



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

Civil Suit 112 of 2003

INTERCONTINENTAL HOTEL CORPORATION.....PLAINTIFF

VERSUS

NAIROBI CITY COUNCILDEFENDANT

RULING

This ruling is limited to the issue of the costs of this suit.

Both parties are in agreement that the issues which were raised in the Plaintiff had been amicably settled, save for the question of costs. In that regard, the plaintiff called one witness, whilst the defendant called none.

The plaintiff's witness, Mr. Alexander Munuve Mbili, was their "financial assistant controller". He testified that the defendant had, by a letter dated 10th February 2003, demanded a sum of Kshs.20,955,869.55, from the plaintiff. The said demand was disputed by the plaintiff, whereupon the parties held some discussions.

According to the witness, the negotiations were not fruitful, culminating in these proceedings. The plaintiffs contend that it became necessary to file the proceedings so as to pre-empt the disconnection of water to its premises. Thereafter, the parties continued with the negotiations, which led to an agreement, to the effect that the sum due and payable by the plaintiff, to the defendant was Kshs.2.3 million.

Having paid that sum, the plaintiff holds the view that it should not pay costs of this suit. It was submitted that had the defendant demanded the correct sum for the services rendered to the plaintiff, the suit would not have been necessary.

But, the defendant relies on the authority of **HUSSEIN JANMOHAMED –VS- TWENSCHÉ OVERSEAS TRADING CO. LTD. [1967] EA. 287**, for the proposition that costs should follow the event. For that reason, the defendant could only have been deprived of costs if the plaintiff had satisfied the court why the defendant was not so entitled, it was submitted. And in this case, the defendant feels that the plaintiff has not made out any case to justify an exception to the rule.

At page 292 of the case **HUSSEIN JANHOMAMED –VS- TWENSCHÉ**, (supra), the Hon. Biron J. expressed himself thus;

"To my mind, not only were there no proper grounds for the exercise of the court's discretion in

depriving the successful defendant of his costs, which as noted would constitute an unjudicial exercise of the discretion, but the purported grounds were, as indicated, not supported by any evidence; in fact, imported into the case by the learned magistrate himself, as it were out of the blue.

I would go further and hold that on the particular facts of this case, the order depriving the successful defendant of his costs is, in the words of the judgement in Mangilal Sitaram Aggarwal – vs- Durgabai w/o Shantiprasad (1947) A.I.R 34 Nag 124, arbitrary and perverse."

In the light of that authority, the defendant pointed out the fact that the plaintiff's witness had conceded that payments were made by it, prior to the institution of these proceedings. In the circumstances, the defendant insists that the plaintiff did not therefore need to file this case.

It was the defendant's case that having been brought to court, for no good reason, they were entitled to the costs of both this application as well as of the suit itself.

The witness had produced, as evidence, three cheques dated 4th October 2002 (for Kshs.1,000,000/=); 18th October 2002 (for Kshs.600,000/=); and 6th November 2002 (for Kshs.701,368.90). The total value of the three cheques was, by my calculations, Kshs.2,301,368.90.

When it is borne in mind that the demand by the defendant, for Kshs.20,955,869.55 was dated 10th February 2003, it is evident that the said sums were being claimed subsequent to the payments particularised above.

On the other hand, the plaintiff's witness testified that the payment of Kshs.2,301,368.90 was effected after the parties had held negotiations. The impression I got from his evidence was that the said negotiations had been conducted after the demand notice dated 10th February 2003. But obviously, as the payments were made in October and November 2002, the said payments cannot have been made in response to a demand that was yet to be made.

Why therefore was this suit filed, after the plaintiff had made payments?

The answer did not come out through the testimony of the witness. Nor did the submissions by the defendant cast any more light on the matter. The court therefore delved into the court records, with a view to ascertaining if there was any material therein which could assist it in arriving at an informed decision.

In the plaint, it was pleaded that the defendant had, on 10th February 2003, demanded payment of Kshs.20,955,869.55, in respect of water allegedly consumed by the defendant between 1969 and 27th February 2003. The defendant is said to have threatened to disconnect the water supply to the plaintiff unless the sum demanded was paid.

By its defence, the defendant acknowledged making a demand for Kshs.20,955,869.55/=, and also insisted that it was entitled to disconnect the water supply, if the plaintiff did not pay the sum so demanded.

Meanwhile, in relation to the plaintiff's application for a temporary injunction, to restrain the defendant from disconnecting the water supply, the court did grant an injunction on 18th March 2003. That order was extended, by consent of the parties, on 9th April 2003, so that it remained in force upto 13th May 2003. Thereafter, the court kept on extending the interim injunction, and the same is now in place until the plaintiff's application is heard and determined. To date, the plaintiff's application for injunction has not yet been heard and determined. In effect, the interim injunction remains in place.

From the foregoing, it is evident that the plaintiff needed to file this suit, because otherwise it risked having its water supply disconnected. It is by filing suit and obtaining an injunction that the plaintiff

managed to secure a continued supply of water from the defendant.

The defendant has not adduced any evidence to show that it was right to demand payment of Kshs.20,955,865.55. If anything, the defendant did consent to the extension of the interim injunction, thereby implying that the demand for Kshs.20,955,865.55 was not justified. Had the defendant justified its said demand, I would have held that they were successful in defending the suit.

But the only evidence before me, and which was uncontroverted, was that the plaintiff has finally paid only a little more than one tenth (1/10) of the sums originally demanded by the defendant. That fact, if correct, implies that it was the plaintiff who was the successful party in this suit. I can only talk about the implication drawn from the information made available to court, as the parties did not actually provide the court with the particulars of the terms of the settlement they arrived at.

Section 27 (1) of the Civil Procedure Act stipulates 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 that 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 shall follow the event unless the court or judge shall for good reasons otherwise order."

In this matter, even though I talk about the plaintiff being successful in the suit, the said success is limited primarily to the injunction application. Therefore to that extent, I hold the view that the plaintiff is entitled to costs. Accordingly, the defendant shall pay the costs of the plaintiff's application dated 4th March 2003.

However, as the parties did not disclose to the court the terms of the settlement of the suit, I cannot determine which of the parties is, ultimately, successful in the suit. But if success is pegged to the fact that although the plaintiff had originally asserted that it did not owe any money to the defendant, but has thereafter paid a total of Kshs.2,301,368.90/= to the defendant, the latter must be deemed to have been successful to that extent. But then again, that sum was paid prior to the institution of this suit, so that it cannot form part of what the defendant was demanding from the plaintiff, as at 2nd March 2003.

From the supplementary affidavit of Frederick Kilembwa, which was sworn on 1st November 2004, the plaintiff said that it had paid Kshs.1,431, 669/= on 5th February 2004. To my mind, it is that sum which forms the measure of the defendant's success in this suit. Accordingly, the defendant shall have the costs of the suit, which shall be calculated on the basis of the sum of Kshs.1,431,669/=.

In arriving at this sum, I have told myself that the costs cannot be based on the sum of Kshs.20,955,869.50 because that was the sum which the defendant had demanded, but failed to get. In other words, one might even argue that to the extent to which the plaintiff did not have to pay the sum demanded, it was successful, in its claim. But, in the final analysis, the plaintiff had to make some payment, therefore they were not absolutely right to assert that they did not owe any money to the defendant.

Accordingly, as already herein stated, the plaintiff is awarded the costs of the application dated 3rd March 2003, whilst the defendant is awarded the costs of the suit.

Dated and Delivered at Nairobi this 28th day of February 2006.

FRED A. OCHIENG

JUDGE