



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

HCCC NO. 67 OF 2018

ZAINAB AYUB MOHAMMED.....1ST PLAINTIFF/RESPONDENT

KASIM SHABAN KOMBO.....2ND PLAINTIFF/RESPONDENT

VERSUS

RAFIKI MICROFINANCE BANK LTD.....DEFENDANT/APPLICANT

RULING

What is pending before the court is an application filed on 4th November 2019. The applicant seeks the following orders;

1. Spent

2. THAT the Honourable court be pleased to set aside its ex parte orders made on 23rd October 2019 marking the matter as settled and awarding costs to the plaintiffs/Respondents.

3. THAT this Honourable Court be pleased to issue stay of execution of the orders made on 23rd October 2019 pending the hearing and determination of this application.

4. THAT this Honourable Court be pleased to order that the matter be mentioned again before the judge for purposes of getting direction.

5. THAT in the alternative this Honourable Court be pleased to order that each party bear their own costs in the matter.

6. THAT costs of this Application be provided for.

The application is based on the grounds that the firm of Mulondo & co Advocates received instructions from the defendant/applicant to represent it in the matter. Before the matter proceeded the parties attempted out of court negotiations with a view of settling the matter but the negotiations did not bear fruits in totality. On 23rd October 2019 the matter came up for confirmation of settlement.

The applicant's advocate instructed an advocate to attend on her behalf but the advocate instructed another advocate who failed to attend court. In the circumstances there was no representation. The court proceeded to make ex parte orders in the matter marking the matter as settled and awarding costs of the suit to the respondents. The orders made were erroneous and it was not proper for the matter to be marked as settled whereas only one party

was present in court. Non-attendance on the part of the applicant was inadvertent.

The applicant is ready to comply with any conditions that the court will attach to granting the orders sought in the application therein.

APPLICANT'S CASE

The applicant has not filed submissions in the matter. Parties were to file submissions as per the proceedings of 25th May 2021.

The application is supported by an affidavit sworn by the applicant's advocate. She deponed that before the matter proceeded parties engaged in negotiations with an aim of settling the same out of court. Owing to mutual negotiations the subject loan was restructured but the

respondent's advocates insisted that they should be paid costs.

The applicants have attended court on a number of occasions resting with the attendance of August 1st 2019 during which date the parties were allowed to continue with negotiations and return on 23rd October 2019 to confirm whether settlement would have been reached. They were unable to agree on costs.

Being away in Nairobi the applicant's advocate instructed an advocate to hold brief on her behalf but being busy he instructed another advocate who failed to attend court. She annexed the emails written as CO2 and CO3 that evidenced that she sent the emails instructing Kwame Rama.

There was no representation of the applicant in court on the said date. The court proceeded to make ex parte orders. The said orders are adverse to the applicant as there was no proper basis laid to award costs to the respondents.

During the negotiations the parties had not reached a consensus on the issue of costs as the loan was restructured on account of mutual agreement and in favour of the respondents. It was not proper for the matter to be marked as settled whereas only one party was present.

The applicant reiterated that the non-attendance was inadvertent and had there been an appearance on behalf of the applicant the court would have arrived at a different finding *moreso* on the issue of costs.

The applicant is willing to abide by any conditions the court will attach to granting the orders.

Unless the orders are granted, there is a real likelihood that the respondent

will prepare and serve an exaggerated bill of costs against the applicant thereby causing it great prejudice and unnecessary costs.

It is in the interests of justice that the orders sought herein are granted.

RESPONDENT'S CASE

The respondent filed a replying affidavit on 19th November 2019.

The respondent depones that the application is incompetent as all the provisions it is brought under do not relate to setting aside party and party costs.

The gist of the suit is that the defendant had not fully disbursed the loan sums to the plaintiff. While the suit was pending the defendant disbursed the money to the plaintiffs under a restructured plan. The acts of the defendant compromised the suit and was an admission of the plaintiffs claim. Costs follow the event under *Section 27* of the *Civil Procedure Act* and the court could only, given the circumstances, award costs to the plaintiffs.

The defendant cannot be heard to claim that each party should bear its own costs as in any event even during the ruling on the interlocutory injunction motion the plaintiffs had been awarded costs which order the defendant has not challenged.

The decision to award costs was made under *Section 27* of the *Civil Procedure Act* and the only remedy of the defendant is to file an appeal against it. *Section 67(1)* of the *Civil Procedure Act* recognizes that an appeal arises from an original decree/order ex parte as was the case herein.

The absence of the defendant does not change the entitlement of an award of party and party costs to the plaintiffs. The plaintiffs have already filed the party and party bill of costs rendering this motion to be superfluous. The application is devoid of merit and should be dismissed with costs.

ISSUES FOR DETERMINATION

1. Whether the application is incompetent
2. Whether the order should be set aside

WHETHER THE APPLICATION IS INCOMPETENT

The application is brought under *Order 10 Rule 11*, *Order 12 Rule 7* of the *Civil Procedure Code*.

Order 10 Rule 11 provides;

Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.

Order 12 Rule 7 provides;

Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.

These provisions are not specific to party and party costs but they apply as there are orders that were issued and the applicant seeks to have them set aside. The fact that they don't refer to party and party costs in particular does not render the application incompetent.

WHETHER THE ORDERS SHOULD BE SET ASIDE

Order 51 Rule 15 of the Civil Procedure Rules provides: -

The court may set aside an order made ex parte

In the case of *Wachira Karani vs Bildad Wachira (2016) eKLR* in allowing an application to set aside an *ex parte* judgment the court held that:-

The rationale for this rule lies largely on the premise that an *ex parte* judgment is not a judgment on the merits and where the interests of justice are such that the defaulting party with sound reasons should be heard then that party should indeed be given a hearing.

The applicant has given an explanation of the reason why there was no representation on their part. There is evidence that she instructed an advocate to hold her brief and the matter was to be marked as settled with no orders as to costs. The same is annexed as CO-2. The instructed advocate has also sworn an affidavit confirming the series of events.

However, the parties seem to not have agreed on the issue of costs therefore had the applicants appeared in court it would have been left to the court to decide. The applicant has not given any compelling reasons as to why discretion to give no order as to costs should be exercised in its favour.

Section 27 of the Civil Procedure Code provides that costs follow the event. In the case of *Orix (K) Limited vs Paul Kabeu & 2 others (2014) eKLR* it was held *inter alia*: -

“..... the court should have been guided by the law that costs follow the event, and the plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied costs or the successful issue was not attracting costs. None of the deviant factors are present in this case and the court would still have awarded costs to the plaintiff, which I do.”

According to **Richard Kuloba, Judicial Hints on Civil Procedure, 2nd Edition, page 99**, with regards to costs, it is stated;

“The words “the event” mean the result of all the proceedings to the litigation. The event is the result of the 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 an 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 judgement in the whole or in part”

The defendants' actions amount to an admission of the plaintiff's claim therefore it is evident that the plaintiff is the successful party in this suit.

In the premises I find that the plaintiff is entitled to costs and therefore the application fails in its entirety with costs to the respondent.

S.M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 12th day of July, 2021.

In the presence of:-

Mr. Mugambi for the Plaintiff

Firm of Mulondo is for defendant (absent)

Ms Gladys - Court assistant