



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL CASE NO. 83 OF 2016**

**ELITE INTELLOGENT TRAFFIC SYSTEM LTD.....PLAINTIFF/RESPONDENT**

**VERSUS**

**HFC LIMITED.....DEFENDANT/RESPONDENT**

**HASSAN ZUBEID.....1<sup>ST</sup> INTERESTED/PARTY/APPLICANT**

**SUSAN MUKAMI KAMWATI.....2<sup>ND</sup> INTERESTED/PARTY/APPLICANT**

**LYDIA WANJIRU KARIUKI.....3<sup>RD</sup> INTERESTED/PARTY/APPLICANT**

**RULING**

1. The ruling relates to an application filed by the Interested parties (herein “the Applicants”), seeking an order of costs following the filing of notice of discontinuance of the suit, dated 19<sup>th</sup> December 2017, and filed in court on the 27<sup>th</sup> February 2018, pursuant to the provisions of; Order 25 Rule 1 of the Civil Procedure Rules.

2. The background facts of the case are that, the Plaintiff entered into a contract with the defendant, whereby the defendant was supposed to advance it a loan facility in the sum of Kenya shillings two sixty nine million (Kshs. 269,000,000). The loan was supposed to be secured by the suit property. It was agreed that the defendant would take over a facility of; Kenya shillings ninety five million (Kshs. 95,000,000), advanced to the plaintiff by Kenya Commercial Bank Limited. The defendant subsequently took over the loan facility from Kenya Commercial Bank Limited, and the suit property was discharged and charged in its favour.

3. However, the Plaintiff alleges that, the Defendant failed to disburse the remainder of the loan thus frustrating it in the development of the project. That the defendants conduct amounts to breach of contract. Hence the filing of the plaint dated 17<sup>th</sup> March 2016, on 18<sup>th</sup> March 2016, seeking for orders inter alia, that the Defendant be restrained from disposing of, the suit property namely; Land Reference No 208/1052 and reimburse the Plaintiffs money allegedly owed by the Defendants.

4. Subsequently, the 1<sup>st</sup> Interested party filed a notice of motion application dated 25<sup>th</sup> April 2016, seeking to be enjoined in these proceedings, as an interested party. In a nutshell, the Applicant deposed that, he is the beneficial owner of the apartment no. 3 and no. 5 in Block A on the suit property, having purchased the same from the plaintiff. That he has filed a suit; namely HCCC No. 79 of 2014, against the plaintiff herein and one Patrick Mwangi as defendants. The suit relates to a joint venture agreement entered into between himself and the plaintiff for development of Apartments on the suit property.

5. Similarly, the 2<sup>nd</sup> and 3<sup>rd</sup> Interested parties filed a notice of motion application dated 28<sup>th</sup> April 2016, also seeking to be enjoined in the suit, on grounds that, they are also beneficial owner of the apartments on the suit property. The application were heard and the court delivered a ruling thereon, on 25<sup>th</sup> October 2016, allowing the Applicants to be enjoined in the suit.

6. The Interested parties were then ordered to file their respective responses on the plaintiff application filed by the Plaintiff dated 16 March 2016. However, the suit did not proceed to full hearing following with the filing of aforesaid notice of discontinuation. It is noteworthy that, the Defendant had no objection to the discontinuation of the suit. However, the interested parties conceded to the notice of discontinuation, save that costs be provided in their favour. The Plaintiff objected to the payment of costs hence the current application.

7. In opposing the application, the plaintiff argues that, the applicants invited themselves to the suit. They were unnecessary parties. That

even if the costs have to be awarded then, it is the plaintiff/respondent to be awarded costs, on the basis of the 1<sup>st</sup> Interested party's/Applicant's conduct, in that he breached the Joint Vehicle Agreement necessitating the need for the plaintiff to approach the Bank, to seek for finance for the development of the apartments.

8. That further the suit HCC 79 of 2014, referred to herein and the accompanying application to restrain the plaintiff from obtaining finances was dismissed by the court. The plaintiff did not appeal against the same. He therefore used the Joint Venture Agreement as a means to gain relevance in this suit. That although the court allowed the 1<sup>st</sup> applicant to join in this matter on the basis of the alleged two apartments, the apartments were never an issue in the matter, HCCC 79 of 2014, and was only sneaked into this matter through the joinder.

