



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 60 OF 2020

REUBEN KINYUA M'IKAMATI.....APPELLANT

VERSUS

SOLUTION SACCO SOCIETY.....1ST RESPONDENT

VIEWLINE AUCTIONEERS.....2ND RESPONDENT

KAIRIRA MONORU.....3RD RESPONDENT

RULING

1. The Appellant filed a Memorandum of Appeal dated 29th July 2020 seeking to challenge the trial Court's Ruling in CMCC No. 28 of 2020, which Ruling had the effect of dismissing his application for reasons that his supporting affidavit was defective, having been sworn at Nairobi but commissioned in Meru. About one month later, the Appellant filed a Notice of Withdrawal of Appeal dated 27th August 2020. He expected that following this filing, the lower Court file would be returned to the trial Court for the matter to proceed but this was not done. This prompted him to file an application seeking to have the Appeal marked as withdrawn and to have the lower Court file be forwarded to the trial Court in Maua. On 22nd February 2021, the Court gave orders that the lower Court file be taken back to the trial Court at Maua and the appeal was withdrawn. Parties were however not able to agree on the issue of costs. This Ruling is therefore on the issue of costs.

2. It is trite that costs follow the event. The matter of costs is also one for which the Court is enjoined to exercise discretion. The rationale behind payment of costs is to compensate the winning party for the expenses incurred in prosecuting and/or defending his case it being that he was inconvenienced due to the actions and/or inactions of the losing party.

3. The provision of law regarding the matter of costs are found in Section 27 of the Civil Procedure Act, CAP 21 Laws of Kenya as follows: -

27. Costs

(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.

4. In the case where a party withdraws his suit before it has gone for hearing, costs are still awardable. This was confirmed by the Court in the case of *Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another Civil Case No. 17 of 2014 [2016] eKLR* where Mativo J held as follows: -

“In my view section 27 of the Civil Procedure Act provides the general rule which ought to be followed unless for good reason to be recorded. The said section in my view does not make distinctions between determinations made by consent or on courts own determination or withdrawals. This position is well stipulated by Richard Kuloba in the above cited book where he observed that:-

“the fact that the unsuccessful party did not contest the case is not in itself a ground for refusal of costs but it is a factor that can be taken into account if other good reason exists”(Emphasis added).”

5. The Court further held as follows: -

“To my mind, in determining the issue of costs, the court is entitled to look at inter alia:-

- (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.***

In other words the court may not only consider the conduct of the party in the actual litigation, but the matters which led to the litigation, the eventual termination thereof and the likely consequences of the order for costs.”

6. To this Court’s mind, the principles espoused in Section 27 (1) of the Civil Procedure Act cut across all circumstances and it matters not whether the matter was heard to finality or it was withdrawn before going for hearing as was the case in the present matter. Despite not having gone for hearing, the Respondent reasonably took active steps to instruct their Advocates to defend the Appeal and they most definitely went through the trouble of engaging such Advocate appropriately. This Court has established that indeed, the 1st and 2nd Respondents instructed Advocates, namely M/S Mithega & Kariuki Advocates to represent them in this Appeal, as evinced by the Notice of Appointment of Advocates dated 4th September 2020. The court file also confirms that the said Advocates wrote some correspondence to the Deputy Registrar seeking information on the status of the Appeal. See the letter dated 16th September 2020.

7. The subject matter of the litigation involves default in payment of loan, leading to repossession of a motor vehicle. The main suit is however still pending at the trial Court. It is not clear what reasons informed the decision to withdraw the Appeal. This Court is mindful of the need to discourage parties from filing frivolous matters in view of the overriding objectives of the Civil Procedure Act, key among them being the need to utilize judicial time and resources effectively and efficiently.

8. Indeed, the Respondent took active steps in this matter notwithstanding the fact that it did not proceed to hearing. Furthermore, the real issue in dispute being one on financial facility is one which is very much alive with real economic interest. This Court finds that it is only fair and just that the Respondents are recompensed for the reasonable expenses they incurred in the Appeal, however minimal.

ORDERS

9. In the end this Court makes the following orders: -

i) The Respondent is entitled to costs of the Appeal.

ii) The Appellant will pay the Respondent costs of the Appeal at a figure to be drawn as per scale under the Advocates Remuneration Order.

Order accordingly.

DATED AND DELIVERED ON THIS 10TH DAY OF JUNE, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Mutembei & Kimathi Advocates for the Appellant

M/S Mithega & Kariuki Advocates for the 1st and 2nd Respondents.