

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Miscellaneous Application 663 of 2008

KENYA SYNTANS & CHEMICALS LTD.....APPLICANT

Versus

KENYA REVENUE
AUTHORITY.....RESPONDENT

RULING

This ruling relates to the issue of costs. The ex parte Applicant Kenya Syntans & Chemicals Ltd. filed the Notice of Motion dated 12th November 2008 challenging the agency notices issued by the Respondent on 22nd October 2008. The Applicant contends that it was issued with tax assessment notices on 7th October 2008, and was allowed 30 days to object. The Applicant lodged an objection but before the 30 days were over, the Respondent issued agency notices on its bankers and that is why the Applicant moved this court by way of Judicial Review to challenge the said notices. On 30th October 2008, the court granted leave and leave to operate a stay of the agency notices. On 15th April 2009, the Respondent lifted the agency notices. According to the Applicant the lifting of the agency notices in effect compromised the whole notice of motion save for the issue of cost. That is why the Applicant contends that it is entitled to the costs of the Notice of Motion. Counsel relied on the case of **JESSEE MBURU GITAU V AG HMISC 1517/03** where Justice Nyamu held that the principle that costs follow the event is based on justice because the successful party should not be denied costs unless he is at fault. That in this case, once the agency notices were lifted by the Respondent, they conceded to the orders sought by the Applicant. Counsel also relied on **ARMADILO EQUITY LTD. V INSTITUTE OF CORRESPONDENCE STUDIES LTD HCC 118/04** where Justice Kasango considered the event that led to the institution of the suit and granted costs. In **ABDULRATHIM SAID V RAGHIR MOHAMED CA 29/1988** the Court of Appeal condemned the party whose action led to the litigation. That the onus is on the Respondent to prove why costs should not be paid.

In their submissions the Respondent contended that they only lifted the agency notices after receiving a letter from the Applicants on 6th November 2008 requesting the lifting of the notices and promising to readily comply with paying of taxes. That the Respondent believed that the matter was being negotiated, and withdrew the agency notices. That the Applicant admitted owing taxes and it was therefore not necessary for the Respondent to file their papers. Counsel cited Halsbury Laws of England Vol 10 at page 10 and 18 in support of their contention that a claimant who discontinues a suit is liable for the costs incurred on or before the date on which notice of discontinuance was served on him. That when the Applicant sought the Respondent's indulgence, that effectively discontinued the matter. Counsel also urged that the discretion lies with the court as to who will bear the costs. That this matter having been at a preliminary stage, and there is no successful party, the court should make no order as to costs.

I have considered all the submissions on record and the case law relied upon. At the end of the day, I find that the issue of costs is based on the exercise of the court's discretion considering the circumstances each special case.

I have perused the court file. Directions were given that the Respondent file their replying papers but when the matter came up on 3rd February 2009 Ms. Mwangi indicated to the court that the parties were negotiating and agency notices had been lifted. When the matter came up again on 30th April, 2009, the Respondent's Counsel confirmed that notices were lifted and the matter be marked as settled with no orders as to costs but the Applicant's Counsel insisted on costs. That is why this court directed the parties to file submissions on the issue of costs.

Though the Respondent claim to have received a letter from the Applicants requesting lifting of the agency notices, we have no evidence of that letter for the simple reason that the Respondent did not file any reply. In lifting the agency notice it seems the Respondents have conceded to the fact that the said agency notices were wrongly issued (prematurely) as claimed in the Judicial Review application.

It is however not disputed that taxes were owed by the Applicant. At the time the parties started negotiating, it was still at a preliminary stage and the matter was not even ready for hearing. The Respondents did not waste the Applicants time by insisting on the hearing of the matter but upon realizing their mistake, withdrew the agency notices promptly.

In my judgment, I find that it is fair that each party bears their own costs. It is so ordered.

Dated and delivered this 14th day of July 2009.

R.P.V. WENDOHO

JUDGE

Present

Mr. Jaoko holding brief for Mr. Mate for Applicant

Ms Ngugi holding brief for Mwangi for Respondent

Muturi: Court Clerk