



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 235 of 2011

WARGEN SERVICES LTDPLAINTIFF

VERSUS

JAMES GATHERU MATHENGE DEFENDANT

R U L I N G

1. By a Plaint dated 14th June, 2012 the Plaintiff claimed from the Defendant Kshs.1,000,000/- together with interest of 18% per annum. A Defence was filed on 22nd July, 2011 wherein the Defendant indicated that he had paid the Plaintiff the said sum of Kshs.1,000,000/- on 29th June, 2011 and interest thereon calculated at Kshs.143,224/25 on 6th July, 2012. In the Defence, the Defendant pleaded that neither the payment of the principal sum nor interest was precipitated by any threatened litigation as the debt was settled by the Defendant before the summons to Enter Appearance were served. The Defence also denied service of any demand notice.

2. On 5th July, 2012 the Plaintiff filed a Motion on Notice seeking to strike out the Defence for being embarrassing and an abuse of the court process. When the matter came up for hearing the court, with the concurrence of the parties directed, that the only issue for determination was the costs of the suit as there was no denial that the decretal sum plus interest had been paid. The parties filed their respective written submissions and this ruling is a determination of that issue.

3. In its submissions dated 2nd October, 2012, the Plaintiff submitted that the Defendant had only repaid the debt after the suit had been filed, that a Demand Notice had been issued to which the Defendant did not respond to, that the suit was necessitated by the Defendant's actions and that he was therefore liable for costs incurred in the institution of the suit. The Plaintiff relied on the authorities of Milimani H.C.C.C No. 341 of 2004 Co-operative Bank of Kenya Ltd –vs- Harun Komen Tuitoek (2011) e KLR and Armadilo Equity Limited –vs- Institute of correspondence Studies (K) Ltd (2006) e KLR.

4. On his part the Defendant filed submissions on 31st August, 2012. It was therein submitted that summons to Enter Appearance was not properly served, that no demand notices was ever issued, that the debt amount had been settled before the suit was instituted and that the claims made by the Plaintiff were misconceived and aimed at unjustly enriching itself. It was further submitted that the address used by the Plaintiff was wrong and the Defendant could not have received the demand notice or summons. The Defendant relied on **Mulla: The Code of Civil Procedure, 14th Edition, page 224 – 230, Judicial Hints on Civil Procedure** and Section 27 of the Civil Procedure Act.

5. I have carefully considered the Affidavits on record and submissions of learned Counsel and the authorities relied on. Section 27 of the Civil Procedure Act provides:-

“27.(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 of judge shall for good reason otherwise order.”

6. It is clear from the foregoing that courts have the discretion to determine the issue of costs in a suit. It is not in dispute that the Plaintiff did advance money to the Defendant on or about August 2010. This amount was to be repaid at an interest at the Plaintiff’s ‘bank overdraft rate’ which was pegged at 18%. From the correspondence between the Plaintiff and the Defendant, it was clear that the rate had already been discussed and agreed upon. In its email letter dated 1st December, 2010, Mr. J.K. Gitonga, a Director of the Plaintiff wrote;

“...It is now four weeks you promised to repay the Kshs.1,000,000/- plus interest at the Bank overdraft rate of 18% compound from the day the funds were deposited in your bank account.”

Further in his email letter dated 6th July, 2011, the Director of the Plaintiff wrote to the Defendant;

“ the compound interest of Kshs.1,000,000/- for 20 months is Kshs.143,224,25/-“

7. This sum was paid on the same date when writing the mail of 6th July, 2011. In that mail, the Plaintiff did not indicate that it had filed any suit. The Plaintiff has submitted that the Defendant was only compelled to repay the debt plus interest after the suit had been filed. The Defendant on his part has objected and submitted that the amount would still have been and had indeed been paid without the instance of the suit. The Defendant further submitted that he was neither served with the Demand Notice nor the Summons to Enter Appearance. I have perused the record, it is clear that the Plaintiff did not file any Affidavit of Service as per the provisions of Order 5 Rule 15(1) of the Civil Procedure Rules for the court to ascertain when and how service of summons was effected.

8. I have seen the demand notice dated 4th May, 2011 addressed to the Defendant. The address used in the demand notice is **P.O Box [particulars withheld] – 00100 NAIROBI**. The Defendant has indicated that that is not his address and that the correct address is **P.O Box [particulars withheld] -00619 NAIROBI**. There was no reply to Defence to contradict, deny or controvert the averments therein. The Plaintiff has not shown how it got the address. There being no evidence to the contrary, I am inclined to believe the Defendant that he did not receive the demand letter. In **Mulla: The Code of Civil Procedure** at page 227 the learned writers observe:-

“..... Costs shall follow the event – the general rule is that costs shall follow the event unless the court, for good reasons orders otherwise. This means that the successful party is entitled to costs unless he is guilty of misconduct or there is some good other cause for not awarding costs to him. ... the court may not only consider the conduct of the party in the accrual litigation, but the matters which led up to the litigation.”

Accordingly, in **Judicial Hints on Civil Procedure**, Kuloba,J (Rtd) at page 96 writes;

“..... it has been generally held that unless a party is guilty of misconduct, he is entitled to costs as of right. But there can be other ‘good reason’ than misconduct, justifying a departure from the general rule and it is necessary to examine the facts of each case to come to a conclusion.”

Further at page 97, it is stated:-

“..... 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 the misconduct, costs may be refused to a successful party. For example where the proceedings were not contested and they would not have been necessary if notice of action had been given and the Plaintiff’s interests were not likely to be harmed by communication the opposite party, the court would exercise discretion by awarding no costs to the successful Plaintiff.”

9. In the case of **Armadilo Equity Limited –vs- Institute of Correspondence Studies (K) Ltd (2006) e KLR**, Kasango, J awarded costs on the basis that the execution of leases was made after the Plaintiff had filed an Originating Summons. The Defendant was liable for costs as it had necessitated the filing of the application. In the instant suit, can it be said that the repayment of the debt was necessitated by the filing of the suit. To my mind, I do not think so. The Defendant deposited Kshs.1,000,000/- on 29th June, 2010, about 13 days after summons were issued. He claims to have received the Summons on 2nd July, 2011. The Plaintiff did not deny that fact. Neither was an Affidavit of Service filed to contradict the same. The payment of the debt could therefore not be said to have necessarily been precipitated by the institution of the suit against the Defendant. There being no evidence of service of the demand notice or Affidavit of Service to show that summons were served before the decretal sum was paid, I am inclined to find that the Defendant is not liable for costs. The order that commends itself to me is that each party do bear its/his own costs.

DATED and DELIVERED at Nairobi this 22nd day of November, 2012

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A. MABEYA

JUDGE