



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL CASE NO. E039 OF 2020**

**BETWEEN**

**WINFRED WANJIKU NGUMI.....PLAINTIFF**

**AND**

**NJAMA WAMBUGU.....DEFENDANT**

**RULING**

**Background**

1. The plaintiff filed this suit against the defendant on 17<sup>th</sup> February 2020 seeking to enforce a Term Sheet Agreement between the parties dated 20<sup>th</sup> January 2018 in which the defendant contracted to sell and transfer all his 43,302 ordinary shares and 1,560,000 redeemable preference shares held in the Space and Style Limited to the plaintiff for cash consideration and other non-cash consideration as stipulated in the Term Sheet, subject to a valuation of the Company. In the suit the plaintiff sought orders of specific performance of the Time Sheet Agreement, a mandatory injunction compelling the defendant to transfer the shares in the Company and a mandatory injunction compelling him to execute all the necessary agreements between the parties and costs.
2. The defendant did not file a statement of defence but filed a Notice of Admission of Case under **Order 12 rule 1** of the **Civil Procedure Rules, 2010** (“the **Rules**”). The plaintiff then filed a Notice of Motion dated 23<sup>rd</sup> April 2020 under **Order 12 rule 1** and **2** of the **Rules** seeking judgment on admission based on the Notice of Admission the defendant had filed.
3. The plaintiff took the position that the defendant could not apply for judgment against himself, she therefore filed a Notice of Motion dated 21<sup>st</sup> May 2020 under **Order 12 rule 1** and **2** of the **Rules** seeking judgment on admission on its own terms as prayed in the plaint.
4. When the matter came up before me for directions on 22<sup>nd</sup> May 2020, I informed the parties that there was no argument to be made in light of the clear admission by the defendant to the prayers in the plaint and therefore the court on its own motion would enter judgment. I therefore entered judgment on admission in terms of prayer (a), (b) and (c) of the plaint dated 13<sup>th</sup> February 2020. Since the parties were not agreed on costs, they reserved the matter for this court’s decision. It is to this issue I now turn.

**Section 27 of the Civil Procedure Rules**

5. The parties agreed to canvass the application by way of written submissions. They are agreed that the controlling provision in resolving the issue of costs is **section 27** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which states as follows:

*27(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 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.*

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

### **Plaintiff's Case**

6. The plaintiff submitted that it was entitled to costs as the defendant had admitted the terms of her claim entirely despite having vigorously disputed it leading her to suffer expense and hardship in filing the suit in order to ensure that the terms of the agreement were executed. The plaintiff further submitted under **section 27** aforesaid, while the award of costs incidental to the suit are a discretion of the court, the general rule is that costs shall follow the event unless there is a good reason for ordering otherwise.

7. Counsel for the plaintiff argued that since the defendant admitted the plaintiff's case, costs should be awarded unless there is a good reason. Counsel cited the case of **Masaai Kenya Limited v Hardware & Steel Centre Limited and Another ML HCCC No. 273 of 2012 [2014] eKLR** where the learned judge awarded costs following judgment on admission.

### **Defendant's Case**

8. The defendant took the position that the purpose of costs was not to penalize the losing party but to compensate the successful party for the trouble it has taken to prosecute the suit. Counsel cited the case of **Jasbir Singh Rai and 3 Others v Tarlochan Singh Rai and 4 Others SCK Petition No. 4 of 2012 [2014] eKLR** where the Supreme Court observed that:

*So the basic rule on attribution of costs is: costs follow the event. But it is well recognised that this principle is not to be used to penalize the losing party; rather, it is compensating the successful party for the trouble taken in prosecuting the suit.*

9. The defendant submitted that in making the determination on costs, the court ought to examine the special circumstances of this case. Counsel urged the court to consider that judgment was based on the defendant's admission and that both parties were successful as the parties agreed that the defendant should purchase plaintiff's entire shareholding in Space and Style Limited for valuable consideration hence no party can be deemed to be a losing party. Second and in light of the **Jasbir Rai Case (Supra)**, the plaintiff had not gone to the trouble of prosecuting the suit since the matter was settled by the admission hence the suit was not prosecuted.

### **Determination**

10. The Supreme Court in the **Jasbir Rai Case (Supra)** re-iterated the general principle in **section 27** of the **Civil Procedure Act** and set out the following conclusion:

*[18] 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 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.*

11. The question then is whether the defendant should pay costs since the plaintiff was successful in the sense that the defendant admitted her claim. Although the defendant contends that both parties were successful as the result of the admission and that the resulting judgment merely affirmed the contents of the agreement, it is not lost to the court that the plaintiff took the trouble to instruct counsel and file suit. The Term Sheet was signed in January 2018 and it is only now in 2020, two years later, that the defendant has agreed to give contractual obligations judicial imprimatur by accepting the plaintiff's. Had the defendant complied with its obligations under the agreement, this suit would not have been necessary.

12. The defendant had placed emphasis on the fact that the suit was not prosecuted. **The Concise Oxford English Dictionary (12<sup>th</sup> Ed)** defines prosecute as, "to institute or conduct legal proceedings, institute legal proceedings in respect of a claim or offence or continue with a view to completion." Thus the act of filing suit amounts to prosecution of the claim. Whether the plaintiff took further steps in the matter is a question of quantum of costs to be addressed elsewhere. That the plaintiff filed suit and obtained judgment entitles her to costs in the circumstances.

### **Disposition**

13. In conclusion, I do not find any reason why I should depart from the general principle that costs follow the event. The defendant shall therefore bear the costs of the suit.

**DATED AND DELIVERED AT NAIROBI THIS 08TH DAY OF JUNE 2020.**

**D. S. MAJANJA**

**JUDGE**

Mr Mungai with him Mr Miano instructed by Kinoti and Kibe Advocates for the plaintiff.

Mr Rene instructed by Havi and Company for the defendant.