REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 149 OF 2011

LITTLE AFRICA KENYA LIMITED ……..…….....PLAINTIFF

VERSUS

ANDREW MWITI JASON …….....…… DEFENDANT

RULING

Award of costs on withdrawn suit

[1] The only issue remaining in this case is the payment of costs following the withdrawal of the suit on 15th April 2013. The Plaintiff argued that three facts are pertinent to note, namely: One, the Plaintiff filed suit on 19th April 2011 under Certificate of Urgency contemporaneously with an application for injunction. The temporary injunction was granted and confirmed by this Honourable Court on several occasions; despite the Defendant's contestations. The case involved claim for breaches of confidentiality, non-competition and of intellectual property. Essentially, the Plaintiff's claim was not frivolous, malicious or spurious. Two, the Defendant filed a counterclaim on 27th July 2011, which he now admits (at paragraph 5 of the submissions dated and filed on 18th March 2014) that the *"Defendant had no intention whatsoever of filing any claim against the Plaintiff, otherwise he would have done so immediately after resigning from the Plaintiff's employment.).* This admission, thus, means that the counterclaim was at least in bad faith or malicious. Three, despite the injunctive orders against the Defendant, on 15th April, 2013, the plaintiff agreed to withdraw this claim in the interest of amicable resolution and a demonstration of good faith. The Defendant also withdrew his counterclaim on the same day.

[2] The plaintiff does not see any basis for costs to be visited on any party since each party withdrew their claim and each party should bear their own costs or at least, there should be no order as to costs. The Plaintiff further argued that, if the court shall decide the issue of costs on the basis of the conduct of the parties, it is the Defendant who should pay costs. Derived from the provisions of section 27 of the Civil Procedure Act, the general legal principle on costs can be summed into three points:-

a. That costs follow the event.
b. "The event" is that the unsuccessful party will be ordered to pay the costs of the successful party;
c. The court has discretion as to who pays costs, the amount thereof and when they are to be paid. The discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance

with reason and justice.

[3] The Plaintiff asserted that, in deciding on costs, the court must have regard to all the circumstances, including: 1) the conduct of all the parties; 2) Whether a party has succeeded on his case, wholly or partly; and 3) Any payment into court or admissible offer to settle made by a party which is drawn to the court's attention. The conduct of the parties include: a) Conduct before and during the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol; b) Whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; c) The manner in which a party has pursued or defended his case or a particular allegation or issue; and d) Whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.

[4] According to the Plaintiff, parties consented to withdrawal of a matter and the appropriate order should be either each party to bear their own costs or there should be no order as to costs. This is supported by the case of **RUFUS NJUGUNA MIRINGU & ANOTHER v MARTHA MURIITHI & 2 OTHERS [2012] eKLR** where the learned judge stated,

> **"…consent cannot be interpreted to mean that one or the other party has succeeded in a suit. Even if in the present case such settlement has worked out in the Defendants' favour, the successful determination of the dispute is still attributable to both the Plaintiffs and the 1st and 2nd Defendants… In the circumstances, it would be just for the parties to bear their own costs of the proceedings."**

[5] The Plaintiff is of the view that the Defendant has shown any reasonable cause that he deserves costs. They cited the case of **JOSEPH ODUOR ANODE v KENYA RED CROSS SOCIETY, NAIROBI HIGH COURT CIVIL SUIT NO. 66 OF 2009*;* [2012] eKLR** where Odunga, J. observed:

> **"… In matters of costs, the general rule as adumbrated in the aforesaid statute [the Civil Procedure Act] is that costs follow the event unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words, where the Court decides not to follow the general principle, the Court is enjoined to give reasons for not doing so.…"**

[6] They also found support in the literally work of Mr. Justice (Rtd) Kuloba in ***Judicial Hints on Civil Procedure,*** 2nd ed. (Nairobi: Law Africa, 2011), p. 94 that:

> **"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: Chamilabs v. Lalji Bhimji and Shamji Jinabhai Patel, High Court of Kenya, Civil Case No. 1062 of 1973."**

Again, Costs are awarded to compensate the successful party for the trouble taken in prosecuting or defending the suit. Presently, there is no successful party. And they quoted Justice Kuloba's ***Judicial Hints on Civil Procedure***, at p.94]:

> **"[T]he object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure…Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action."**

[7] The Plaintiff maintained that the settlement of this matter was to simply pursue amicable settlement and in very good faith. The Plaintiff had a good claim with an injunction in its favour and cannot be penalized for exercising its Constitutional Rights. See **JASBIR SINGH RAI & 3 OTHERS v TARLOCHAN SINGH RAI & 4 OTHERS [2014] eKLR** where the Supreme Court (in declining to grant an order for costs) stated *pari material;*

> **"It is plain to us that, at the time the petition was lodged in the Supreme Court, it was, in**

every respect, a valid cause of action; and thus, no blame attaches to the act of filing. By Article 50(1) of the Constitution of Kenya, 2010 – 'Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court…' "

[8] Conversely, Plaintiff argued that the Defendant filed a counterclaim solely because the Plaintiff had filed a suit against him. It is admitted as much (at paragraph 5 of the submissions dated and filed on 18th March 2014) that the *"Defendant had no intention whatsoever of filing any claim against the Plaintiff, otherwise he would have done so immediately after resigning from the Plaintiff's employment.* Their seeking costs after withdrawal of the claim and injunction by the Plaintiff is demonstrable bad faith. Both parties have withdrawn their respective claims. Thus, there is no successful or losing party. Each party should bear its own costs or there should be no order as to costs. However, should the court be inclined to order differently, the Plaintiff prayed that the court should grant the plaintiff costs on account of the admission of the Defendant that they filed a counterclaim that would never have been filed) simply because he was sued.

