



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 64 OF 2018

DAVID KIPTUM KORIR.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK..... 1ST DEFENDANT

DENNIS KIRUI T/A SADDABRI AUCTIONEERS....2ND DEFENDANT

RULING

1. The current application regards costs of the suit and award thereof sought by the 1st defendant (**KENYA COMMERCIAL BANK**). The genesis of this matter is that the Plaintiff moved the court vide Plaintiff dated 22nd October, 2014 and concomitantly filed an application and supporting affidavit of even date.

2. The Plaintiff was the sole registered proprietor of the freehold interest comprised in parcel known as **L.R. NO. NGERIA/CHEPYAKWAI BLOCK 3(KINGWAL)/54 measuring 14.75 hectares** in which the 1st Defendant had an interest in the property as a charge, having advanced an overdraft facility of **Ksh. 500,000/=** through **account number 1102468274** in the name of the Plaintiff in or about the year 2000.

A condition set was that the plaintiff would surrender the original title for the suit property with the 1st Defendant. The Plaintiff complied with the condition and funds thereafter released.

3. The Plaintiff accepted the terms and conditions governing the loan offered and executed the facility but due to constant defaults and the outstanding arrears, the overdraft facility accrued interest. The 1st Defendant sought to realize the security thus accumulating in the current suit filed by the plaintiff.

4. The 1st Defendant instructed counsel who entered appearance and filed their statement of Defence on 18 February, 2015. The 1st Defendant further filed a Replying Affidavit to the application sworn on 9th March, 2015. Parties herein filed written submissions to the application dated 22nd October, 2014 and the court gave its ruling in favour of the Applicant on 28th June, 2017.

5. Subsequently the Plaintiff entered into negotiations with the 1st Defendant, with a view to settling the outstanding sum and eventually they entered into a consent and suit property successfully discharged in favour of the Plaintiff. The 1st Defendant sought costs of the suit, but the plaintiff contested and argued that he was the one entitled to costs hence the current application.

The thrust of this application is that the plaintiff and the 1st defendant by consent settled the dispute before court through payment of outstanding sum of Kshs.94000 by the plaintiff to the 1st defendant and the successful discharge of the suit property in favour of the plaintiff by the 1st Defendant.

6. The gist of the above settlement is that on or about the year 2000, the 1st defendant advanced an overdraft financial facility of Kshs.500,000 to the plaintiff with the plaintiff surrendering title deed on land number **NGERIA/CHEPYAKWAI BLOCK 3 (KINGWAL) 54** measuring 14.75 acres as security.

7. However, due to default and outstanding arrears by the plaintiff, the overdraft facility accrued interest upon which the 1st defendant sought to execute a statutory power of sale through the 2nd defendant at which stage the plaintiff brought the now settled suit. The 1st defendant argues that they are the successful party and are entitled to costs whilst the plaintiff on his part argues that he is the successful party thus

entitled to costs.

The application was canvassed by way of written submissions.

8. The applicant (1st defendant) submits that the court has jurisdiction to grant the orders sought by virtue of **Section 27 of the Civil Procedure Act**, saying it is trite law that the issue of costs is a discretionary award that is awarded to a successful party. To buttress this point, the applicant relies on the case of **Party of Independent Candidate of Kenya & another vs Mutula Kilonzo & 2 others (2013) eKLR** which cited with approval the words of Murray C J in **Levben Products vs Alexander Films (SA) (PTY) Ltd 1957 (4) SA 225 (SR)** at 227 that:

"It is clear from authorities that the fundamental principle underling the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion ...But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at...In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so."

9. In addition, the applicant contends that an out of court settlement amounts to conclusion of a case and therefore amounts to events contemplated under **Section 27 of the Civil Procedure Act**. The applicant relies on the case of **Morgan Air Cargo Limited vs Evrest Enterprises Limited (2014) eKLR** to cement this position.

10. It is the applicant's submissions that were it not but for the plaintiff's default, the settled suit would not have been filed and the 1st defendant would not have been forced to defend the suit in court. According to the 1st defendant, the plaintiff's failure to pay his debt to the 1st defendant was the catalyst that led to the suit before court. They rely on the case of **Cecilia Karuru Ngayu vs Bacrclays Bank of Kenya & another (2016) eKLR** to buttress the fact that they are entitled to costs for the troubled undertaken to defend the proceedings.

