



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 179 OF 2013**

**MORGAN AIR CARGO LIMITED .....PLAINTIFF**

**VERSUS**

**EVREST ENTERPRISES LIMITED ..... DEFENDANT**

**RULING**

**The issue of costs**

[1] By consent recorded by the Court on 6<sup>th</sup> February, 2014, Parties agreed that the only outstanding issues for determination by this Court is whether the Plaintiff should be awarded costs of the suit and interest. Both parties filed their respective submissions except the Plaintiff submitted only on costs. Nonetheless, the issue of interest was part of consent and is properly before the Court. In any case, the Defendant submitted on it and would still, therefore, be a matter left to the Court for determination. The case of **ODDS v JOBS MUBEA** is relevant here.

**Plaintiff's submissions**

[2] The plaintiff's submitted that it is the successful party in this suit and is, thus, entitled to costs of the suit. The Plaintiff see its success in the partial judgment that was recorded in court by consent of the parties on 26/07/2013 whose essential core is in the following terms;

- a. **THAT the default judgment entered on 06/06/2013 be set aside.**
- b. **THAT the judgment be entered for the plaintiff against the defendant for the amount of US\$133,455.**
- c. **THAT the aforesaid amount be liquidated as follows.**
  - i. **US\$ 5,000 on or before 01/10/2013.**
  - ii. **US\$ 5,000 every subsequent week**
  - iii. **The balance subsisting be paid on or before 28/02/2014.**
  - iv. **In default of any one instalment execution to issue.**
  - v. **The parties do agree on costs and interest.**

[3] The plaintiff cited statutory as well as case law on costs, that "Costs follow the event" and quoted in ex tenso the literally work by Justice Kuloba's (as he then was) what the word "event"

entails re; **Judicial Hints on Civil Procedure** 2<sup>nd</sup> edition at page 99 as follows;

**“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.**

[4] The Plaintiff did not stop there. It amplified its position that the Plaintiff succeeded in its claim against the Defendant as claimed in the Plaint, albeit it was by compromise reached through the consent order recorded by the Court. As a successful party, the court does not have discretion to it of costs of the suit. It again quoted the a statement at page 101 of **Judicial Hints of Civil Procedure** thus;

**“The law of costs as it is understood by the 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 attributable to him, which would induce the court to deprive him of his costs – the court has no discretion and cannot take away the plaintiff’s right to cost. 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;**

The plaintiff rights had been infringed by the Defendant herein and it is entitled to enforce its rights as it did. The plaintiff is not guilty of any misconduct and hence is entitled to cost of the suit as a matter of course.

[5] The Plaintiff submitted further that a successful party cannot be deprived of costs even if the matter proceeded ex parte or was uncontested. It once more found great help in the work of Justice Kuloba in **Judicial Hints of Civil Procedure** that;

**“Furthermore a successful party cannot be deprived of his costs merely because the suit proceeded ex parte or uncontested. This is to say, 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.**

**The giving or absence of notice to sue, before a suit is instituted is a relevant consideration in awarding costs. This is a circumstance in which quite apart from misconduct, costs can be refused to a successful party.**

[6] There was no misconduct on the part of the plaintiff and the plaintiff gave notice of intention to sue to the defendant, thereby, giving the Defendant ample time to settle what it owed. The plaintiff is, therefore, entitled to the costs in this suit. Other judicial authorities quoted in support of the Plaintiff’s stand on costs include:

- i. **Norman Main Vs Adam Ferguson 91942-43) 20 (1) KLR 5 pages 25-29**
- ii. **The East African Standard Vs The Coast Guardian (1943) 16 (1) KLR 23 – pages 30-36**
- iii. **Potgier Vs Stumberg and Another pages 37 – 49**
- iv. **Benard and Co. Vs Souza Junior and Dais (1911 – 1912 (1) KLR 54 – pages 50-53c-**
- v. **Wambugu Vs Public Service Commission 91972) EA 296 – pages 54-60**
- vi. **Kiska Ltd Vs De Angelis 91969) EA 6 pages 61-68**
- vii. **Bhagwanji Raja Vs Swaran Singh 91962) EA 288 – pages 69-81**

## **DEFENDANT'S WRITTEN SUBMISIONS**

[7] The Defendant took a different view of the matter; that the Plaintiff is not entitled to costs of the suit or interest. According to the Defendant, the law on costs of the suit and interest thereon is in Section 27(1) of the Civil Procedure Act, Cap 21 of the laws of Kenya, which gives courts the unfettered discretion to determine by whom and out of what property and to what extent costs are to be paid, and to give all necessary directions for the purpose aforesaid. However, the proviso thereof states 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.’**

[8] The Defendant found support of its stand on the matter in the case of **RUFUS NJUGUNA MIRINGU & ANOR v MARTHA MURIITHI & 2 OTHERS (2012) eKLR** particularly on the interpretation of the proviso to Section 27(1) of the Civil Procedure Act, that the material event referred to therein is the result of the proceedings, and it is the successful party in this result who is normally awarded costs. However, where parties have settled the matter by consent, the consent cannot be interpreted to mean that on or the other party has succeeded in a suit. The successful determination of the dispute is attributable to both parties. The issue of a party's conduct, affecting the award of costs, 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 plaintiffs are seeking to set aside the consent order. The court found that in the circumstances, it was only just for the parties to bear their own costs of the proceedings.