9. That the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants, executed sale agreements to purchase their respective apartments with full knowledge that the property had been charged to Kenya Commercial Bank Limited. Therefore they cannot come to court and alleged that, the plaintiff had no right to charge the property. In any event the Environment and Land Court dismissed the injunction application in their suit No. 1377 of 2013 and allowed the plaintiff to continue development of the suit property.

10. The Plaintiff/ Respondent referred to the Ruling of this Court on the Applicants applications for joinder and submitted that, the court placed onus on the applicants to demonstrate their rights in the suit property and the extent to which they were to be enjoined. However, the application for the injunction order was not heard to conclusion. Therefore, the Court did not make a finding on the necessity of the enjoinder of the applicants. The Applicants cannot claim for costs yet they did not demonstrate to the Court whether they were relevant to the suit in the first place.

11. Further, the suit having been discontinued, the court did not retire to make a determination on the matter and ascertain who the successful party in the suit is. As such, the court will be guided by the law that, costs follow the event, and the successful party should ordinarily be awarded costs. This means that the phrase "follow the event" means that the party who succeeds in a claim is entitled to costs. In this matter, there was no successful party.

12. That the Plaintiff is not guilty of any misconduct, omission or neglect, and/or vexatious or oppressive conduct, which would induce the court to punish it with costs. It did not infringe on any legal right of the applicants, as such, there is no legal reason to punish it with costs for doing that which the law provides for in protecting its interest.

13. Finally, the Plaintiff/Respondent further submitted that, it is not in dispute that the Honourable court has jurisdiction to award costs to a party. However, Section 27(1) of the Civil Procedure Rules states that, the costs of a suit shall be in the discretion of the court and shall follow the event. As such, costs are not awarded as a matter of right but under the judicious discretion of the court.

14. The Plaintiffs relied on the case of; *Marigat Group Ranch & 3 Others –vs- Wesley Chepkoiment & 19 others [2014] eKLR, Little Kenya Africa Ltd versus Andrew Mwitii Jackson 2014 eKLR* and on *Judicial Hints on Civil Procedure 2<sup>nd</sup> edition at page 99*, where the word "event" was defined.

15. However, the 1<sup>st</sup> Interested party/Applicant submitted that, the provisions of Section 27 of the Civil Procedure Act, provide that costs must follow the event and the spirit of this provision is that, in awarding costs in a suit, judicial hands are not tied by any eventuality. Thus, whether the suit is withdrawn, struck out for want of jurisdiction or fully determined, the court has discretion to award costs. Reliance was placed on the case of; *Little Africa Kenya Limited vs Andrew Mwitii Jason (supra)*.

16. That, it is the Plaintiff which filed a suit touching on the rights and interests of the 1<sup>st</sup> Interested party/Applicant that necessitated the 1<sup>st</sup> Interested Party to seek leave of Court to be enjoined in the matter. Thus, were it not for the Plaintiff's actions that threatened the rights of the 1<sup>st</sup> Interested party, the 1<sup>st</sup> Interested party would not be before the court. That even the court itself agreed that the 1<sup>st</sup> Interested party/Applicant had legitimate rights and interest to defend and protect thus necessitating the enjoinder.

17. Further the Plaintiff's conduct has occasioned financial stress and emotional and psychological trauma to him, in that the Plaintiff knowingly and willingly endangered his proprietary rights and interests without a care and went into great lengths to perpetuate the malice by covertly changing its name from Elite Paka Services Limited to Elite Intelligence Systems in an effort to escape liability.

18. It was submitted that the consent which informed the withdrawal of this matter remains undisclosed to the 1<sup>st</sup> interested party/Applicant to date, despite his beneficial interest in the substratum of this suit. That it is also intriguing that even the Honourable Court remains in the dark about the terms of the said consent. Thus the court must consider the Plaintiff's conduct when it considers the issue of costs.

