



Hexa Development Group Limited v Chase Bank (Kenya) Limited (In Liquidation (Commercial Case E444 of 2020) [2024] KEHC 12214 (KLR) (Commercial and Tax) (4 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12214 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E444 OF 2020**

MN MWANGI, J

OCTOBER 4, 2024

BETWEEN

HEXA DEVELOPMENT GROUP LIMITED PLAINTIFF

AND

CHASE BANK (KENYA) LIMITED (IN LIQUIDATION DEFENDANT

RULING

1. Before me is a Notice of Motion application dated 16th February, 2024 filed pursuant to the provisions of Sections 1A, 1B (1), 3A & 27 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya, Order 25 & Order 51 Rule 1 of the Civil Procedure Rules, 2010, the inherent jurisdiction of the Court, all other enabling provisions of the law, and the directions of the Hon. Lady Justice Njoki Mwangi dated 14th February, 2024. The defendant seeks orders that the costs of this suit and the instant application, be paid by the plaintiff together with interest thereon at Court rates from 14th February, 2024 until payment in full.
2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Geoffrey Nyakundi, the Manager Bank Resolution in Kenya Deposit Insurance Corporation, the defendant's Liquidator. He confirmed and reiterated the chronology and steps of the litigation in this suit as have been detailed on the face of the application, and which can be verified from the Court file and the Judiciary e-filing platform. He asserted that the defendant has invested resources, including time and money, in defending and managing this case. He urged that awarding costs as requested would help compensate it for these efforts. He argued that costs should follow the withdrawal of this suit in the circumstances.
3. In opposition to the application, the plaintiff filed a replying affidavit sworn on 11th March, 2024 by Anthony W. Mwaniki, the plaintiff's Director. He averred that the plaintiff had bank accounts with



the defendant and was granted an overdraft/loan facility. He stated that after the defendant went into liquidation, most of its assets and liabilities, including the plaintiff's overdraft/loan facility, were acquired and transferred to SBM Bank (Kenya) Limited by the defendant and KDIC as part of the agreement, and as a result, SBM Bank (Kenya) Limited assumed control of the facility, and it was no longer under the defendant's management. He deposed that the current proceedings arose due to the defendant's and KDIC's failure to release funds intended to settle a negotiated agreement between the plaintiff and SBM Bank.

4. He asserted that the defendant was fully aware of the ongoing case, HCCOMM No. E425 of 2020, and had participated in settlement discussions with the plaintiff before any litigation begun, resulting in a settlement agreement between the parties. He stated that the agreed-upon funds were deposited into a settlement account known as a Foreclosed Assets Account, referring to accounts previously held at the defendant bank but transferred to SBM Bank following the sale of its core assets. He contended that this lawsuit would not have been filed if the defendant had applied the funds intended for settling the common overdraft facilities. Additionally, he noted that both this case and HCCOMM No. E425 of 2020 were initiated to benefit the plaintiff, who was caught in the acquisition of a bank where it held an account.
5. He argued that given the said situation, the plaintiff should not be penalized for seeking to enforce its rights, which were violated by both the bank and the regulator. Further, in view of the consent recorded in HCCOMM No. E425 of 2020, which amicably resolved the dispute relating to the overdraft facility, there is no valid reason for the plaintiff to be called upon to pay the defendant costs of the suit. Mr. Mwaniki emphasized that aside from opposing the application for leave to continue with the proceedings after liquidation, this suit had not yet been certified ready for hearing before it was withdrawn. In any case, the withdrawal of this suit and the consent recorded in HCCOMM No. E425 of 2020 should not be interpreted as the defendant being successful in this suit.
6. In a rejoinder, the defendant filed a further affidavit sworn on 12th March, 2024 by Geoffrey Nyakundi, the Manager Bank Resolution in the Kenya Deposit Insurance Corporation, the defendant's Liquidator. He claimed that in opposing the defendant's oral request for costs relating to the withdrawn suit, the plaintiff claimed it would present evidence showing that the defendant participated in discussions leading to the consent dated 31st October, 2022, filed in HCCOMM No. E425 of 2020. He deposed that upon reviewing the plaintiff's replying affidavit, no such evidence has been provided. He asserted that the defendant has not engaged in any settlement negotiations with the plaintiff since this suit was filed and it was prepared to defend this case.
7. He averred that once a suit is withdrawn, as is the case herein, the Court no longer has jurisdiction to consider the disputed factual issues that were not examined through evidence and determined on merits. He stated that the plaintiff has acknowledged that the overdraft facility in question was with SBM Bank Kenya, not the defendant, yet it filed this suit against the defendant and later initiated another suit against SBM Bank (Kenya) Limited. He further argued that the fact that the plaintiff settled its suit with SBM Bank and immediately withdrew this case indicates that it had no valid claim against the defendant, making the latter an unnecessary party in this litigation. Mr. Nyakundi pointed out that the discussions between the parties before this suit was filed bore no fruits, thus the plaintiff instituted this suit, and the one against SBM Bank.
8. He stated that awarding the defendant costs in this suit would not be a punishment to the plaintiff but rather, compensation for involving the defendant in a case it should not have been part of, from the outset. Additionally, he noted that according to Clause 3 of the consent filed in HCCOMM No. E425 of 2020, the plaintiff already covered the defendant's costs in that case, so there is no valid reason for the plaintiff not to pay the defendant's costs in this suit. He stated that in any event, the plaintiff has



