



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL SUIT NO. 1 OF 2019

(CORAM: F.M. GIKONYO J.)

HARAF TRADERS LIMITED.....PLAINTIFF

VERSUS

NAROK COUNTY GOVERNMENT.....DEFENDANT

RULING

[1] 14th December, 2021, legal counsels herein intimated to the court, and it was recorded by consent, that the principal sum herein has been paid. The only issue for determination being; whether costs and interest on the principal sum are awardable and chargeable, respectively.

The Context

[2] The reliefs sought by the plaintiff in the plaint dated the 11th January 2019 are: -

- a) The principal sums of Kshs 16,062,870/=***
- b) Interest on (a) above from 13th May 2015 until payment in full.***
- c) Costs of the suit.***

d) Any other remedy that this honourable court may deem fit to award.

[3] In their defence filed on 14th February 2019, the defendant denied owing the plaintiff the amount claimed.

[4] The plaintiff filed an application on 22nd January 2019 seeking that a judgment on admission be entered against the defendant as prayed in the plaint. The defendant opposed it through a replying affidavit sworn on 28th February 2019 denying admission of the allegations in the plaint.

[5] On 5th August 2019 the defendant filed an amended statement of defence.

[6] When the matter came up in court on 25th July 2019, counsel for the plaintiff informed the court that the parties were in advanced stage of negotiating with a view of an out of court settlement.

[7] On 23rd January 2020, Mr. Ibrahim, counsel for the plaintiff indicated to this court that the parties had been able to reach some agreement. He sought a mention date to confirm the instalment payments. The matter was severally subsequently to confirm payment in full.

[8] On 26th April 2021, Mr. Ibrahim indicated to this court that the principal amount had been settled and what was left was the interest and costs.

[9] On 14th December, 2021 by consent of parties the court recorded that the principal sum had been paid and the outstanding issue for determination is costs and interest,

[10] Mr. Kere, counsel for the Defendant contested that they had agreed that each party to bear its own costs.

[11] In a rejoinder, Mr. Ibrahim stated that they had not agreed on costs and that vouchers were necessary for purposes of accounts.

[12] On 22nd July 2021, this court directed that it shall determine the issue of costs and interest. The plaintiff to file and serve submissions in 2 days upon service, defendant to file and serve submissions in 7 days thereof.

The plaintiff's submissions

[13] The plaintiff submitted that it is entitled to payment of interest on the sum claimed for the period it remained unpaid, to wit from certification on 13th May 2015 until payment on 21st May 2020. That payment certificates were contractually payable within a period of 14 days after issuance under clause 2.2 of the agreement. Article 60.10 of FIDIC 4 conditions provides that payment must be made within 28 days of the issuance of payment certificate. The plaintiff is agreeable to payment of interest either after 14 days of issuance of the payment certificate as provided under the agreement.

[14] The plaintiff is also agreeable to payment of interest at the court's rate of interest.

[15] That the defendant appointed LYNC AFRICA CONSULTANTS prepared a handover report dated 13th May 2015 wherein they certified that the works were 100% complete at 13th May 2015. After such certification the defendant was obligated to make payment to the plaintiff within a period of 14 days and thereafter the outstanding amount would attract interest at the rates of 15% until payment in full.

[16] That the agreement provided that the same would follow the FIDIC conditions of contract under clause 16.1 of the agreement. The FIDIC conditions of contract provides for payment of interest on the outstanding amount at the rate of 15% per annum

[17] The plaintiff submitted that it is entitled to payment of costs of this suit to compensate it for the amounts incurred in paying its advocates and filing the present suit.

[18] In conclusion the plaintiff prayed, Firstly, that it be awarded interest at the rate of 15% per annum from 13th May 2015 when the outstanding amount became due and payable until 21st May 2020 when the same was eventually paid by the defendant. Secondly it be awarded costs to compensate it for the amount spent in pursuing the outstanding amount that was rightly due and payable to the plaintiff but unjustly and without any colour of right withheld by the defendant.

The defendant's submissions

[19] The defendant urged that the plaintiff breached the contract in not completing it on time, by unilaterally extending performance of the contract without the consent of the defendant as had been agreed in the contract, and by doing substandard works in some sections of the roads. These breaches lead to a dispute which was almost referred to arbitration but parties later on agreed to settle the contract sum in full and final settlement of the case. The principal sum has been paid on this understanding. Counsel for the defendant therefore asks the court not to award the plaintiff any interest for it breached the contract or costs.

ANALYSIS AND DETERMINATION

[20] The specific issues for determination are;

i. Whether the plaintiff is entitled to costs of this suit?

ii. Whether the plaintiff is entitled to interest on the principal amount?

