



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL SUIT 319 OF 2009

MUDHIHIRI MOHAMMED

MOHAMMED MUDHIHIRI

SHEHUNA M. MOHAMMED

Suing on behalf of the Board of Trustees of

PUMWANI MUSLIM COMMUNITY CENTRE.....PLAINTIFFS/APPLICANT

VERSUS

**AHMED IMANI AND OTHERS ABDUL KARURI (Sued for and on behalf of
the Board of Trustees**

or Pumwani Riyadhha Mosque Committee)

RAMADHAN SAID

MUASA MAMA KIBIBI

OMARI PETIT

MOHAMMED ABASS

MWAI MWINYI.....DEFENDANTS/RESPONDENTS

RULING

The plaintiffs through counsel moved to this court, by way of a plaint dated 1st day of July 2009 and filed on 2nd July 2009. Simultaneously with the filing of the suit was filed an interim application also dated and filed the same date. On 2/7/09 when the applicant appeared in court the interim orders were not granted. It is on record that on 7/7/09 both counsel's appeared before Stati J. Mr. Sumba is indicated as appearing for plaintiffs and Kibe as appearing for the 1st and 2nd defendants, and also intending to appear for the 6th defendant.

On 13/07/09 the matter came up before this court. The counsels' representations were as follows:-

Mr. Sumba for plaintiffs, and Mr. Kibe for the 1st, 2nd and 6th defendants. The matter was marked stood over to 16/07/09 for further orders. On this date Mr. Sumba intimidated to the court, at the start of the proceedings that, he wishes to withdraw the suit and bring a proper one. At the mention of the withdrawal, Mr. Kibe stated that he seeks costs for the defendants on board and the intended. It is on record that Mr. Sumba intimidated that he was conceding to costs for the 1st, 2nd and 6th defendants only. Upon saying so Mr. Kibe said that the issue be argued out.

On 21/07/09 both counsels appeared and made representations on the issue of payment of costs. Mr. Sumba maintained that they were conceding to costs payable to the 1st, 2nd and the defendants only, who were on board as at the time they intimidated to the court that they wished to withdraw the suit.

Mr. Kibe on the other hand stated that He now had instructions to appear for all defendants. Agreed that as at 13/07/09 he was appearing only for the 1st, 2nd and 6th defendants and he needed time to consult his clients and after due consultation is when he appeared in court, on 21/07/09 he informed the court, that he had instructions to appear for all defendants. According to Mr. Kibe since all the defendants had been served they should all be paid costs.

Further it is to be noted from the record that the plaintiff filed a Return of service sworn on the 6th day of July 2009 and filed on the 7th day of July 2009 indicating that all the defendants had been served. In response to that service, a notice of appointment of advocate for the 6th defendant was filed on 7th July 2009. Along side that notice of appointment is a replying affidavit filed on the 7th July 2009 for the 1st and 2nd respondents. On 10th July 2009, was filed a replying affidavit for the 6th respondent. Then on 16th July 2009 there is a notice of appointment for the 3rd, 4th, 5th and 7th defendants, along side a replying affidavit.

The question for determination is for which defendant/respondents are costs payable. The plaintiffs' counsel says that costs should only be paid to those on board as at 13/07/08 when they gave an intimation to withdraw the suit. Whereas the defence assert that all defendants be paid costs because they had been served. That costs normally follows the event.

Due consideration has been made of this rival arguments on the issue of costs. Section 27 on costs provides as follows:-

“section 27 (1) subject to such conditions and limitation as may be provided 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 when and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes afore said, 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 events unless the court, or judge shall for good reason otherwise order.

(2) The court, or judge may give interest on costs at any rate not exceeding fourteen percent per annum, and such interest shall be added to the costs and shall be recoverable as such”

This court has given consideration to the above quoted section and construed the same and has come to the conclusion that there are two commands in the said provision namely:-

(i). *Costs of and incidental to all suits shall be in the discretion of the court.*

(ii). *Costs of any action cause or any other matter shall follow the event”*

In both commands, the exercise of the discretion is mandatory. The principles that this court, invokes

when exercising the discretion have now crystalized in this jurisdiction. There is a wealth of case law on the subject emanating from the CA and as dutifully followed by the superior courts. This court, has judicial notice of the same and these are:-

(i).The courts', discretion is unfettered.

(ii). The only fetter attached to it is that it has to be exercised judiciously and with a reason.

These have been applied to the rival arguments herein and the court makes a finding that:-

1. There is no dispute that the suit herein was filed by the plaintiffs.
2. That indeed the plaint as well as the interim application were served on the defendants.
3. It is on record that opposite counsel appeared on record first for the first and 2nd defendants and later for the 6th defendant.
4. As at 13/07/09 when the plaintiff informed the court, that he wished to withdraw the suit, counsel was on record for the 1st, 2nd and 6th defendants/respondent. Notice of appointment as well as replying affidavits had been filed for those parties.
5. Had the respondents counsel not asked for time to consult his clients, the suit would have been withdrawn on 13/07/07.
6. On 16th 07/09 when parties appeared in court, the opposite counsel had filed a notice of appointment for the remainder of the defendants as well as a replying affidavit.
7. It is on record that disagreement arose as to when costs should be paid if matter is withdrawn and for which defendants.

In this courts', opinion, the plaintiff having intimated to the court, that he wished to withdraw the suit, it was not necessary for the opposing counsel to file a replying affidavit for the reminder of the defendants. The filing of the notice of appointment for the 3rd, 4th and 5th defendants is however prudent before withdrawal and is valid so that they also participate in the withdrawal of the suit against them.

For the reasons given above, the court, is of the opinion that herein indeed costs shall follow the events in that, the withdrawal of the suit is subject to payment of costs.

(2) The costs will be paid to the 1st, 2nd and 6th defendants fully up to the date of withdrawal.

(3) Costs to the 3rd, 4th and 5th defendants will be limited to the filing of the notice of appointment only which was necessary for them to participate in the withdrawal.

(4) Costs of obtaining instructions from the 3rd, 4th and 5th defendants are disallowed because these instructions were given after the plaintiff had intimated to the court, that they wished to withdraw the suit.

(5) Costs for the filing of the replying affidavit of the 3rd, 4th and 5th defendants has been disallowed because it was unnecessary. Counsels should have waited to see if the matter would be withdrawn or not before moving to file the same.

(6) Costs of these proceedings in the cause.

DATED, READ AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY 2009.

R.N. NAMBUYE

JUDGE