19. Finally the 1<sup>st</sup> Interested Party/Applicant submitted that, the conduct of the Plaintiff is riddled with malice and bad faith and drains every ounce of confidence the Honourable Court should have had in the Plaintiffs claim. That, the Plaintiff's claim was merely an abuse of court process and complete waste of scant and precious judicial time. The courts should be approached with honour and dignity and the wheels of Justice should not be set in motion in vain as judicial time is precious and sacrosanct.

20. The 2<sup>nd</sup> and 3<sup>rd</sup> Interested parties/Applicants submitted that they are entitled to costs on grounds that they were part of the proceedings before the court and when the Plaintiff/Respondent and the Defendant entered into an understanding that the suit be discontinued they were never informed despite knowing full well that they were part of the suit and participated in the hearing of the Plaintiff's/Respondent's application for injunction dated 17<sup>th</sup> March 2016.

21. It was submitted that, it is clear from the provisions of Section 27 of the Civil Procedure Act, that costs follow the event unless the court or for good reason otherwise order. There is no good cause demonstrated by the Plaintiff as to why the applicants should not have costs. Reliance was placed on the case of; *Cecilia Karugu Ngayu vs Barclays Bank of Kenya & Another HCC No. 17 of 2014*.

22. Finally, it was submitted that, considering the entire chain of events, there is no reason to deny the 2<sup>nd</sup> and 3<sup>rd</sup> applicants costs, in the court's exercise of discretion in a manner that meets the interests of justice.

23. I have considered the application, the arguments for and against, and I find that the only issue to determine is whether the Applicants are entitled to costs, or not in this matter.

24. The statutory provision that governs costs is found under Section 27 of the Civil Procedure Act which states as follows:

*“(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 the 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. (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.”*

25. Flowing from these provisions, are two main principles that, costs are awarded at the discretion of the court and follow the event, unless with good reason the court declines to award the same.

26. The Halsbury's Laws of England supports these principles and states that:-

*“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 them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice.”*

27. In the case of; Party of Independent Candidate of Kenya vs Mutula Kilonzo & 2 others, citing the decisions in the cases of; Nedbank Swaziland Ltd versus Sandile Dlamini No. (144/2010) [2013] SZHC30 (2013) Maphalala J. referring to the holding of Murray C J, in the case of; Levben Products VS Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227, the court held 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.**”*

28. Similarly, the court in the case of; Jasbir Singh Rai & Others vs Tarlochan Rai & Others. [2002] eKLR 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 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.”**

29. The Black's law dictionary, defines the word “event” and states that, “in reference to judicial and quasi judicial proceedings, the “event” means the 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.”

30. In the same vein, Hon. Justice Kuloba (Rtd) in the text on Judicial Hits on Civil Procedure , 2<sup>nd</sup> 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 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 o action, but includes any issue which has a direct and definite event in defeating the claim to judgment in the whole or in part.”*

31. Based on the legal principles above, and the facts in this case, I find that there is no dispute that the suit herein involved the Plaintiff and the Defendant in their unique relationship of a debtor and a creditor founded on the contractual banker-customer relationship. The Interested parties/Applicants herein are not a party to this relationship. The nexus between all the parties herein is the subject matter of the case which is basically the suit property.

32. It suffices to note that, it is the Applicants who applied to be enjoined in the matter asserting their rights through the purchase of the apartments situated on the suit property. In the Ruling, the Court delivered on the Applications to join the Applicants, the court held paragraph 39, that, “...as to whether the Applicant's claim will have a bearing on the suit herein and the extend as to which they will participate in this matter will be determined by their responses to the Application”.

33. It is therefore clear that, the necessity of the Applicants in this suit would only have been determined if the said application was heard. The suit having been discontinued as stated herein, the court did not have the opportunity to determine who among the Defendant and the Applicants had a prior legal and equitable interest over the suit property.

34. Additionally, evidence revealed that the Applicants had filed other suits, being HCCC No. 79 of 2014 and ELC No. 1377 of 2013 in relation to the suit property and where they sought for orders to restrain the Plaintiff from continuing the construction of apartments in the suit property. The evidence adduced is that the Applicants applications were dismissed.

