



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 558 OF 2005**

**KENYA SUGAR BOARD.....PLAINTIFF**

**VERSUS**

**NDUNGU GATHINJI..... DEFENDANT**

**RULING**

1. The Application before me is the Plaintiff's Notice of Motion dated **6th August 2012** and filed in Court on **14th November 2012**. It is expressed to be brought under **Order 45 Rule 2** of the **Civil Procedure Rules** and **Sections 3A and 80** of the **Civil Procedure Act**. It seeks to review or set aside the consequential orders as to costs emanating from the ruling dated **23rd April 2010**.
2. The Application is supported by the affidavit of **NDIRU GICHAMBA** sworn on **6th August 2012** and is based on the grounds stated on the face thereof.
3. Briefly, on **23rd October 2009**, this matter came up for the hearing of the Notice To Show Cause (NTSC) why the suit should not be dismissed for want of prosecution before Justice Khaminwa (as she then was). The NTSC was *suo moto* by the Court as per **Order XVI rule 2(1)** of the former **Civil Procedure Rules**. On the said date, the Plaintiff did not appear to show cause why the suit should not be dismissed and the Judge proceeded to dismiss the suit with no orders as to costs.
4. Thereafter, on **23rd April 2010**, the Defendant appeared on a mention before Justice Khaminwa and urged the Judge to grant costs. The Judge went on and ordered that the costs of the suit be awarded to the Defendant with interest at Court rates. It is the said Order that moved the Plaintiff to file the Current application.
5. The application is based on the grounds that the consequential orders as to costs from the ruling dated **23rd April 2010** was awarded and delivered on account of an error; and that the said orders were granted in an unprocedural manner as the suit was dismissed *suo motto* and not on an application by the Plaintiff.
6. In the Plaintiff's supporting affidavit sworn on its behalf by Advocate Nduru Gichamba, it is deponed that with respect to this suit no party was successful nor was the suit decided on merit. According to Counsel, it is trite law that in the instance that the court moves *suo moto* and gives the respective parties to a suit a NTSC why the suit should not be dismissed, the parties should bear their own costs, as the very Notice serves to show that there is inordinate delay on the part of both parties.
7. It is further deponed by Counsel that the Court granted the orders of costs in error as the same should have been sought by way of an application and that the acts of the Defendant on 23rd April 2010 were tantamount to a review and the same could only be considered by way of a formal application.
8. It is Counsel's position that the consequential order as to costs will occasion the Plaintiff

- irreparable harm and damages. He avers that the Defendant's Counsel has since written to the Plaintiff's advocates seeking to quantify their costs and they are apprehensive that the Defendant's advocates shall proceed to tax the same. He further avers that it is in the interest of justice that the said orders be reviewed and set aside in their totality.
9. The application was argued before me on **30th October 2013** with Mr. Ligunya appearing for the Plaintiff while Senior Counsel Mr. Gitonga appeared for the Defendant.
  10. Mr. Ligunya narrated the brief facts leading to the current application and confirmed that the order awarding the costs was given during a mention with no application. He submitted that for those costs to have been granted there ought to have been an application. It is his submission that since that was not the case, then the orders of Justice Khaminwa should be set aside.
  11. In reply, Counsel for the Defendant informed the Court that when the order dismissing the suit was made, they did not realise that the Judge had made the omission of not providing costs. They complained to the Court and it was his submission that the matter was taken back to the Judge who then ordered that all parties should be present when delivering the order as to costs. He further submitted that a Notice to this effect was sent to both parties by the Court.
  12. Mr. Gitonga further submitted that when the Defendant came before the Judge the Plaintiff did not turn up despite the Notice. It was his submission that the judge heard them and agreed that she had inadvertently omitted to grant the Defendant costs. According to Counsel after the order on costs was made, the Plaintiff never made an application to set it aside.
  13. Counsel observed further that on **29th June 2010** the Plaintiff filed an application to set aside the order dismissing the suit and all consequential orders thereto, including the order of costs. The application was heard by Justice Kihara (as he then was) who dismissed the same. According to Counsel, what remained was for the applicant to appeal. On that ground, it was Counsel's submission that this matter then became *res judicata* since the Plaintiff has never appealed. According to Senior Counsel Mr. Gitonga, what resurrected the Plaintiff was a Bill of costs filed on behalf of the Defendant around July 2012.
  14. In reply, Mr. Ligunya submitted that the issue of *res judicata* did not apply as at no point had the issue of costs been argued. He referred the Court to the Application dated 28th June 2010 and the Ruling by Justice Kihara Kariuki (as he then was).
  15. It was his contention that there was no evidence that the Court ever served the notice of mention for the 4th of March 2010 on all the parties. It was further his contention that even if they were served, substantive orders cannot be given in a Mention process.

### **ANALYSIS**

16. I have carefully considered the application as well as submissions by Counsel. The main issue for determination is whether the Plaintiff is entitled to an order for review as regards the costs awarded to the Defendant following the dismissal of the suit.
17. It is the Plaintiff's case that in the instance that the court moves *suo moto* and gives the respective parties to a suit a NTSC why the suit should not be dismissed, the parties should bear their own costs. **Order 17** of the **Civil Procedure Rules** deals with the dismissal of suits for want of prosecution. **Order 17 rule 2** of the said rules gives the Court the power to dismiss a suit for want of prosecution on its own motion. Nowhere in the said rules is it stated that where a Court dismisses a suit on its own motion there shall be no order as to costs or that each party shall bear their own costs.
18. The general rule is that costs shall follow the event and the issue of costs is at the discretion of the Judge; See **Davda – vs - Ahmed and others [1987] KLR 665 (Githinji, J on 11 November 1987)**. **Section 27** of the **Civil Procedure Act** provides for the issue of costs as follows:-
  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. (Underlining supplied)**

19. It is also the Plaintiff's case that the Court granted the orders of costs in error as the same should have been sought by way of an application and not in a mention. I know of no provision in law that requires one to make a formal application for costs to be granted. Any party can make an application in Court either orally or in writing depending on the circumstances or the issue at hand. In the Defendant's case, his Counsel made an oral application with regard to the issue of costs.
20. It is not in dispute that initially when the Judge dismissed the suit for want of prosecution there was no order as to costs. From the Court file, it is evident that the matter came before Justice Khaminwa whereby she admitted that she had inadvertently omitted to address the issue of costs. The Judge went ahead and awarded the Defendant the costs of the suit with interest at Court rates.
21. As I have stated earlier, the general rule is that costs follow the event and the issue of costs is at the discretion of the Judge. That is the case in the current matter. The Judge ruled that costs should follow the event and exercised her discretion in awarding the Defendant the said costs. There is nothing to show that the said discretion was not exercised judicially or that it was exercised capriciously. It is therefore beyond my powers to fetter or interfere with that discretion.
22. In the upshot, the Plaintiff's Notice of Motion dated **6th August 2012** and filed in Court on **14th November 2012** is hereby dismissed with costs.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 4<sup>TH</sup> DAY OF DECEMBER 2013.**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

*Ligunya for Plaintiff*

*Gitonga for Defendant*

*Teresia – Court clerk*