[9] The Defendant relied wholly on the holding in the **RUFFUS CASE** above and completely adopted the thinking of the Learned Judge in the said Case. On that basis, it beseeched the Court to deny the Plaintiff any award of costs or interest. But the Defendant made alternative submissions that, even assuming that the plaintiff is the successful party in this matter, in its opinion, the plaintiff ought to be denied costs of this suit and interest thereon: because, at the time of instituting the suit, the parties were heavily engaged in negotiations towards reaching an out-of-court settlement of the dispute in this Cause. The suit was, therefore, instituted prematurely and was absolutely unnecessary as the parties enjoyed and continues to enjoy good relations to date which eventually informed the settlement of this case by consent of the parties. The Defendant was forced to expend money that would have been used to effect payment to the plaintiffs as agreed, towards defending this suit. In the premise, it is only just that each party to this suit bears their own costs.

[10] The Defendant contended that, since the Plaintiff is not entitled to costs, the Court should not impose interest on cost under Section 27(2) of the Civil Procedure Act. None shall be recoverable as such.

## **COURT'S RENDITION**

[11] The Court takes the view that awarding costs is a matter of the discretion of the Court. It is not a matter of course. 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. With regard to the circumstances of this case, my grounding is in the work of Justice Kuloba in **Judicial Hints of Civil Procedure** that;

**“Furthermore a successful party cannot be deprived of his costs merely because the suit proceeded ex parte or uncontested. This is to say, 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.**

**The giving or absence of notice to sue, before a suit is instituted is a relevant consideration in awarding costs. This is a circumstance in which quite apart from misconduct, costs can be refused to a successful party.**

[12] I need to discuss one important issue: the law on compromise, and 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.”**

But, 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. The incidence of settlement by consent of the parties, to my mind, is just but a vital factor the court should consider, within the circumstances of each case, in deciding whether costs are payable or not. A consent recorded in settlement of a proceeding is not an automatic disentitlement of costs and I, would, therefore, hesitate profoundly to make any generalized propositions on the law that consent is an automatic disentitlement of costs without reference to the context of the particular case. There are obvious reasons I say so; the nature of settlement in the consent may 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 defeated on the argument that a settlement by consent of the parties means no party pays costs unless it is expressly stated or by implication inferred in the case. 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. The Court should, therefore, look at the event within the circumstances of the case. And that exercise will inform the exercise of discretion by the Court. It should also be understood well; that a successful party does not refer to a person who has been taken through rigorous and convoluted motions of litigation by the other party. Similarly, a party does not cease to be a successful party merely because he met little or no contest in his claim against the Defendant. He is a successful party because he is declared so by the Court after looking at the result of the entire litigation, which includes; negotiations or steps which culminates to, and the recording of a consent thereto, conduct of the Plaintiff etc. On that basis I believe settlement of a case by consent of the parties should be one of the factors the court should consider in deciding whether or not costs should be awarded to the successful party.

[14] Having said that, I note that there is no consent between the parties that costs shall not be paid to any of the parties or that each party shall bear own costs. The consent judgment clearly left the decision on costs to the parties. But they could not agree and so came back to court for a judicial decision on the matter. In the absence of a consent stating that no costs are payable, this Court falls back to its discretion which, it has been said time and again should be exercised in accordance with established legal principles; not whimsically; not capriciously. The circumstances of each case play a major role here. What are the circumstances of this case? Although the parties were negotiating, the correspondences on record show that the Plaintiff expressly indicated that it had rejected the offer by the Defendant and will file suit. It then instructed its advocates to start the legal process and notice of institution of suit was issued. It is, therefore, not correct to state that this suit was premature or was unnecessary. Of necessary note, the successful claim herein is not one which does not attract costs or is incapable of attracting costs. The consent filed herein did not compromise on costs as that item was left out of the compromise and was to be agreed at a later date. It is the failure to agree on costs that parties asked the court to make a determination on the issue. There is also no attrition of any conduct which would prevent the Plaintiff from being

awarded costs. In sum, I do not find any material on which an estoppel would arise in this matter. Further illumination on this position is in a work of this court in **ORIX OIL (KENYA) LIMITED v PAUL KABEU & 2 OTHER [2014] eKLR** where the court stated:

**“...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 the costs or the successful issue was not attracting costs. None of those deviant factors are present in this case and the court would still have awarded costs to the Plaintiff, which I do.**

[15] Looking at the nature of the consent filed herein and the entire circumstances of the case, the Plaintiff was the successful party and is entitled to costs. I accordingly, award the Plaintiff costs on the sum of US \$ 133,455.

**Dated, signed and delivered in open court at Nairobi this 16<sup>th</sup> day of September, 2014**

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**F. GIKONYO**

**JUDGE**