Law on Costs of the suit

[21] Section 27 of the Civil Procedure Act provides: -

27 (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 give all the necessary directions for the purposes aforesaid; and the fact that the court 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 direct.

[22] In *Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review application no 6 of 2014* court held as follows: -

"The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case."

[23] Trouble taken in prosecuting or defending the suit does not mean trouble in the dictionary meaning say suffering or woes or distress. It

refers to the various lawful and legitimate steps taken by the parties in the case in pursuit of remedy.

[24] Costs are at the discretion of the court, yet, follows the event. See the **Halsbury's Laws of England**; 4th Edition (Re-issue), {2010}, Vol.10. para 16

“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”(Emphasis added).

[25] See also writing by *Justice (Retired) Kuloba Judicial Hints on Civil Procedure, 2nd Edition, (Nairobi) Law Africa) 2011, page 94* that:

“Costs are {awarded at} the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise...”

[26] “*Good reasons*” that justifies departure from the general rule that ‘*costs follow the event*’ will vary from case to case. See the Supreme Court of Kenya in the case of ***Jasbir Singh Rai & Others vs Tarlochan Rai & Others {2014} eKLR*** observed that:

“in the classic common law style, the courts have to proceed on a case by case basis, to identify “good reasons” for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs.....”

[27] From the jurisprudence in this area of law, the exercise of discretion on costs depends on the facts of each case, and is guided by the principle that costs should follow the event unless the court orders otherwise. Such circumstances as are relevant include (i) the conduct of the parties, (ii) the subject of litigation, (iii) the circumstances which led to the institution of the proceedings, (iv) the events which eventually led to their termination,(v) the stage at which the proceedings were terminated, (vi) the manner in which they were terminated, (vii) the relationship between the parties and (viii) the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of the Constitution; (ix) public interest.

Applying the test

[28] This suit was initiated after works were completed but full payment was not forthcoming from the defendant. I am aware the defendant had paid half the contract sum. I am aware also that the defendant accuses the plaintiff of various breaches of the contract including shoddy work in some portions of the roads done, unilateral extension of performance of the contract. But, the incident of settlement of the principal sum is an event that entitles the plaintiff costs for it is a resolution of a dispute between the parties. Lawful steps taken were in pursuit of remedy. But, these matters will weigh heavy when I am considering the question of interest. Of importance is that the plaintiff and the defendant have agreed to compromise the case.

[29] As stated above in cases whereby the parties enter into a consent, the court does not go further to inquire the reasons for the consent or dig into the reasons why the plaintiff seeks to resolve the matter with the defendant, nor can an adverse inference be made against the plaintiff while determining costs. The only relevant issue is whether or not the plaintiff is entitled to costs given the event of the suit in light of lawful steps taken in pursuit of remedy.

[30] In the unique circumstances of this case, and despite the allegations of breach of contract on the part of the plaintiff, a balancing of the rights of these parties abound- and this will become clear when I deal with the question of interest achieved.

[31] Considering the entire chain of events from filing this suit up to the time the parties left the issue to the court to determine, the numerous court attendances cited above I find no reason to deny the plaintiff costs. In exercise of my discretion in order to meet the interests of justice for both parties, I award costs to the plaintiff.

Interest

[32] The plaintiff claims for interest purportedly on the terms of the contract herein. The defendant stated that was not the position. The defendant blamed the plaintiff of breach of contract but after negotiations they agreed to settle the matter in god faith. This really is the word of the plaintiff against the defendant's and vice versa. But, one thing is clear: parties settled the claim herein between themselves and in good faith. A consent ordinarily burry everything beneath it, and the court will not inquire into the reasons for settlement by parties. Except, it is desirable that parties should clearly spell out the terms of settlement to avoid disputes on the scope of the consent. In this case, parties seem to blame each other for breach; and it is safe to leave them at where I found them. Accordingly, I find no basis to order interest on the principal sum in such matter full of obscurities on interest; and the conduct of the parties which generally is not inspiring or seductive of equity into resolving the question of interest for one party and against the other. I decline to award interest on the principal sum in light of the amicable settlement of the claim between the parties.

Orders

[33] In the upshot, I make the following orders: -

i. That the principal sum is fully paid and settled between the parties herein following mutual settlement of the parties.

ii. I award costs to the plaintiff to be taxed or agreed.

iii. That no interest on the principal sum is to be paid by the defendant in view of the mutual settlement of the suit.

iv. Orders accordingly

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 14TH DAY OF FEBRUARY, 2022

.....

F. GIKONYO M.

JUDGE

In the presence of:

1. Ibrahim for Plaintiff

2. Kere for Defendant

3. Kasaso - CA