not provided sufficient justification for the Court to deviate from the general rule that costs should follow the event.

9. The instant application was canvassed by way of written submissions. The defendant's submissions were filed by the law firm of Abdulhakim & Co. Advocates on 12th March, 2024, whereas the plaintiff's submissions were filed on 19th March, 2024 by the law firm of Majanja Luseno & Company Advocates.
10. Mr. Akatch, learned counsel for the defendant, referred to Section 27 of the *Civil Procedure Act* and argued that the Court has the discretion to compensate the successful party in a suit for the trouble taken in prosecuting or defending a suit, and not to penalize the losing party. He cited the decision in Joseph Oduor Anode v Kenya Red Cross Society [2012] eKLR and Samson K.A. Tim v D.M. Machage [2019] eKLR, emphasizing that it is well-established that costs generally follow the event, meaning that the successful party is awarded costs unless the Court decides otherwise for sufficient reasons.
11. He submitted that in exercising its discretion, the Court considers factors such as the duration the suit has been in Court before withdrawal or determination, the nature of the relief sought, steps taken in the proceedings, the stage of the hearing, the need to ensure access to justice for indigent parties, and any other sufficient reasons in the interest of justice. He cited the case of Shadrack Silla Muthama v Kebaso Wycliffe Maengwe [2021] eKLR, and contended that awarding costs for a withdrawn suit is not dependent on whether the suit had been set for hearing at the time of withdrawal. He submitted that in this case, the key factor is that the defendant had taken steps in the proceedings, hired legal representation, and as a result incurred expenses.
12. Mr. Luseno, learned Counsel for the plaintiff referred to the provisions of Section 27 of the *Civil Procedure Act* and the cases of DGM v EWG [2021] eKLR and Rufus Niuguna Miringu & another v Martha Muriithi & 2 others [2012] eKLR, and submitted that where parties consent to the withdrawal of a suit, the appropriate order should be that either party to bear their own costs and/or that there should be no order as to costs, since the successful determination of the suit in these circumstances is attributable to both parties. He argued that the fact that the defendant appointed Counsel to represent it does not automatically mean that it should be awarded costs as the circumstances that led to the withdrawal of this suit also need to be taken into consideration.

Analysis And Determination.

