



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO. 11 OF 2018

BESTLADY COSMETICS SHOP LIMITED.....PLAINTIFF/APPLICANT

VERSUS

KENYA AFRICAN NATIONAL UNION (KANU).....1ST DEFENDANT/RESPONDENT

TITUS KOCEYO T/A KOCEYO & COMPANY ADVOCATES....2ND DEFENDANT/RESPONDENT

KIPKENDA & COMPANY ADVOCATES.....THIRD PARTY/RESPONDENT

RULING

Brief facts

1. The applicant has brought an application dated 3rd May 2021 under **Order 2 Rule 15, 51 Rule 1 and 3 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act** seeking to stay the taxation of the 2nd respondent's bill of costs dated 15th April 2021 pending the hearing and determination of the instant application and to strike out the 2nd respondent's bill of costs in its entirety against the applicant.

The Applicant's case

2. The applicant instituted this case vide a plaint dated 28th May 2018 as against the 1st and 2nd respondents arising out of a professional negligent act committed by the 2nd respondent while acting under the instructions of the respondent.

3. The applicant incurred losses to which it sought judgment against the defendants jointly and severally. During the pendency of the suit, the 2nd defendant enjoined the 3rd party seeking indemnity against the applicant's claim. Subsequently, the claim was settled vide a consent adopted by the court on 20th January 2021 as between the 1st defendant and the applicant.

4. The third party raised an issue of their costs and the court gave directions that the 2nd defendant and the 3rd party deliberate on costs failure to which the 3rd party was at liberty to file a bill of costs. The applicant thus contends that since it won this case, it cannot be condemned to pay costs to the 2nd respondent and therefore the 2nd respondent's bill of costs against the applicant ought to be struck out.

5. The 1st respondent is not opposed to the application and prays that the matter can be settled so that they determine the issue of costs.

The 2nd Respondent's Case

6. The 2nd respondent states that the issue of costs was not concluded. They add that they filed their bill of costs dated 15th April 2021 as they were under the impression that they had been awarded costs. As such, the 2nd respondent prays that their bill of costs is not struck out.

The 3rd Party's Case

7. The 3rd party states that they filed their bill of costs dated 30th March 2021 upon the instruction of the court. They add that the said bill of costs has not been opposed. The 3rd party further contends that the 2nd respondent filed a bill of costs but they were not awarded any costs thus they are in contravention of the court's directions.

Issues for determination

8. After careful analysis, we humbly submit that the main issue for determination is:

a) Whether the 2nd respondent is entitled to costs.

The Law

Whether the 2nd respondent is entitled to costs.

9. The discretion of the court to grant or withhold costs is enshrined in **Section 27(1) of the Civil Procedure Act** which provides:-

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 who 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.

10. In the case of **Party Independent Candidates of Kenya vs Mutula Kilonzo & 2 Others HC EP No. 6 of 2013**, the High Court said the following on the issue of costs:-

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

11. Similarly in the case of **Jasbir Singh Rai & Others vs Tarlocham Rai & Others [2002] eKLR** the court observed that:-

“It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting the suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior to, during and subsequent to the actual process of litigation.”

12. The question then begs as to what constitutes “the event”. According to Black’s Law Dictionary, the word event has been described to mean “in reference to judicial and quasi-judicial proceedings, the event means that conclusion, end or final outcome or result of a litigation; as, in the phrase “abide the event” speaking of costs or of an agreement that one suit shall be governed by the determination in another. An event is that which follows from the cause, and is called an event because it eventuates from causes. A new matter always produces various events. **Elite Intellogent Traffic System Ltd vs HFC Limited; Hassan Zubeid & 2 Others (Interested Parties) [2019] eKLR.**

13. In the same vein, **Hon Justice Kuloba (Rtd)** in the text on **Judicial Hints on Civil Procedure, 2nd edition at page 99** states that:-

“That words “the event” mean the result of all the proceedings to the litigation. The event is the result of entire litigation. It is clear however, that the word “event” is to be regarded as a collective noun and is to be read distinctively so that in fact it may mean the “events” of separate issues in action. Thus the expression “the 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 that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it. An issue in this sense need not go to the whole cause of action, but includes any issue which has a direct and definite event in defeating the claim to judgment in whole or in part.”

14. Based on the legal principles above and the facts in this case, the dispute herein involved the applicant and the 1st and 2nd respondent. The matter was determined by a consent order between the 1st respondent and the applicant. Therefore, the successful party in this case is the applicant. In that regard, the 2nd respondent is precluded from lodging a bill of costs against the plaintiff. In the same breadth, the 2nd respondent is the party that enjoined the 3rd party seeking indemnity to the applicant’s claim. Therefore the 3rd party is entitled to costs from the 2nd respondent because the 2nd respondent is the party that dragged them to court and not the plaintiff.

Conclusion

15. I am in agreement that the plaintiff/applicant being the successful party should not be condemned to pay the costs of the 2nd defendant or any other party. The consent judgement recorded on 28/01/2021 was against the defendants jointly and there was no order in the said

consent on costs. The 2nd defendant has no basis of claiming costs from the plaintiff.

16. As for the 3rd party, it is the 2nd defendant who applied to join the 3rd party in an application dated 30th January 2020. The orders were obtained on 31/01/2020 before the then presiding judge Ngaah, J. Following the said orders the 3rd party entered appearance through Kipkenda & Company Advocates and later filed defence through its advocates T.K. Ruto & Company. A Notice of Change of Advocates was filed by T.K Ruto & Company thus removing Kipkenda & Company from the record as advocates for the 3rd party. Thereafter, the parties entered into negotiations and settled the matter by consent.

17. Having acknowledged that the 3rd party entered appearance and filed a defence, and that the said party instructed a firm of advocates to act for them who did carry out some work under the said instructions. As such the 3rd party is entitled to costs.

18. It is my considered view that the 2nd defendant having joined the 3rd party ought to meet the costs incurred in respect of this case before it was settled, and I so find.

19. In that regard, I hereby make the following orders:-

a) That the 2nd defendant is not entitled to costs and its Bill of costs dated 15th April 2021 against the plaintiff is hereby struck out.

b) That the 3rd party is at liberty to file a bill of costs against the 2nd defendant to be taxed by the Deputy Registrar.

20. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 15th DAY OF JULY, 2021.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 15th day of July, 2021.