The Defendant insisted on costs

[9] The Defendant in its submissions urged the Court to critically look into the Conduct of the parties and determine whether the defendant is entitled to an award of costs herein. The defendant reiterates that he had no intention of suing the plaintiff were it not for the Plaintiff's dragging him to court. By filing the counterclaim, the defendant cannot be said to have acted in bad faith or maliciously. The defendant only acted in accordance with the law – Order 3 Rule 4(2) of the Civil Procedure Rules Cap 21, Laws of Kenya.

"Where a plaintiff (party) omits to sue in respect of or relinquishes any position of his claim, he shall not afterwards sue in respect of the portion omitted or relinquished."

[10] That notwithstanding, the Defendant submitted that the conduct of the parties cannot arise at this stage as submitted by the plaintiff. He referred the Court to the **RUFUS NJUGUNA MIRINGU Case (Supra)** where the learned judge opined thus:

'The issue of a party's conduct affecting the award of costs as submitted by the plaintiff's counsel in my opinion does not arise when parties have entered consent as they are deemed to have accepted their respective conduct prior to the consent. In addition, the Defendants' conduct would in the circumstances only be material if the plaintiff is seeking to set aside the consent order.'

The Defendant also relied on the **JASBIR SINGH RAI Case (supra)** that it was his right to file a counter-claim to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court. The defendant cannot therefore be said to have acted in bad faith by exercising his constitutional rights. In all, the Defendant is entitled to costs for reasons that: It was reasonable to the defendant to pursue his claim in Court, having acted in accordance with the law; It was the plaintiff who dragged the defendant to court and the defendant acted reasonably under the circumstances and in accordance with the law; The Defendant has spent time and money that it would only be just for the plaintiff to compensate. There have been fourteen (14) court attendances and Kshs. 18,255.00 spent in filing fees.

COURT'S RENDITION

[11] Costs are not awarded as a matter of right. They are awarded at the discretion of the Court. At the risk of monotony, the discretion must be exercised judicially and judicious; not capriciously; not whimsically but upon define legal principles. The judicial decisions on this subject are ample and legion, but I need not multiply them. But all depends on the circumstances of each case. Therefore, the law in designing the legal phrase that ***''Cost follow the event''*** recognized the fact that there could be no ''one-size-fit-all'' prescription 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 decided on the facts of the case. Needless to state, circumstances differ from case to case. The circumstances of this case are that the Plaintiff filed suit and obtained an injunction. The Defendant filed a defence and counter-claim. But as a result of negotiations between the parties, it was agreed that each party withdraws its claim. I say this fully aware of the provisions of Order 7 rule 3 and 13 of the Civil Procedure Rules that; a counter-claim has the same effect as a cross-suit; and it is not decimated by the withdrawal or discontinuance or dismissal of the original suit. The said set of facts exists here and catapults the Court into saying something more about the incidence of the consent by the parties and its significance on costs.

[12] Whereas a compromise of a suit by way of consent suppresses all the issues which were in contention, it does not necessarily mean that, where parties have entered into consent to settle a proceeding, no costs should be awarded, or there is no successful party in the matter. I will, therefore, hesitate profoundly to make any generalized propositions on the law in that behalf without reference to the context of the particular case. There are obvious reasons I say so; the nature of settlement in the consent will determine the course of the event and, thus, the place of costs in the suit; parties may as well in the consent indicate that costs shall be borne by a particular party and I do not think that can be faulted on the argument that a settlement by consent means no party pays costs. These are real legal as well as practical issues which abound in this subject. Even the **RUFUS NJUGUNA MIRINGU Case (Supra)** which is most cited on this subject was decided…***in the circumstances…***of the case. Nonetheless, the incidence of settlement by consent of the parties becomes a vital factor the court should consider, within the circumstances of each case, in deciding whether costs are payable or not. For now, I will look at the event within the circumstances of the case. But first, what does ‘***’costs follow the event entail’’?***

[13] See what the word “event” entails in the elucidation provided in the literally work by Justice Kuloba (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.**

[14] The consent entered into herein is double-edged in that it culminated into the Plaintiff withdrawing the suit as well the Defendant withdrawing its counter-claim. The consent was an amicable settlement of the issues between persons who once enjoyed employer-employee relationship. These circumstances are quite peculiar to this case and are definitely in play when the Court retires to consider the question of costs. Although technically the suit and the counter-claim are different causes of action but in this case the issues are inextricably intertwined and capable of being conveniently disposed of in one cause. And the ‘’event’’ or ‘’success’’ herein should, therefore, be seen within that light as constituting ***the result of entire litigation***. The work of David Foskett, Q.C of Gray’s Inn at page 77 of his book **In the Law and Practice of Compromise** is relevant that;

> **“An unimpeached compromise represents the end of the dispute or disputes from which it arose. Such issues of fact or law as may have formed the subject-matter of the original disputation are buried beneath the surface of the compromise. The court will not permit them to be raised afresh in the context of new action.”**

This is one case which would be perfect for each party to bear own costs in both the suit and the counter-claim. I am not oblivious of the argument which the defendant has put forth; that it has appeared in court on 14 occasions and has had to pay a sum of Kshs. 18,255 as filing fee. I wish to state that the substantial fee paid by the Defendant was on the counter-claim, which I stated earlier, by law, survives a withdrawal

or termination of the suit. But despite that right, the Defendant chose not to pursue the counter-claim and withdrew it also. On the basis of the entire circumstances of this case and the above rendition, I order that each party shall bear own costs in the suit and the counter-claim. It is so ordered. I will not consider the conduct of any party in view of what I have stated.

Dated, signed and delivered in open court at Nairobi this 17th day of September, 2014

F. GIKONYO

JUDGE