



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL SUIT NO. 143 OF 2012

MUHITO MWINYENDERI BUILDING CO LTD.....1ST PLAINTIFF

JOSEPH NDUNGO MIRITI.....2ND PLAINTIFF

VERSUS

JOHNSTONE GITHUA GATHERE.....1ST DEFENDANT

S.P. DAVDA.....2ND DEFENDANT

RULING

Before me for determination is the question of costs of this suit, hence it's imperative at this early stage to enumerate the steps taken by the parties since the inception of this suit. By a plaint dated the 29th day of June 2012, the plaintiffs moved to this honourable court seeking the following orders against the defendants jointly and severally:-

- a. *That the defendants by themselves, their agents, servants or any other persons claiming through them be restrained by a permanent injunction from interfering with the plaintiff's company operations on the strength of the minutes dated 9th February 2012.*
- b. *A declaration that the meeting held on 29th February 2012 and the returns filed thereafter on 29th February 2012 are null and void abinitio.*
- c. *Costs and interests.*

The plaint was accompanied by an application expressed under the provisions of Order **40 Rules 1 (a)** and **2** of the Civil Procedure Rules, 2010 and section **3A** of the Civil Procedure Act. The application was brought under certificate of urgency and at the *ex-parte* stage interim orders were granted.

Upon being served the first defendant filed a memorandum of appearance and a replying affidavit through M/S Kimunya & Company advocates on 27th July 2012. The first defendant also filed his defence, statement, list of witnesses and list of documents on 9th August 2012. From the record, the second defendant does not appear to have participated in these proceedings; hence this ruling will only apply to the plaintiffs and the first defendant.

The plaintiffs filed a reply to defence and a further supporting affidavit on 23rd August 2012. The parties filed written submissions on the aforesaid application and on 19th December 2012, the court rendered its ruling on the said application and allowed the application.

The record shows that the plaintiffs took steps to fix the matter for hearing while the first defendant filed a supplementary list of documents on 6th March 2015. However before the matter could proceed further, there were fresh developments in that at a meeting of the first plaintiffs shareholders held on 7th March 2014, fresh directors were elected and fresh returns filed with the Registrar of Companies. The effect of the said development was that the defendants were removed as directors of the company. The said changes had an impact in this suit in that the dispute was to use the plaintiffs' advocates words "compromised." The only issue that remained unresolved is whether or not the first respondents ought to be condemned to pay the costs of this suit, alternatively, whether the plaintiffs are entitled to costs of the proceedings.

On 9.3.2015, counsel for both parties appeared in court and the plaintiffs' advocate is recorded informing the court that "the matter has been compromised" while counsel for the defendant is recorded informing the court that "the matter can be marked as withdrawn." The court noted that the parties were not in agreement as to whether the matter could be marked either as "withdrawn" or "settled" and "who ought to bear the costs" and directed the matter be mentioned on 12.5.2013 to enable the parties to inform the court the position. However, on the said date, no agreement had been reached hence the parties were directed to file written submission on the issue.

Evidently from the court record it is clear that this matter is not yet formally marked as either settled or withdrawn and that the parties are unable to agree on the issue of costs. I will determine the two issues because I cannot make an order on costs before the matter is concluded by being marked formally as either settled or withdrawn otherwise the order for costs would not be properly grounded unless the matter is concluded as foresaid.

Both parties filed written submissions in of support of their respective positions on the issue of costs. In their submissions the plaintiffs strongly opine that they are entitled to costs and maintain that this suit was triggered by the defendants action of attempting to illegally take over the company and in particular argue that the defendants purported to hold a meeting with a deceased director and another director who had declared that he never took part in the alleged meeting and also purported to file returns with the companies registry. They maintain that they had a genuine cause of action, hence the reason that they filed the case.

The plaintiffs further acknowledge in their submissions that the issue of costs is the discretion of the court as provided under Section 27 of the Civil Procedure Act.^[1] The plaintiffs argue that the suit came into conclusion in their favour, hence they are entitled to costs and that costs ought to follow the event and have relied on the judgement of **Kasango J in Armadilo Equity Limited vs. Institute of Correspondence Studies (K) Limited.**^[2]

The first defendant also admit that the court has discretion to award costs as provided under section 27 of the CPA cited above, but add that '*costs follow the event,*' hence *the court has to determine which event took place.* It is the defendants submissions that the plaintiffs suit became untenable and was bound to fail and argue that the defendants "*being successful are entitled to costs*". The defendant's advocates have cited the case of **Vijay Kumar vs Suresh Fatana & others** ^[3]in support of their arguments.