Based on the foregoing, the 1st defendant submits that the court grant it the orders sought.

11. The respondent on his part (plaintiff) argues that he is the one entitled to costs and not the 1st defendant on the basis that the conduct of the defendants from the beginning (which he terms as a misrepresentation of the facts) greatly inconvenienced him leaving him with no option but to seek court's intervention. He argues that the amount as displayed by the defendants in the statutory notice of sale differed from the amount he paid and that resulted in the settlement of the suit. He contends that he was left with no option but to contest the debt of Kshs. 4, 931,614.41 which has never been substantiated by the defendants. The plaintiff submits that this was done in bad faith because immediately he paid Kshs.94000 to the defendants, the defendants moved the court to have the matter marked as settled.

12. Additionally, the plaintiff submits that the defendants proceeded to issue a notification for sale of the suit property dated 8th October 2014 before issuing statutory notices as stipulated by law. That as a consequence, the equitable maxim of he who comes to court must do so with clean hands must be applied by court. He relies on the case of **Francis Munyoki Kilonzo & another vs Vincent Mutua Mutiso (2013) eKLR**.

13. The plaintiff invites court to take into account this conduct of the parties as one of the factors to be considered in determining costs as was held in **Cecilia Karuru Ngayu vs Bacrclays Bank of Kenya & another (2016) eKLR**. He maintains that the defendant is not the successful party.

And that termination of the suit by the defendants as a result of settlement by the parties, cannot be considered as being successful but rather, is a demonstration that but for the conduct of the defendant's action, the suit would not have been brought. Based on the foregoing, the plaintiff prays for costs in his favour against the defendants.

Analysis and Determination

14. The main issue for determination regards who shall bear the costs of the suit. The 1st defendant relies on **Section 27 of the Civil Procedure Act** which is instructive and therefore necessary to reproduce hereunder.

15. Section 27 provides: -

" (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."

A careful reading of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by **Sir Dinshah Fardunji Mulla in his book The Code of Civil Procedure, 18th Edition, 2011 reprint 2012** at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise.

16. Additionally, the provision provides for 'costs of and incidental to all suit' which expression includes not only costs of suit but also costs of application in suit as described by *Mulla (supra)* at 536. Furthermore, Rtd. Justice Richard Kuloba in his book **Judicial Hints on Civil Procedure, 2nd Edition, 2005 at 95** notes that the words 'the event' means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under section 27 remains at the discretion of the court.

17. In **Republic v. Rosemary Wairimu Munene (Ex parte Applicant) v. Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review Application No. 6 of 2004** Mativo J. held that the issue of costs is the discretion of the Court and is used to compensate the successful party for the trouble taken in prosecuting or defending the case and not to penalize the losing party. This position was adopted by the court in *Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & Another [2016] eKLR* which has been cited with approval by both parties in their submissions.

18. The import is that a successful party is entitled to costs unless he or she is guilty of any misconduct or there exists some other good reasons and or cause for not awarding costs to the successful party.

19. In *Reid, Hewitt & Co v Joseph, AIR 1918 Cal 717 and Myres v Defries (1880) 5 Ex D 180*, the house of Lords noted that: -

“The expression ‘costs shall follow the event’ means that the party, who, on the whole, succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.”

The drift therefore is that it is not on every issue that success will bring a right to the costs. As Kuloba notes in *Judicial Hints (supra)*, in case of total success, the successful party may be deprived of the costs of a separate issue on which he was unsuccessful.

20. 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 Evrest 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.”

21. 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” (Emphasis added).

22. Any departure from this trite law can only be for good reasons which the Supreme Court in *Jasbir Singh Rai & Others vs Tarlochan Rai & Others [2014] eKLR* noted includes public interest litigation since in such a case, the litigant is pursuing public interest as opposed to personal gain.

23. The court must therefore ask itself what factors should be taken into consideration when determining the costs of suit. This issue was addressed by the learned judge in *Morgan Air Cargo Limited v Evrest Enterprises Limited (Supra)* to include:

- 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.

24. Noteworthy, the list is not exhaustive. In other words, the court must be guided not only by the conduct of the parties in the actual

litigation, but also other matters including likely consequences of the order for costs.

