



**Marigu Investments Limited v Kelbrook Limited & 4 others (Civil Case 263 of 2018)
[2024] KEHC 1232 (KLR) (Commercial & Admiralty) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1232 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
CIVIL CASE 263 OF 2018
PM MULWA, J
FEBRUARY 15, 2024**

BETWEEN

MARIGU INVESTMENTS LIMITED PLAINTIFF

AND

KELBROOK LIMITED 1ST DEFENDANT

SURESH SANTRAM BACHHETA 2ND DEFENDANT

DIAMOND HASHAM LALJI 3RD DEFENDANT

SHAHID DIAMOND LALJI 4TH DEFENDANT

PRAKASH SANAS 5TH DEFENDANT

RULING

1. This ruling is in respect of the issue of whether the defendants are entitled to costs of the suit that was wholly withdrawn by the plaintiff.
2. The background is that the plaintiff instituted the suit through a plaint dated 27th June 2018, extracted summons and served the defendants who entered appearance and filed a defence. The suit was referred to mediation, which failed. Before the suit could be set down for full hearing before the Court, the plaintiff wholly withdrew the suit against the defendants. The parties however failed to agree on costs.
3. The plaintiff and the 1st defendant were the shareholders and the 2nd to 5th defendants were directors of Morris and Company (2004) Limited (the company). In this suit, the plaintiff claimed that its shareholding in the company was diluted from 45% to 2.25%. This was after the defendants allegedly fraudulently changed the company's shareholding structure and share capital and failed to pay for the



additional shares. The plaintiff was seeking reversion of the shares to its original 45% and 55% for the 1st defendant.

4. In a related suit, that is HCCC 366 of 2018 which was a derivative action against the 1st, 2nd and 5th defendants, the plaintiff challenged the charges and further charges registered against L.R. No. 209/8201, the only company property, to secure banking facilities with Diamond Trust Bank as the facilities were not used for the company's benefit. The suit was settled by the parties by a deed of settlement dated 17th June 2021 and varied on 22nd July 2022. The parties acknowledged the bank's right to exercise its statutory power of sale through disposing the charged property by public auction or private treaty.
5. The plaintiff argued that it should not be condemned to pay costs of this suit after withdrawing the same as the settlement in HCCC 366 of 2018 rendered it academic. The plaintiff urged the Court to consider the outcome of the suit and the circumstances of the case. The plaintiff also submitted that it had been proactive in seeking the amicable settlement of the matter and that it would be unjust to condemn it to pay costs.
6. On the other hand, the defendant asserted that they are entitled to the costs of the suit since the plaintiff filed the same against them and that they had to instruct an advocate to enter appearance, file defence and respond to the application.
7. I have considered the parties respective submissions. Order 25 rule 3 of the [Civil Procedure Rules](#) provides that:

“Upon discontinuation of a suit and upon request in writing by any defendant the Registrar has the power to sign judgment for the costs of a suit which has been wholly discontinued, and, any defendant may apply at the hearing for the costs of any part of the claim against him which has been wholly withdrawn.”

8. Section 27 of the [Civil Procedure Act](#) provides that:

“(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 or judge shall for good reason otherwise order.”

9. The guiding principle is that the costs follow the event unless there is good reason to order otherwise. What's more, in determining costs, the court enjoys a wide and unfettered discretion. However, this discretion must be exercised judiciously and with reason and for the ends of justice.
10. In [DGM v EWG](#) [2021] eKLR, cited in both parties' submissions, the Court observed that:-

“27. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the



outcome of the suit but also the circumstances of each case. In *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR the court noted that;

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that ‘costs follow the event’ was driven by the fact that there could be no ‘one-size-fit-all’ situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

28. Furthermore, this discretion must be exercised judiciously and courts should not deprive a plaintiff/defendant of his or her costs unless it can be shown that they acted unreasonably. The *Halsbury’s Laws of England*, 4th Edition (Re-issue), [2010], Vol.10. para 16, notes that:

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice.”

11. In *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR, the Court set out some of the elements for consideration, as follows:-

- a. the conduct of the parties
- b. the subject of litigation
- c. the circumstances which led to the institution of the proceedings
- d. the events which eventually led to their termination
- e. the stage at which the proceedings were terminated
- f. the manner in which they were terminated
- g. the relationship between the parties and
- h. the need to promote reconciliation amongst the disputing parties pursuant to article 159 (2) (c) of the *Constitution*.”

12. In this matter, the plaintiff withdrew the suit before it was set down for hearing. Previously, the parties were engaged in court-annexed mediation that failed. I have considered the above position and arguments. It is not in dispute that the plaintiff initiated the suit against the defendants seeking for reliefs as enumerated in the plaint.

13. The legitimacy or otherwise of the plaintiff’s claim against the defendants is not a relevant consideration as the suit was withdrawn. Suffice it to say that the plaintiff having filed the suit, it served the same upon the defendants, who retained the services of counsel, and went ahead to file defence as



well as response to the application. Counsel for the defendants continued to appear in court whenever the case was listed and the plaintiff therefore cannot run away from paying costs whether the suit was withdrawn or compromised. The defendants, through counsel expended time and resources and are entitled to costs (See *Pacis Insurance Company Ltd v Francis Njeru Njoka* [2018] eKLR).

14. I am not persuaded by the plaintiff's contention that they should not be condemned to pay the costs herein.
15. Accordingly, I order that the plaintiff pays the 1st to 5th defendants' costs of this suit to be agreed or taxed by the Deputy Registrar.

RULING DELIVERED, DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF FEBRUARY 2024.

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P. MULWA

JUDGE

In the presence of:

Mr. Opole h/b for Mr. Musyoka for Plaintiff

Mr Wafula for Defendants

Court Assistant - Carlos

