY CONSTRUCTION COMPANY LIMITED..….....1ST PLAINTIFF

Versus

ECO BANK KENYA LTD……..……1ST DEFENDANT

JAMES KARIUKI……...……2ND DEFENDANT

DAVID NDUNGUNGANGA…….....…..……..…..3RD DEFENDANT

SUSAN MACHARIA……..…..……..…..…..4TH DEFENDANT

KAY CONSTRUCTION CO. LTD……...…..…….……..5TH DEFENDANT

KENYA RURAL ROADS AUTHORITY……...…..…….6TH DEFENDANT

ATTORNEY GENERAL……..……..…….7TH DEFENDANT

RULING

Costs

[1] The court has been asked to determine whether the 1st Defendant is entitled to costs or not. The request emanates from the 1st Defendant's application dated 20th March 2015 which is essentially an interpleader application under Order 34 of the Civil Procedure Rules. The application sought determination as to ownership of the sum of Kshs. 287,769,500 held in account number 023001502398701 at Ecobank Kenya Limited, Valley Arcade Branch with costs to it. The application also prayed for the suit as against the 1st Defendant to be dismissed with costs. Subsequently, the ownership of the said sum of money was determined by the court following consent of the parties. The money was returned to the 6th Defendant. See order made on 10th June 2015. Similarly, on the same day, by consent of the parties, the 1st Defendant was effectively removed as a substantive party in the suit and remained only as interpleader. Parties could not agree on costs. Henceforth, therefore, I will refer the 1st Defendant as the interpleader.

[2] The court directed parties to canvass the issue of costs through written submissions. The interpleader and the plaintiff filed submissions. The 6th and 7th Defendant simply asked the court

to consider the Replying Affidavit by the AG and order that each party bears its own costs. I will consider the said terse but sufficient submission. I will also consider the submissions by the plaintiff and the interpleader on costs and make a determination.

[3] The interpleader argued that the plaintiff sought orders against the interpleader both in the suit and in the Motion dated 4th April 2015. The interpleader entered appearance in the suit as well as grounds of opposition and detailed replying affidavit to the application. Proceedings for joinder of relevant parties were had and the 6th Defendant was added as a party in the suit. Court process was also served as ordered by the court. The interpleader also responded to the Motion dated 24th February 2015 filed by the 6th Defendant. The interpleader also participated in these proceedings and appeared in court through counsel on not less than seven occasions. According to the interpleader, the plaintiff did not make demand before filing suit as required. In light of these considerations, the interpleader filed the current interpleader application in order to resolve the issues herein.

[4] The interpleader stated that it was guided by the fact that the real dispute was between the plaintiff and the other defendants. It also urged that it had no interest in the money as it was merely the banker which is entitled to charges or costs only on the money. It was also ready and willing to pay over the suit sum to the rightful owner or claimant as shall be determined by the court. It was not involved in the fraud herein. The plaintiff merely made unsubstantiated claims of fraud without any proof. These are serious allegations and prompted publication in the dailies. There has not been any apology from the plaintiff on the allegations of fraud. According to the interpleader, in the circumstances, the plaintiff should not escape paying costs to the interpleader. Thus, the application for interpleader amounted to its defence in the suit herein. Therefore, since the withdrawal of the suit against the interpleader came after the filing of the interpleader proceedings, it is entitled to costs of the suit.Costs follow the event. The interpleader was the successful party and so, the court should exercise its discretion under section 27 of the Civil Procedure Act and award them costs. In addition, they relied on **Mulla, *The Code of Civil Procedure Vol 1, Sixteenth Edition,* Section 58 of Cap 21, Little Africa Kenya Ltd vs. Andrew Mwiti Jason [2014] eKLR,** and **NHIF Board of Management vs. DPF [2014] e KLR** to support their avowed position above.

[5] The Plaintiff argued that the interpleader has an interest in the money herein. Upon the deposit of a negotiable instrument the money becomes the property of the bank. The bank is not obligated to refund the actual notes deposited but only the equivalent. Therefore, the bank is only the debtor of the depositor. See **Onjallah vs. KCB [2004] eKLR**which cited with approval Halsbury's Laws of England, 4th Edition volume 3, paragraph 40**.** Relying on these authorities, theyalso submitted that money paid to the bank by a third party either directly, on account of a banker's customer is repayable if it is established that it was paid under a mistake of fact and the mistake has been brought to the attention of banker. Equally, issues directly touching on the interpleader were raised in the suit, and so these are not, and the interpleadercannot institute interpleader proceedings.See section 58 of Cap 21 and the case of **Paramount Universal Bank vs. Ali AboudMaalim& 3 others**. They accused the interpleader as a party in default but who later became compliant after the suit was filed. They submitted that the interpleader was alerted that the account in question was a fraudulent scheme to syphon money belonging to the plaintiff but it refused to close the fraudulent account herein.The said refusal prompted the filing of these precipitate proceedings to have the account frozen.But while the suit was pending and after the freezing orders were issued herein, a creditor to the plaintiff deposited a sum of Kshs. 287,769,500 into the said account. Luckily, the freezing orders prevented the interpleader from operating the account. The plaintiff claims that were it not for the freezing orders, the interpleader could have released the money to the fraudsters herein.

