REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL SUIT 66 OF 2009

JOSEPH ODUOR ANODE…….…….....…...…PLAINTIFF

VERSUS

KENYA RED CROSS SOCIETY…...…….……..… DEFENDANT

R U L I N G

On 6th June 2012 when the Notice of Motion dated 15th March 2012 came up for hearing, **Mr Kuloba**, learned counsel for the plaintiff informed the Court that having perused the grounds of opposition filed by the defendants he had decided to withdraw the said application. He, however, was not prepared to accede to the payment of costs. Since **Mr Litoro**, learned counsel for the defendant needed time to seek instructions, the said application was ordered withdrawn but the issue of costs was deferred to 20th June 2012.

On 20th June 2012, **Mr Litoro**, presumably on the instructions sought, was not prepared to forego the costs. In his submissions seeking the costs of the application, **Mr Litoro** was of the view that since his client had filed grounds of opposition in opposition to the application, the consequences of the withdrawal of the application meant that the plaintiff was the unsuccessful party therein. As costs do follow the event, there is no reason why the defendant should be deprived of the costs. Although section 27 gives the Court discretion when it comes to award of costs, counsel submitted that the Court is enjoined to award costs unless otherwise ordered on reasons to be given. Here, it is submitted, the application was a complex one revolving around the issue of jurisdiction and that the said application had stalled the hearing of the suit since two attendances were necessitated by the said application. Counsel urged the Court to order that the said costs be assessed under Schedule VI paragraph (o)(viii) of the Remuneration Order which makes provision for the costs of opposed application. Counsel then referred the Court to Order 25 of the Civil Procedure Rules which deal with consequences of withdrawal of a suit and invited the Court to adopt the same.

On his part **Mr Kuloba**, learned Counsel for the plaintiff, submitted that under section 27 of the Civil Procedure Act, costs do follow the event. The phrase “event” according to learned counsel, is the result of the entire litigation and means that a party who succeeds in the action is then entitled to costs. In this case, counsel opines, there has been no litigation as far as the said application is concerned and no party can be said to have succeeded or not. Counsel submitted that prior to the Court appearance on 6th June 2012, the

plaintiff had intimated to the defendant its intention to withdraw the application but no response was received hence the costs incurred by the Court appearance on the said date was as a result of the failure by the defendant's counsel to respond to the said intimation. In as much as the Court has discretion on costs, such discretion must be exercised judiciously, it was submitted, bearing in mind the circumstances surrounding the suit and the prior events the Court and should not grant costs benevolently. Since the matter has never come up for hearing, it is submitted that the contention that the application stalled the hearing cannot be correct.

In his rejoinder, **Mr Litoro** submitted that section 27(1) of the Civil Procedure Act provides for costs of and incidental to the suit. In counsel's view, the subject application is an incidental action in the suit since it is part of the action. With respect to the letter intimating withdrawal of the application, counsel submitted that was an afterthought as it was a reaction to the grounds of opposition. In counsel's view it is injudicious to award costs in the circumstances of this case.

My view of the matter, having considered the submissions of counsel is as follows.

The general rule as to costs is provided for in **section 27** of the **Civil Procedure Act** which provides 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.

This provision has been the subject of several judicial pronouncements. In the case of Supermarine Handling Services Ltd vs. Kenya Revenue Authority Civil Appeal No. 85 of 2006 the Court of Appeal expressed itself thus:

"Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance... Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where the reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the rule...In the instant case the learned Judge gave no reasons whatsoever for his decision to deprive the successful plaintiff of its costs and yet it was not shown that the defendant had been guilty of some misconduct which led to litigation. In the court's view the learned Judge's order was wrong and for the foregoing reasons, the plaintiff's appeal succeeds as to the award of interest and costs on the principal sum awarded".

In this case **Mr Kuloba's** view is that the event contemplated under section 27 aforesaid is the culmination of the final disposal of the suit. With due respect, I beg to disagree. Under section 27 aforesaid the Court has powers to award costs of the suit as well as incidental costs. Incidental costs, I agree with **Mr Litoro**, include costs incurred as a result of interlocutory applications. It also includes costs of adjournment. If **Mr Kuloba's** submissions were to be upheld on this point, it would mean that a Court is not entitled to award costs of adjournment. Section 27 aforesaid is expressed in wide terms and gives the Court a wide latitude when it comes to costs "***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".

It is therefore my view and I hold that the withdrawal of the application was an event for the purposes of section 27 aforesaid and called for the invocation of the discretionary powers of the Court under the section.

Mr Kuloba further submitted that the conduct of the defendant in not responding to the letter intimating withdrawal of the application militates against costs being awarded to the defendant.

In **Devram Manji Daltani vs. Danda [1949] 16 EACA 35** it was held that a successful litigant can only be deprived of his costs where his conduct has led to litigation, which might have been averted. In **Mr Kuloba's** view the defendant's conduct of remaining silent when informed of the intention to withdraw the applicant militate against award of costs. Whereas I agree that out of courtesy, the defendant should have responded to the said intimation in order to avert the incurrence of further costs, that silence cannot affect the costs that had already accrued in respect for example to instructions to oppose the application and steps undertaken towards the same such as the filing of grounds of opposition. I associate myself with the holding in **Alexander-Tryphon Dembeniotis vs. Central Africa Co. Ltd [1967] EA 310** where the Court expressed itself as follows:

"The defendant is entitled to put his back against the wall and to fight from every available point of vantage. It would be extremely hard on defendants if as a rule they were told, at the end of the trial: "You have beaten the plaintiff, but because you have raised some points on which you have not succeeded you shall not have all the costs of the action"… Full costs should be awarded to a plaintiff who has succeeded in the main purpose of his suit and obtained the precise form of relief he wanted…It is not on every issue in a suit that success will bring a right to the costs of that issue. Clearly costs should follow the event where the plaintiff has succeeded in the main purpose of his suit, and he should not be deprived of costs merely because he has raised another issue which in itself cannot affect the result of the suit even if he loses on that issue. Here he has not only substantially succeeded in the main purpose of the suit, but he has obtained the full relief claimed that was the cancellation of the agreement. He obtained the precise form of relief he wanted, and it is immaterial that the other issue is left undecided, because whichever way that issue falls to be decided it cannot affect the result".

In the present case an application was made by the plaintiff to transfer the suit. The defendant filed grounds of opposition. Confronted with the said grounds the plaintiff threw in the towel and promptly sought to withdraw the application. Either way, the defendant succeeded in depriving the plaintiff of the orders he had sought to obtain.

In the foregoing premises I am not convinced that the defendant's conduct in the said proceedings was such that it did not deserve costs being awarded in its favour.

I agree with **Mr Kuloba** that whereas this Court has discretion when awarding costs, that discretion must, as usual, be exercised judicially. The first point of reference, with respect to the exercise of discretion is the guiding principles provided under the law. In matters of costs, the general rule as adumbrated in the aforesaid statute is that costs follow the events 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 principles the Court is enjoined to give reasons for not so doing. In my view it is the failure to follow the general principles without reasons that would amount to arbitrary exercise of discretion and not the other way round.

I accordingly award the costs of the application dated 15th March 2012 to the defendant in any event to be taxed at the conclusion of the suit as mandated under Order 51 rule 11(2) of the Civil Procedure Rules.

Ruling read, signed and delivered in court this 28th day of June 2012

G.V. ODUNGA
JUDGE
In the presence of:

Ms. Kirimi for Mr. Kuloba for Plaintiff

Mr. Litoro for Defendant

G.V. ODUNGA
JUDGE