13. I have considered the application filed herein and the affidavits filed in support thereof. I have also considered the replying affidavit filed by the plaintiff and the written submissions by Counsel for the parties. The issue that arises for determination is whether costs should be awarded to the defendant.
14. The plaintiff instituted this suit against the defendant sometime in the year 2020. It is not disputed that prior to the institution of this suit, the parties herein engaged in negotiations with a view of settling the dispute between the parties herein amicably. The said negotiations bore no fruits as the plaintiff instituted this suit against the defendant and HCCOMM No. E425 of 2020 against SBM Bank. I agree with Counsel for the defendant that upon withdrawing this suit, this Court has no business determining the issues between the parties herein save for the issue on costs of the suit. This means that the averments contained in the plaintiff's replying affidavit touching on other issues are of no probative value at this juncture.
15. It is not disputed that upon service of the plaint and its accompanying documents upon the defendant, the defendant instructed Counsel who filed a statement of defence against this suit denying the allegations contained in the plaintiff's plaint. The defendant also filed its pre-trial bundle of documents in preparation for the hearing and determination of this suit. Upon perusal of the Court record, it is evident that this matter was certified ready for hearing by the Deputy Registrar on 9th August, 2023



and scheduled for mention before this Court for purposes of fixing of a hearing date, however, before a hearing date could be fixed, the suit was withdrawn by the plaintiff.

16. Costs are provided for under Section 27 of the *Civil Procedure Act*, Cap 21 Laws of Kenya which states 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.

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

17. It is trite law that costs of any action shall follow the event unless the Court orders otherwise for good reason. The plaintiff contends that the consent recorded in HCCOMM No. E425 of 2020 and the withdrawal of the suit between the parties herein, should not be interpreted as the defendant being successful in the suit. Further, it submitted that where parties consent to the withdrawal of a suit, the appropriate order should be that either party to bear its own costs and/or that there should be no order as to costs, since the successful determination of the suit in those circumstances is attributable to both parties.

18. This Court takes cognizance of the fact that the defendant took considerable steps towards defending this suit. In addition, the defendant has denied engaging the plaintiff in negotiations with the aim of settling this suit since it was lodged by the plaintiff. The plaintiff on the other hand has not tendered any evidence of negotiations held such as invites to meetings with the defendant with a view of amicably settling this suit, and/or the defendant's involvement in the negotiations leading to the consent dated 31st October, 2022 filed in HCCOMM No. E425 of 2020. Further, I note that at paragraph 3 of the aforesaid consent, it was agreed that the plaintiff shall settle the party & party costs in the said suit either to be agreed between the parties therein or to be taxed by the Deputy Registrar.

19. The Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, held as follows-

A party's right to withdraw a matter before the court cannot be taken away. A court cannot bar a party from withdrawing his matter. All that the court can do is to make an order as to costs where it is deemed appropriate. Recently, a single judge of this Court in *John O. Ochanda vs Telkom Kenya Limited*, Motion No. 25 of 2014, in granting an application for withdrawal of a Notice of Appeal, stated inter alia:

"I do hold the view that a prospective Appellant is at liberty to withdrawal of a Notice of Appeal at any time before the Appeal has been lodged and any further steps taken. No proceedings have commenced strictly. I am also of the view that just like under the Civil Procedure Rules or Court of Appeal Rules, the right to withdraw or discontinue proceedings or withdraw a Notice of Appeal respectively ought to be allowed as a matter of right subject to any issue of costs which can be claimed by the respondents if any." (Emphasis added).



20. Bound by the abovementioned decision, this Court finds it difficult to be persuaded by the plaintiff's argument that it should not be condemned to settle the party & party costs in this suit, since the suit was withdrawn by consent. Due to the foregoing position, coupled with the fact that the defendant took considerable steps towards defending this suit before it was withdrawn by the plaintiff, I find that it is in the interest of justice for the defendant to be compensated for the time and money expended in doing so.
21. The upshot is that the application herein is merited. It is hereby allowed as prayed, with costs of the suit and the instant application being awarded to the defendant/applicant.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF OCTOBER, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Akatch for the defendant/applicant

Ms Mwangi h/b for Ms Musau for the plaintiff/respondent

Ms B. Wokabi - Court Assistant.