Both parties are in agreement that the dispute has been resolved. As mentioned earlier, counsel for the plaintiff informed the court that the matter has been compromised while the defence maintained it ought to be withdrawn. As alluded above, it's inappropriate for me to determine the issue of costs before a formal order is recorded concluding this suit, hence I am compelled for record purposes to formally record an order concluding the matter. As enumerated earlier in this ruling, it is not disputed that the plaintiffs sued the defendant, successfully prosecuted an application for injunction and obtained orders against the defendants and that prior to fixing this matter for hearing the shareholders of the company held a general meeting whereby fresh directors were elected and the records at the companies registry were up dated accordingly effectively resolving the main controversy in this case. The above scenario made it unnecessary for the parties to proceed with the case because it was technically overtaken by events. The viable option left was either for the plaintiff to withdraw the suit or for the parties to have the matter marked as settled. As mentioned earlier in this ruling, the parties were not able to agree of the

above and also could not agree on costs and left the issue to be determined by the court. In my view, given the fact that the parties are in agreement that the dispute has been resolved, I am of the view that the matter ought to be marked as settled and I hereby so order.

I now turn to the question of costs. Section 27 (1) of the Civil Procedure Act provides that:-

“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”

The basic rule on attribution of costs is that *costs follow the event*. Since costs follow the event, it is important to bear in mind the steps taken by the parties since the inception of this suit so as to appreciate whether or not the event has taken place. This appears to be the crux of the first defendants’ arguments who maintain that the court has to determine whether indeed the event has taken place. I will revert to this issue shortly. First I propose to briefly examine the law on determining costs.

It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.^[4] Thus, it imperative to bear in mind the various steps taken by the parties in this case so as to appreciate the trouble taken by both parties since the suit was filed. Since I have already outlined the various steps above, I need not repeat the same here. I find useful guidance in the following passage from the **Halsbury’s Laws of England**;^[5]

*“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”***

Writing on the same subject **Mr. Justice (Retired) Kuloba**^[6] stated:-

“Costs are {awarded at} the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise...”

To my mind there appears to be no clear or prescribed definition of what constitutes “good reasons” that will justify the courts departure, in awarding costs, from the general rule that ‘*costs follow the event.*’ Discussing the same point, the supreme court of Kenya in the above cited case of **Jasbir Singh Rai & Others vs Tarlochan Rai & Others**^[7] observed that:

“in the classic common law style, the courts have to proceed on a case by case basis, to identify “good reasons” for such a departure. An examination of evolving practices on this question, shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs.....”

The reason for the above reasoning is that in public litigation, a litigant is usually advancing public interest as opposed to personal gain.

In **Party of Independent Candidate of Kenya vs Mutula Kilonzo & 2 others**,^[8] citing two leading decisions of the subject the court held *inter alia* that:-

“It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is a matter in which the trial Judge is given discretion.But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

In my view section 27 of the Civil Procedure Act provides the general rule which ought to be followed *unless for good reason to be recorded*. The said section in my view does not make distinctions between determinations made by consent or on courts own determination. This position is well stipulated by **Richard Kuloba** in the earlier cited book where he observed that:-

“the fact that the unsuccessful party did not contest the case is not in itself a ground for refusal of costs but it is a factor that can be taken into account if other good reason exists”

However, the only consideration is the “event” as was held in the supreme court of Uganda in **Impressa Ing Fortunato Federice vs Nabwire**^[9] where the court stated:-

*“The effect of section 27 of the Civil Procedure Act is that the Judge or court dealing with the issue of costs in any suit, action, cause or matter has absolute discretion to determine by whom and to what extent such costs are to be paid; of course like all judicial discretions, the discretion on costs must be exercised judiciously and how a court or judge exercises such discretion depends on the facts of each case. If there were mathematical formula, it would no longer be discretion... while it is true that ordinarily, costs should follow the event unless for some good reason the court orders otherwise, the principles to be applied are- (i) under section 27 (1) of the Civil Procedure Act, costs should **follow the event unless the court orders otherwise**. This provision gives the judge discretion in awarding costs but that discretion has to be exercised judicially. (ii), A successful party can be denied costs if it is proved that but for his conduct the action would not have been brought... It is trite law that where judgement is given on the basis of consent of parties, a court may not inquire into what motivated the parties to consent or to admit liability.....”*

Also of useful guidance is the decision in the Ugandan case of **Re Ebuneiri Waisswa Kafuko**^[10] where the court held as hereunder:-

“The judge in his discretion may say expressly that he makes no order as to costs and in that case each party must pay his own costs. If he does not make an order as to costs, the general rule is that he shall order that the costs follow the event except where it appears to him in the circumstances of the case some other order should be made as to the whole or any part of the costs. But he must not apply this or any other general rule in such a way as to exclude the exercise of the discretion entrusted to him and the material must exist upon which the discretion can be exercised. The discretion, like any other must be exercised judicially and the judge ought not to exercise it against the successful party except for some reason connected with the case. It is not judicial exercise of the judge’s discretion to order a party who has completely succeeded and against whom no misconduct is even alleged to pay costs.”

