



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL SUIT NO. 24 OF 2013**

**UAP INSURANCE COMPANY.....PLAINTIFF**

**VERSUS**

**TOIYOI INVESTMENT LIMITED.....DEFENDANT**

**RULING**

1. By an application dated 17/10/2019, the defendant/applicant (**TOIYOI INVESTMENT LIMITED**) prays for orders:

a) That the plaint by **UAP INSURANCE COMPANY** (the plaintiff/Respondent) dated 2<sup>nd</sup> October, 2013 be struck out as it discloses no reasonable cause of action in law, it is scandalous, frivolous, vexatious and is otherwise an abuse of court process with costs of the suit to the applicant.

b) That the Respondent be compelled to pay the cost of the suit.

2. When the matter came up for inter parties hearing, the Respondent conceded the application but prays that each party bears its own costs.

3. The applicant opposes the said application on the grounds that this is a 2013 matter which has been in court for a very long time where the applicant has been exposed to costs and that a successful litigant should be awarded costs after a long period of litigation.

4. The plaintiff refers to Section 27 of the Civil Procedure Act which provides for costs, and further relied on the Court of Appeal decision in **Robic Limited & another versus Kobil Petroleum Limited & another (2018)eKLR** where the court took note of the provisions of Section 27 to the effect that an award of costs is purely discretionary and proceeded to state the guiding principle in awarding costs.

5. It is contended that there is no dispute that the institution of this suit was occasioned by the fact that the defendant had issued a winding up notice against the plaintiff. The defendant refused to withdraw the said winding up notice despite being fully aware that the plaintiff was able to pay the sums owed to the defendant.

6. That even after the institution of this suit, the parties were in constant negotiations while also prosecuting appeals that touch on the subject matter.

7. The plaintiff effected payment of monies owed to the defendant after exhausting all his avenues. It is therefore in bad faith for the defendant after having been paid the monies owed to again asked to be paid the costs of the suit.

8. The defendant/applicant submits that as a result of the respondent's transgression, it has incurred immense expenses during the pendency of this suit and they are therefore entitled to costs.

9. The defendant relies on the case of **Party of Independent Candidate of Kenya vs Mutula Kilo**

10. **zo & 2 others** where the court held that:

***“...it's clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs in a 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 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.”***

11. The Civil Procedure Act gives this court discretionary powers to order payment of costs where it deems fit to do so. The applicant has demonstrated reasonable costs that it deserves costs of the suit herein.

12. The applicant maintains that it is entitled to costs of this application as well as the suit to compensate for the trouble it taken in defending the suit. The applicant is a successful party for having forced the respondent to honor the undertaking to clear the debt owing to the applicant in full.

13. That the respondent is the one who dragged the applicant to court and the applicant acted reasonably under the circumstances and in accordance with the law by filing the statement of defence and counter claim and other further applications in this suit.

14. The defendant has also spent considerable time and money in both legal fees and court filing fees and that it will only be just and fair for the respondent to compensate.

#### Issues for determination

15. The main issue for determination is whether the defendant/applicant is entitled to costs. Awarding costs is a matter of the discretion of the Court. It is not a matter of course. The exercise of the discretion, however, depends on the circumstances of each case.

16. 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. **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.

17. Circumstances differ from case to case. With regard to the circumstances of this case, the work of **Kuloba (J)** in **Judicial Hints of Civil Procedure** that;

**“Furthermore a successful party cannot be deprived of his costs merely because the suit proceeded ex parte or uncontested. This is to say, 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.**

**The giving or absence of notice to sue, before a suit is instituted is a relevant consideration in awarding costs. This is a circumstance in which quite apart from misconduct, costs can be refused to a successful party.**

18. The Court should, therefore, look at the event within the circumstances of the case. And that exercise will inform the exercise of discretion by the Court. It should also be understood well; that a successful party does not refer to a person who has been taken through rigorous and convoluted motions of litigation by the other party.

19. Similarly, a party does not cease to be a successful party merely because he met little or no contest in his claim against the Defendant. He is a successful party because he is declared so by the Court after looking at the result of the entire litigation, which includes; negotiations or steps which culminates to, and the recording of a consent thereto, conduct of the Plaintiff etc.

20. There is also no attrition of any conduct which would prevent the Plaintiff from being awarded costs. In **ORIX OIL (KENYA) LIMITED v PAUL KABEU & 2 OTHER [2014] eKLR** the court stated:

**‘...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 the costs or the successful issue was not attracting costs. None of those deviant factors are present in this case and the court would still have awarded costs to the Plaintiff, which I do.**

21. Section 27 of the Civil Procedure Act, Chapter 21 Laws of Kenya, which provides as follows with regard to 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 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.**

22. The court in the case of **Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR**, Mativo J while deciding on whether or not to award costs to a party; stated as hereunder.

**“...I find useful guidance in the following passage from the Halsbury’s Laws of England;**

**“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”.*

23. Mr. Justice (Retired) Kuloba while writing on the same issue **stated that:**

*“Costs are {awarded at} the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise...”*

24. In the *Party of Independent Candidate of Kenya vs Mutula Kilonzo & 2 others*, where the court citing two leading decisions on the subject held *inter alia* that:-

*“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 on which a reasonable man could 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.”*

25. However, the only consideration is the “event” as was held in the Supreme Court of Uganda in *Impressaing Fortunato Federice vs Nabwire* where the court stated:-

*“The effect of section 27 of the Civil Procedure Act is that the Judge or court dealing with the issue of costs in any suit, action, cause or matter has absolute discretion to determine by whom and to what extent such costs are to be paid; of course like all judicial discretions, the discretion on costs must be exercised judiciously and how a court or judge exercises such discretion depends on the facts of each case. If there were mathematical formula, it would no longer be discretion... while it is true that ordinarily, costs should follow the event unless for some good reason the court orders otherwise, the principles to be applied are- (i) under Section 27 (1) of the Civil Procedure Act, costs should follow the event unless the court orders otherwise. This provision gives the judge discretion in awarding costs but that discretion has to be exercised judicially. (ii), A successful party can be denied costs if it is proved that but for his conduct the action would not have been brought... It is trite law that where 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.....”*

26. The history of this matter speaks for itself, it has a life that evolved and devolved with a multiplicity of applications, many apparent side shows, that at times had a hue of vexation. Taking into account all these. I am persuaded that the applicant in this matter is entitled to be awarded costs of the suit not only because the applicant was the successful party; the ‘event’ in this matter being in the favour but also one who has had to undergo expenses whether monetary or in terms of time and energy in defending the suit, and accompanying applications over the years. I have no hesitation in awarding costs to the defendant/applicant.

**Delivered and dated this 18<sup>th</sup> day of February 2020 at Eldoret**

**H. A. OMONDI**

**JUDGE**