



**Cementers Limited v Multichoice Kenya Limited & another (Civil Suit E384 of 2020)  
[2024] KEHC 2470 (KLR) (Commercial and Tax) (8 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2470 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E384 OF 2020  
FG MUGAMBI, J  
MARCH 8, 2024**

**BETWEEN**

**CEMENTERS LIMITED ..... PLAINTIFF**

**AND**

**MULTICHOICE KENYA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**STEVEN WANDERA OUNDO ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**Background and introduction**

1. This ruling addresses the issue of costs stemming from an Originating Summons dated 24<sup>th</sup> September 2020, filed by the plaintiff. The plaintiff sought to challenge the ruling and award of the 2<sup>nd</sup> defendant dated 21<sup>st</sup> August 2022 in an arbitration commenced by the 1<sup>st</sup> defendant against the plaintiff. The 2<sup>nd</sup> defendant was the sole arbitrator. The plaintiff and the 1<sup>st</sup> defendant challenged the mandate of the 2<sup>nd</sup> defendant leading to the termination of this mandate on 18<sup>th</sup> May 2023.
2. The 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant both filed pleadings in response to the OS with the 1<sup>st</sup> defendant filing an application dated 18<sup>th</sup> March 2021 and the 2<sup>nd</sup> defendant filing a Notice of Preliminary Objection dated 22<sup>nd</sup> February, 2022. The objection was dismissed for being devoid of merit vide a ruling dated 21<sup>st</sup> October 2022 with costs abiding the outcome of the Originating Summons.
3. This Court held that the Originating Summons had been overtaken by events following the termination of the 2<sup>nd</sup> defendant's mandate on 18<sup>th</sup> May 2023. Parties were therefore asked to submit on the issue of costs and each of the parties filed their respective submissions which the Court has carefully considered.



## Analysis

4. Section 27 of the [Civil Procedure Act](#) provides for costs. The provision underscores that the awarding of costs lies within the court's discretion and is not automatic. An examination of this section further reveals that under general circumstances, the successful party in a suit is entitled to recover costs. This principle, that costs typically follow the outcome of the case, has been reinforced through numerous cited legal precedents by the parties, highlighting the established practice within legal proceedings.
5. The Court (Mativo J as he then was) discussed the purpose behind the awarding of costs in Republic V Rosemary Wairimu Munene (Ex parte Applicant) V Ihururu Dairy Farmers Co-operative Society Ltd, JR Appln No. 6 of 2004. The Court clarified that the intention of awarding costs is to compensate the successful party for the efforts and resources expended in defending the suit. This rationale emphasizes compensation over punishment, indicating that costs are not intended to penalize the party that does not prevail in the litigation.
6. Even then, it is a well-established principle that when exercising discretionary powers regarding the awarding of costs, courts must consider not only the outcome of the case but also the specific circumstances surrounding each individual case. This approach ensures a fair and equitable determination of costs, reflecting the nuances and complexities of the legal matters at hand, as well as considering the conduct and circumstances of the parties involved.
7. 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 “Cost 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.”
8. In [Sonko V Clerk, County Assembly of Nairobi City & 12 Others, \(Petition 14 \(E021\) of 2021\) \[2022\] KESC 17 \(KLR\)](#), the Supreme Court dealt with the question of costs arising in circumstances similar to the circumstances of this case where the cause has not crystalized and held that:

“Having so stated, we note from the record that the petition was withdrawn before the respondents had filed any responses or substantive submissions to the appeal save for the 7th respondent who filed a notice of preliminary objection. The appeal, at the time of withdrawal was not ripe for hearing. While applying the principle in [Jasbir Singh Rai](#) that costs normally follow the event, has an event to which costs would follow materialized?

The answer is in the negative. Such an event has not happened. We note that the applicant’s appeal did not proceed as the occurrence of the event that would have led to the applicant being successful crystalized as the 11th respondent was sworn in as Governor of Nairobi County. We therefore come to the conclusion that each party shall bear its costs before this court.”
9. What then are the circumstances of this case? The plaintiff filed an Originating Summons which was in the end overtaken by events, through no fault of his own. The litigation was cut short and so the merits or otherwise of the OS were not determined as it was not yet ripe for hearing.



10. The 1<sup>st</sup> defendant had filed his challenge to the OS before the 2<sup>nd</sup> defendant's mandate was terminated although a determination was not made on this application. Again, the turn of events was not of the 1<sup>st</sup> defendant's making and since the OS was not heard to finality, there is no telling whether the 1<sup>st</sup> defendant would have been successful.
11. The 2<sup>nd</sup> defendant emerged as the unsuccessful party in this scenario due to the termination of his mandate, resulting from his conduct in the arbitration. This conduct is what led to the filing of the OS in the first place and the eventual termination of his mandate. While the 2<sup>nd</sup> defendant's actions resulted to additional costs for the other parties, these were part of the efforts by the 2<sup>nd</sup> defendant to resolve the dispute between the plaintiff and the 1<sup>st</sup> defendant.

**Determination**

12. Given the situation and after considering all the relevant factors, I have come to the conclusion that the most equitable outcome is for each party to bear their own legal costs. It is so ordered.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 8<sup>TH</sup> DAY OF MARCH 2024.**

**F. MUGAMBI**

**JUDGE**