To my mind, in determining the issue of costs, the court is entitled to look at *inter alia* (i) the conduct of the parties, (ii) the subject of litigation, (iii) the circumstances which led to the institution of the proceedings, (iv) the events which eventually led to their termination, (v) the stage at which the proceedings were terminated, (vi) the manner in which they were terminated, (vii) the relationship between the parties and (viii) the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of the Constitution.^[11] In other words the court may not only consider the conduct of the party in the actual litigation, but the matters which led to the litigation, the eventual termination thereof and the likely consequences of the order for costs.^[12]

I have considered the rival arguments advanced by the parties. It is my considered opinion that the

conduct of the parties prior and after filing this suit is a relevant issue. It is not in dispute that suit was initiated after the defendants attempted to take over the company and the plaintiffs were compelled to move to court seeking the orders sought in the plaint. The subject of the litigation is the alleged illegal takeover and management of the first plaintiff by the defendants. To my mind the plaintiffs were in order to seek court remedy by filing this suit. An injunction was granted in this suit at the *ex-parte* stage and subsequently after hearing both parties *inter partes*.

Before the case could proceed further, the shareholders held a meeting and elected new directors and updated the records at the company's registry thereby effectively taking back the management of the company from the defendants and effectively resolving the key dispute in this suit rendering it unnecessary to proceed with this case. Just like in cases whereby the parties enter into a consent, the court does not go further to inquire the reasons for the consent, this court is not bound to dig into the reasons why the shareholders opted to resolve the dispute in the manner they did. The only relevant issue is that it had the effect of resolving this case. The court is only interested in determining whether or not the plaintiff or the defendant is entitled to costs for the steps taken by both parties as enumerated earlier.

The question that arises is whether or not the action taken by the shareholders who effectively rendered it unnecessary for the parties to pursue this case was an event within the phrase "**costs follow the event.**" It is not in dispute that the dispute was effectively resolved nor is it in dispute that as at the time the shareholders took the decision that compromised this suit, the parties had taken the steps earlier on enumerated raising the question which party is entitled to costs for the trouble hitherto undertaken.

Did the filing of the suit and the various steps taken by the parties and the resolution of this suit by the shareholders amount to an event as envisaged under section 27 CPA cited above. Justice (Retired) Richard Kuloba^[13] in the earlier cited book states as follows:-

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

At page 101 of the same book, Kuloba authoritatively states as follows:-

"The law of costs as it is understood by courts in Kenya, is this, that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part-no omission or neglect, and no vexatious or oppressive conduct is attributed to him, which would induce the court to deprive him of his costs-the court has no discretion and cannot take away the plaintiffs right to costs. If the defendant, however innocently, has infringed a legal right of the plaintiff, the plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course"

To my mind, the defendants actions enumerated in the plaint triggered these proceedings. The circumstances under which the case was commenced are clear and show that the plaintiffs properly brought the case to court. The plaintiffs are not guilty of any misconduct. It matters not that the settlement came as a result of action taken by the shareholders of the plaintiffs. What matters is that the action taken by the shareholders resolved the dispute, thus bringing this dispute to an end. In the circumstances the plaintiffs are entitled to costs for the trouble undertaken by them in initiating these proceedings. In this connection, I am guided by the decision in the case of **Orix (K) Limited vs Paul Kabeu & 2 others**^[14] where it was held inter alia:-

".....the court should have been guided by the law that costs follow the event, and

the plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied costs or the successful issue was not attracting costs. None of the deviant factors are present in this case and the court would still have awarded costs to the plaintiff, which I do.”

Considering the entire chain of events from filing this suit up to the resolution of the dispute, I find no reason to deny the plaintiffs costs. The defendants counsel argues that the suit was filed without a resolution of the company. The constitution and the Civil Procedure provide that courts are to determine cases without undue regard to technicalities or of procedure and I take the view that such an omission could have been cured, hence the suit was not fatal after all.

In the final analyses I find that the plaintiffs are entitled to costs of this suit to be paid by the first defendant. I however order that the costs be assed at the lower scale. I further direct that in the event the parties do not agree on the costs payable within 14 days from the date of this ruling, the plaintiffs shall file and serve there bill of costs to be taxed by the court.

Orders accordingly

Right of appeal 28 days

Dated at Nyeri this 23rd day of September 2015

John M. Mativo

Judge

[1] Cap 21, Laws of Kenya.

[2] {2006} eKLR

[3] Hcc no. 64 of 2006 (Nairobi)-Odunga J

[4] Jasbir Singh Rai & 3 others vs Tarlochan Signh Rai & others {2014} eKLR

[5] 4th Edition (Re-issue), {2010}, Vol.10. para 16

[6] Judicial Hints on Civil Procedure, 2nd Edition, (Nairobi) Law Africa) 2011, page 94

[7] Supra note 4

[8] HC EP No. 6 of 2013

[9] {2001} 2 EA 383

[10] Kampala HCMA No. 81 of 1993 cited by Odunga J in Pet No 466 of 2014 cited above, see note 11

[11] See Odunga J in JR No. 466 of 2014 between Republic vs Kenya National Highway Authority & Others , Ex parte Kanyingi Wahome

[12] See Hussein Janmohamed & Sons vs Twentsche Overseas Trading Co. Ltd {1967} EA 287 and Mulla 12th Edition AT Psage 150

[13] Richard Kuloba, Judicial Hints on Civil Procedure, 2nd Edition, page 99