25. In the present case, the plaintiff contends that were it not but for the defendants' action of putting up for sale the suit property, the suit would not have been filed. The defendant on its part also submitted that were it not for the plaintiff action of defaulting in payment of his obligations, then the defendants would not incur costs in defending the proceedings.

26. It is therefore necessary to look at the factors highlighted in *Morgan Air Cargo Ltd (supra)* as applicable to our case. In particular, I will focus on the conduct of the parties, the subject of litigation, the circumstances that led to the termination of the proceedings and the manner in which they were terminated.

27. In the present circumstances, there is no doubt that the plaintiff had obligation to the 1st defendant by virtue of financial overdraft facility extended to him. Their relationship was one of debtor and creditor. What was in dispute is the amount of money owed by the Plaintiff. In its notification for sale of the suit property dated the 19th of August 2014, the amount indicated as due was **Kshs. 4, 931, 619.41**. However, the settlement of the current suit was upon payment of Kshs. **94,000** by the plaintiff. This in my opinion, begs the question what transpired that the amount of Kshs. **4,931,619** suddenly reduced to Kshs. **94000**?

28. Though valid, the above question should not inform the outcome of this application in my opinion considering that parties settled this matter by consent.

I am guided by the decision of the learned judge which was also cited by the 1st defendant in *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another (supra)* which cited with approval the *Supreme Court of Uganda in Impresa Ing Fortunato Federice vs Nabwire* which held: -

“it is trite law that where a judgement is given on the basis of consent of parties, a court may not inquire into what motivated the parties to consent or to admit liability.”

29. Moreover, there is no doubt in my mind that the suit before court was precipitated by the default and failure of the plaintiff to discharge his financial obligations upon which the 1st defendant sought to enforce the statutory power of sale as a means of recovering the debt owed to it and which was paid by the plaintiff resulting in the settling of this matter.

30. As such, the settlement of a matter whether by consent or otherwise, is not a bar to costs. In addition, settlement of a case by consent does not necessarily mean there is no successful party. I stand guided by the decision of the learned judge in *Morgan Air Cargo Limited v Evrest Enterprises Limited (supra)* where the court held: -

“But it does not necessarily mean that, where parties have entered into consent to settle a proceeding, no costs should be awarded, or there is no successful party in the matter.

The incidence of settlement by consent of the parties, to my mind, is just but a vital factor the court should consider, within the circumstances of each case, in deciding whether costs are payable or not. A consent recorded in settlement of a proceeding is not an automatic disentitlement of costs and I, would, therefore, hesitate profoundly to make any generalized propositions on the law that consent is an automatic disentitlement of costs without reference to the context of the particular case.”

31. From the foregoing there does not appear to be any misconduct or behaviour that would warrant a departure from granting costs to the defendants. After all, mere opinion of the court that a successful party had not behaved well, as Kuloba rightly notes in *Judicial Hints at pg 99*, is not by itself sufficient to justify a court in depriving a party of his/her cost. Notably, it is clear that a successful defendant, who after all is brought into court against his/her will, can only be deprived of his/her costs when it is shown that his conduct, either prior to or during the course of the suit has led to litigation which, but for his own conduct might have been averted. There is room to infer that the conduct of the applicant in demanding such astronomical figures, gave the plaintiff cold feet, and he sought protection my filing.

32. Premised on the case of *Rufus Njuguna Miringu & Another vs Martha Muriithi & 2 Others (2012) eKLR* particularly on the interpretation of the proviso to **Section 27(1) of the Civil Procedure Act**, that the material event referred to in the provision is the result of the proceedings, and it is the successful party in this result who is normally awarded costs. However, where parties have settled the matter by consent, the consent cannot be interpreted to mean that on or the other party has succeeded in a suit. The successful determination of the dispute is attributable to both parties. The issue of a party's conduct, affecting the award of costs, does not arise when parties have entered consent as they are deemed to have accepted their respective conduct prior to the consent. The court also noted that the Defendants' conduct would in the circumstances only be material if the plaintiffs are seeking to set aside the consent order. The court found that in the circumstances, it was only just for the parties to bear their own costs of the proceedings.

33. Likewise I am of the view that each party contributed, by their conduct to the filing of this suit, and in that case I order that each party shall bear its cost.

DELIVERED, SIGNED AND DATED THIS 10TH DAY OF MARCH 2021 VIRTUALLY.

H. A. OMONDI

JUDGE