[6] According to the plaintiff, therefore, the conduct of the interpleader is that it was aware of the fraud but refused to act; it did not close the account or repay the money to the 6th Defendant when it was alerted that a fraudulent deposit was made to the account. Thus, the conduct of the

interpleader and thecircumstances of this case do not support exercise of discretion in favour of the interpleader. They acted mala fides. See the cases of **Joseph Oduor Anode vs. Kenya Red Cross Society [2012] eKLR, Chamilabs vs. LaljiBhimji**and literary work by Kuloba J (retired) that costs are not to penalize the losing party; rather, it is for compensating the successful party for the trouble taken in the proceeding or defending the suit**.** The plaintiff urged it filed this suit in good faith to vindicate its rights. It should not be condemned to costs.

DETERMINATION

[7] Costs follow the event. They are, therefore, discretionary and not awarded as a matter of course. The discretion must, however, be exercised judicially and judicious; not capriciously; not whimsically but upon define legal principles. Also, it should be noted that the purpose of costs is not to punish the losing party, rather to compensate the successful party for the trouble taken in the proceeding or defending the suit. Needless to say that, there are ample judicial decisions as well as literary works by eminent scholars on this subject which I need not multiply except to state that the words ‘’the event’’ mean the result of all the proceedings to the litigation; the result of the entire litigation. See **KulobaJ**, ***Judicial Hints on Civil Procedure.***Applying this test to this case, is the interpleader entitled to costs?

[8] Doubtless the suit against the interpleader was withdrawn by the plaintiff. The real issue in controversy is not whether these are interpleader proceedings but rather whether the interpleader is entitled to costs of the withdrawn suit. There are serious allegations of fraud against the 2nd, 3rd, 4th and 5th Defendants. There are also serious allegations of complicit to the said fraud against the interpleader. The plaintiff has averred that the interpleader was made aware of the fraudulent scheme by the 2nd, 3rd, 4th and 5th Defendants to syphon the money in question. However, despite averments in the witness statement, affidavits and pleadings by the plaintiff, that they were aware of the fraudulent scheme for some time, there is absolutely no evidence to show that the fraudulent scheme was brought to the attention of the interpleader at inception. The court expected some written material or letters to that effect especially given the grave nature of the allegations. Therefore, as this court acts on evidence, in the absence thereof, the court cannot conclude that the interpleader was aware that the account herein or that it had been opened for fraudulent purposes. There is nothing to support it was brought to its attention. The earliest notification of stoppage and reversal of payment of the sum of Kshs. 287,769,500 came from the 6th Defendant through a letter dated 4th February, 2015. The letter is annexed to the affidavit by Dr. Peter Rutto sworn on 24th February 2015. It seems from the record and evidence presented that, the letter reached the interpleader bank after the money had already been paid into the account held in the interpleader bank. Indeed the interpleader bank through its counsel replied to the said letter through their letter dated 11th February 2015 stating categorically that the account in question is under a freeze order and therefore it would be in contravention of the said court order to transact any business on the account including reversal of the payment in issue. They forwarded a copy of the order to the 6th Defendant and copies to the relevant persons and authorities herein. Such is not conduct of belligerent person. Therefore, the surmise by the Plaintiff that the interpleader refused to refund the money to the plaintiff or the 6th Defendant despite requests being made to that effect is not supported by evidence before the court. It was in order for the interpleader not to have transacted any business on the account which had been frozen by this court lest they should have been in contempt of court order. The freezing order applied to all transactions including refund sought. Eventually the said funds were later returned to the 6th Defendant, but that was by an order of the court and that fact cannot be applied retrospectively or to mean that the interpleader bank should have complied earlier and made refund when a freezing order existed.Such approach would be uncouth state of affairs that offends the law. In the circumstances, the court cannot attach any mala fides or liability of any sort on the interpleader bank especially given that the suit was withdrawn wholly against the interpleader bank.The interpleader participated in the proceedings and filed pleadings. As I stated earlier, I have not also been shown any demand to the bank to close the account as was alleged. The initial demand would have served useful purposes; (1) to bring to the attention of the bank of the fraud and (2) to ask for remedial action before legal action

is taken. This was not done. Accordingly, the result of the entire litigation is that the interpleader bank was put to costs by the suit for which recompense is in order. It is entitled to costs upon the withdrawn of the suit for having been taken through this litigation. The upshot is that I award the interpleader costs of the suit. It is so ordered.

Dated, signed and delivered in court at Nairobi this 25th day of August 2015.

F. GIKONYO

JUDGE