



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 85 of 1998

NATIONAL BANK OF KENYA LIMITEDPLAINTIFF

VERSUS

STEVE ONYANGO OMOLO.....DEFENDANT

RULING

1. On 16th October 2002 this suit was dismissed for want of prosecution under Order 16 Rule 2(1) of the Civil Procedure Rules. On 31st October 2003 the defendant filed a notice of motion under Section 3(a) and 27 of the Civil Procedure Act seeking for orders that the defendant be awarded costs of this suit. This application is based on the grounds that the suit was dismissed for want of prosecution and defendant had expended time and money in these proceedings and he was not given an opportunity to ask for costs. This application is supported by the affidavit **Mr. Stephen Owino** sworn on 31st October 2003. It is explained that when the suit came up on a notice to show cause on 16th October 2002 no cause was shown by the plaintiff and the suit was dismissed for want of prosecution. **Mr Owino** contends that he deputized his assistant to attend court and pray for costs but he arrived later after the matter had been dealt with. He proceeded to prepare a bill of costs which the plaintiff contested on the grounds that no order of costs was made. He urged the court to grant costs because his client had expended time and money.

2. This application was opposed, the plaintiff relied on the replying affidavit sworn by **Tom Ramogi Ombiero** on 24th November 2003. It was submitted that when the suit was dismissed no orders for costs was made. The suit was dismissed on the court's own motion. The defendant did not move the court to dismiss the case. They did not attend court to seek for costs. They cannot claim for costs when no order for costs was made. Moreover both the plaintiff and the defendant suffered loss because they all incurred costs. The defendant does not reside in Kenya. Even the affidavit in support of the application is sworn by the advocate and this affidavit was just taken out from a different suit. Counsel for the plaintiff urged the court to dismiss the application as it is the advocate who is pursuing cost not the client. The affidavit sworn in support of the application there is no affidavit by the defendant. The plaintiff was frustrated in prosecuting this matter because it was reviewed through investigations that the defendant permanently left the jurisdiction of this court. It was therefore not possible for the plaintiff to pursue their claim while knowing they would get no where.

3. In the case of Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd 1967 E.A page 287 the High Court of

Tanzania Biron J held that

- (i) *The general rule is that costs should follow the event and the successful party should not be deprived of them except for good cause;*
- (ii) *It was incumbent upon the unsuccessful respondent to show good cause;*
- (iii) *There were no proper grounds for the exercise of the court's discretion in depriving the successful appellant of his costs and the order made was arbitrary and perverse.*

In this case this court is asked to exercise its discretion and award costs to the defendant for reasons that they extended time and money in this suit. Secondly, the defendant counsel was late when the suit came up for hearing on a notice to show cause while the suit should not be dismissed for want of prosecution. The power to award costs is discretionary when the order dismissing the suit was made there was no order for costs issued. And this is understandable because none of the parties attended. There was no representation made to the judge. There motion was instituted by the court. The defendant's counsel claims that he had sent his assistant who arrived in court after the matter had been dealt with. However there is no affidavit by the said assistant. The suit was dismissed on 16th October 2002 and this application was brought one year later. The plaintiff has challenged the affidavit in support of this application which are sworn by counsel for the defendant. Counsel has not been able to offer a satisfactory reason why the defendant who is said to be out of the country and to have frustrated the plaintiff's effort in pursuing the claim is not the one giving evidence in support of contested matters. Accordingly, I agree that the further affidavit by **Stephen Owino** sworn on 10th December 2003 is contravention of **Order 18 of the Civil Procedure Rules**.

4. The defendant/applicant has not given any plausible reasons why this court should exercise its discretion to award costs. Accordingly, this application is also dismissed with no orders to costs.

RULING READ AND SIGNED ON 16TH JULY 2010 AT NAIROBI.

M. K. KOOME

JUDGE

