



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

HCCC 57 OF 2018

(FORMERLY ELC NO 423 OF 2015)

DR. ANDREW NJOROGE MBURU.....PLAINTIFF

VERSUS

NIC BANK LIMITED.....1ST DEFENDANT

JOSEPH M. GIKONYO T/A GARAM INVESTMENTS.....2ND DEFENDANT

RULING

1. **NIC BANK LIMITED (1ST DEFENDANT) and JOSEPH M. GIKONYO T/A GARAM INVESTMENTS (2ND DEFENDANT)** had filed an application seeking stay of proceedings pending appeal before the Court of Appeal. However, the defendants through their advocate informed this court that the matter had been settled, and the title which was the subject of litigation had been discharged, and returned to the plaintiff. The matter was thus marked as settled, save for the issue of party and party costs, which was canvassed by way of written submissions.

2. The plaintiff (**DR. ANDREW NJOROGE MBURU**) argues that the issue regarding settlement of the matter was raised by the defence counsel, and his counsel (though still on record) was not privy to the same so there was no evidence of consensus ad idem. To demonstrate this, he refers to the list of documents comprising email correspondence and even the letter of undertaking where the plaintiff's counsel was not involved. Further, that the e-mail dated 23rd August 2019 was not intended to be communicated to the plaintiff's advocate nor the plaintiff, and is therefore not evidence of settled negotiations. That in any event, the undertaking dated 29th July 2019, appears to have preceded the aforementioned e-mail and appears to have been tailor-made to suit the defendants so as to avoid paying costs.

3. The plaintiff insists that given the history of the litigation, the most probable scenario is that the defendants engaged the plaintiff to compromise the matter and adjust the claim, towards a discharge of his title. That this is demonstrated by the defendants' loss of an application for interlocutory injunction restraining their exercise of statutory power of sale. That the defendants even lodged an appeal in the Court of Appeal on 5th July 2018, then for over one and a half years, struggled to stay proceedings, in a bid to bar the plaintiff from advancing towards a full hearing. That subsequently, the charge discharged the title in concession of defeat to the plaintiff's prayer in the plaint, which was seeking discharge of his title.

4. As a consequence of this compromise, then the plaintiff was the successful party, and since an award of costs normally follows the chronology of events then the under section 27 of the Civil Procedure Act, the costs. In support of this reference is made to the case of **ALEXANDER TRYPHON DEMBENIOTIS v CENTRAL AFRICA CO. LTD [1967] EA 310** where the court rendered itself thus:

“Clearly costs should follow the event where the plaintiff has succeeded in the main purpose of his suit, and he should not be deprived of his costs merely because he has raised another issue which in itself affects the results of the suit, even if he loses on that issue. He has not only succeeded on the main purpose of the suit, but has obtained full relief claimed that was the cancellation of the agreement. He obtained the precise form of relief he wanted, and it is immaterial that the other issue is left undecided, because whichever way the issue falls to be decided it cannot affect the result.”

5. The court is also invited to be guided by the decision in **PARTY OF INDEPENDENT CANDIDATE & ANOR v MUTULA KILONZO & 2 OTHERS [2013] eKLR** where the court pointed out that in determining the issue regarding costs, the conduct of parties must be considered.

6. In response the defendants submit that a party is said to be successful when so declared by the court, yet in this litigation there were negotiations which culminated in the recording of a consent, and the court ought to take into account the fact that the matter was settled by the consent of both parties. That as regards the issue of costs, this is at the court's discretion, which must be exercised in line with legal principles, and not whimsically or capriciously.

7. Further, that despite the consent reached, there were some heavy concessions made by the defendants, such as waiving the penalty of accrued interest, and instead of auctioning the plaintiff's property, the bank allowed him to raise the amount owing, by private treaty. That in any case, the defence also had a counter-claim, and consider the conduct of the plaintiff who got a purchaser to buy the property, so that at the very least, this court should order each party to bear its own costs.

8. The issue here is what was the grievance/ and in whose favour was it sorted out? The plaintiff had by a plaint dated 20th November 2015, stated that he had applied for and obtained a loan of Kshs. 4,000,000/- from the defendant bank on 11/03/2013. He serviced the loan, then got an additional facility of Kshs. 200,000/-, and a charge was entered in the register over the land parcel known as **NYANDARUA/GILGIL WEST/682**, Later a further sum of Kshs 815,805 was purportedly advanced to him resulting in entering a further charge over the said property on 14th April 2014.

9. Meanwhile, due to lapses in payments, the bank decided to exercise its statutory power of sale, and instructed the 2nd defendant to attach the property for purposes of conducting a sale by auction, so as to realize the outstanding amount. The plaintiff contested these subsequent actions and the restrictions entered pursuant thereto, terming them a nullity, unlawful,

10. He therefore sought that the further charge entered into on 14/1/2014 and the restrictions entered pursuant thereto be declared a nullity and should be discharged. Further, that the loan contract dated 22/1/2014 is unlawful, a nullity, together with all consequent acts that have taken place pursuant thereto, and the intended sale is unlawful. He also prayed for an order of injunction to restrain the defendants from selling, transferring, or in whatever way alienating the said land parcel.

11. In its statement of defence, the defendants maintained that they acted legally, and the bank was contractually entitled to exercise its statutory power of sale, having issued a redemption notice plus a notification of sale, as a legal charge had been created over the property. It thus contested issuance of any orders of injunction.

12. The matter never proceeded to hearing, but was fraught with a multiplicity of contested applications. The plaintiff argues that it was not a party to the consent which according to the e-mail dated 26/8/2019 included waiver of interest, acceptance of payment of over 8million shillings as full and final settlement, the plaintiff settling the outstanding legal fees, and being allowed to raise the outstanding amount through private treaty. I take note that indeed the defence too had a counterclaim which was contested. It would then mean that in reaching the consent, there was a lot of give and take by each party.

13. The plaintiff cannot ask the court to simply looking at the final outcome, without taking into consideration what the consent entailed just because he has now escaped the auctioneer's hammer. If he was not party to the consent, then how did he get to have a sale by private treaty (which I note has not been denied), which involved some duty on his part before what he sought could be realised. I think it is rather mischievous, and the whole scenario paints a picture of one who wants to have his cake and eat it as well.

14. **Section 27 of the Civil Procedure Act** provides that:

(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.

In my view, the above cited provision does not stipulate that the winner must always take it all, and the court is expected to be rational in making orders on costs. My approach is that going by the history of this matter, finally culminating in the consent I am persuaded that each party must bear its own costs and I so order.

Delivered on-line with the written consent of both counsel and dated this 21st day of July 2020 at Eldoret

H.A. OMONDI

JUDGE