



**Aswa Developers & Contractors Limited v Spire Bank Limited  
(Formerly Equitorial Commercial Bank (Civil Case 278 of 2016)  
[2024] KEHC 14514 (KLR) (Commercial and Tax) (20 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14514 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 278 OF 2016  
JN MULWA, J  
NOVEMBER 20, 2024**

**BETWEEN**

**ASWA DEVELOPERS & CONTRACTORS LIMITED ..... PLAINTIFF**

**AND**

**SPIRE BANK LIMITED (FORMERLY EQUITORIAL COMMERCIAL  
BANK ..... DEFENDANT**

**RULING**

1. The Defendant filed a Notice of Motion dated 26<sup>th</sup> September 2023 seeking to be awarded costs of and incidental to this suit.
2. The application was supported by the grounds on the face of it and by the sworn affidavit of Kenneth Wilson who stated that the suit commenced vide a Plaint dated 11<sup>th</sup> July 2016 which was filed together with an application for an injunction. The Defendant's advocates filed a notice of appointment and subsequently represented the Defendant in the suit and the attendant applications.
3. The suit was subsequently settled vide a consent order issued on 19<sup>th</sup> July 2016. Additionally, the court ordered that that the suit be mentioned on 22<sup>nd</sup> July 2016. The parties neither agreed nor recorded a consent on the Defendants' costs as directed.
4. In response, the Plaintiff filed a replying affidavit dated 23<sup>rd</sup> October 2023 and contended that there was no proper suit brought against the Defendant noting that the Plaintiff never obtained and/or effected service of the summons to enter appearance, having failed to do so, within 30 days from filing the suit, the suit abated with the Defendant left with no legitimate cause of action to defend against.



5. In addition, the Defendants only filed their notice of appointment dated 14<sup>th</sup> July 2016 before the matter was settled. They did not file any response to the application and/or a defence to the Plaintiff's suit as such they did not defend or prosecute the suit to claim that costs follow the event when there was no winning or losing party.
6. The Defendant filed its submissions which the court has considered alongside the application and the Plaintiff's response. There is only one issue for determination, that is, whether the Defendant is entitled to costs of this suit.
7. As a matter of general principle, costs follow the event and a successful party will always have costs of his success unless the court has good reason to order otherwise. The same is the spirit of the statute under Section 27 of the *Civil Procedure Act* which reads 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 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.”
8. It is common ground that no costs were awarded to the Defendant following the recording of the consent dated 19<sup>th</sup> July 2016 as parties were to agree on costs and it seems they did not agree resulting in the present application.
9. It was the Plaintiff's contention that the Defendant is not entitled to costs since the Plaintiff failed to extract and serve summons in the circumstances there was no suit. Under Order 5 Rule 1(6) of the Civil Procedure Rules a suit abates where summons have not been collected for service within thirty (30) days of issue. In this case, the suit was instituted on 11<sup>th</sup> July 2016 and a consent order issued on 19<sup>th</sup> July 2016.
10. In any event the Defendant was fully aware of the existence of this suit and even instructed counsel to represent them. In *Tej Prakasha Shem v Petroafric Company Limited & 2 Others* 2014 eKLR, the Court held:

“In addition, Order 5 Rule (1) provides the function of summons as being to order the Defendant to appear within a specified time. In my view, where a Defendant gets notice of a suit against him through other means other than summons and participates in subsequent proceedings, there is no prejudice occasioned by the delay in the issue and service of summons that would warrant the dismissal of a suit”
11. It was the Defendant's case that the Plaintiff dragged the Defendant to court, caused it to instruct a firm of advocates to defend the instant suit and incur unnecessary expenses noting that litigation is indisputably expensive.
12. In contrast, the Plaintiff argued that the Defendants only filed their notice of appointment dated 14<sup>th</sup> July 2016 before the matter was settled. They did not file any response to the application and/or a defence to the Plaintiff's suit as such they did not defend or prosecute the suit to claim that costs follow the event when there was no winning or losing party.



13. By virtue of Section 27 of the *Civil Procedure Act*, it is trite that the issue of costs is a discretionary award to a successful party. However, in the instant case, the consent was recorded by the parties and in the said consent the issue of costs was not covered. It therefore follows that even where a consent has been recorded, the Court in considering whether or not to grant costs should be guided by the circumstances of each case.
14. Costs are at the discretion of the court, yet, follow 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.”
15. In addition, it is notable that there is no consent between the parties that costs shall not be paid to any of the parties or that each party shall bear own costs. The consent judgment clearly left the decision on costs to the parties. But they could not agree and so came back to court for a judicial decision on the matter.
16. In the absence of a consent stating that no costs are payable, this Court falls back to its discretion which, it has been said time and again should be exercised in accordance with established legal principles.
17. The Plaintiff herein instituted the suit against the Defendant vide a plaint dated 11<sup>th</sup> July 2016. The plaint was filed together with an application for an injunction dated 12<sup>th</sup> July 2016. Nevertheless, the same was served upon the Defendant who duly instructed its counsel to prepare to defend the suit and the attendant applications. Eventually, a consent was recorded in favour of the Defendant.
18. Consequently, looking at the nature of the consent filed herein and the circumstances of the case, the Defendant was the successful party and is entitled to costs. In exercising my discretion, I proceed to assess the costs at Kshs. 1,200,000.00.

Orders accordingly.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 20<sup>TH</sup> DAY OF NOVEMBER 2024.**

**P. MULWA**

**JUDGE**

In the presence of:

Ms. Wamuyu for plaintiff

Ms. Kinyua for defendant

Court Assistant: Carlos