35. The Plaintiff/Respondent submitted that there are over twenty (20) tenants who like the Applicants purchased apartments on the suit property but did not apply to be enjoined in this matter, this evidence was not rebutted.

36. The question that remains is whether in view of the facts above, the Applicants are entitled to costs. The general principle of the law of costs is that a party who is substantially successful in litigation is entitled to costs. In the case of; *Lee v. Horne*, the Judge held that:

*"The general rule is that **costs follow the event** and while a court may depart from this rule, any departure is usually in the way of depriving a successful party of costs and not of awarding costs to an unsuccessful party."*

37. The Supreme Court of Kenya, in the case of; *Jasbir Singh Rai & Others vs Tarlochan Rai & Others* (supra) observed that:

*"in the classic common law style, the courts have to proceed on a case by case basis, to identify "good reasons" for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs....."*

38. Similarly, the court in *British Columbia (Minister of Forests) vs. Okanagan Indian Band*, [2003] 3 S.C.R. 371, 2003 SCC 71, the Supreme Court of Canada, noted that the traditional purpose of costs awards remains indemnification, and that a regular award of costs has four standard characteristics;-

*(a) they are an award to be made in favour of a successful or deserving litigant, payable by the loser;*

*(b) of necessity, the award must await the conclusion of the proceedings, as success or entitlement cannot be determined before that time;*

*(c) they are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceedings; and,*

*(d) they are not payable for the purpose of assuring participation in the proceeding.*

39. In addition, three other justifications for cause have been introduced: the encouragement of settlement, the prevention of frivolous or vexatious litigation, and the discouragement of unnecessary steps in proceedings.

40. The questions herein are whether there is a successful party in this matter and/or what the event that will inform the costs is. In answering this questions, it is noteworthy that, the notice of discontinuation of the suit states clearly that " the Plaintiff wholly discontinues the entire suit against the Defendant" and not the Applicants. It is the Defendant who the Plaintiff sued not the Applicants therefore generally speaking the party that would have sought for costs would be the Defendant, they have not. In the given circumstances, the Applicants cannot be said to be the successful parties. This is informed by the fact that their rights have not been determined as the case was not heard neither had they been sued by the Plaintiff. Therefore, the averments in their respective pleadings and/or documents filed remained unsupported by any evidence and/or proved.

41. It also suffices to note that as much as the law is that, cause follow the event, the court may depart from this principle if there are good reasons for the same, taking into account that each case must be considered on its own facts. In that regard, i associate the findings made by the court in the decision in; *Little Africa Kenya Limited vs Andrew Mwitii Jason* (supra) \_ where the court stated:-

*"---therefore, the law in designing the legal phrase that "costs follow the event" recognized the fact that there could be no "one-size-fit-all" prescription on the matter. That is why 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 decided on the facts of the case. Needless to state, circumstances differ from case to case."*

42. The 1<sup>st</sup> Applicant referred the court to the case of, *Stephen Chege Waweru vs Ephantus Mwangi & Others Nyeri HCCC No. 173 of 2008*, where the court awarded costs to the Defendants upon the withdrawal of the suit by the Plaintiff in unilaterally. This case is distinguishable from the current case in that it is the Defendant who had been sued, upon whom summons were served who had filed a defence and a counterclaim against the Plaintiff's suit. The court observed that both parties had asked for costs in their respective claims. The Applicants in this matter are not Defendants and cannot therefore submit that "it is only fair that the party who has been dragged to Court and has consequently incurred costs to defend themselves be entitled to costs where a Plaintiff withdraws the case."

43. Finally, as already observed, the Applicants have other matters in which they have sought to enforce their respective rights over the subject matter herein and therefore even if the court does not award them any costs herein, they will not suffer any prejudice.

44. It is against this background that i decline to make any orders as to costs in favour of the Applicants and in disallowing their application as to costs, I make no orders as to costs. In my considered opinion, it will serve the interest of justice if each party meets their own costs.

45. It is so ordered.

**Dated, delivered and signed in an open court this 13<sup>th</sup> day of March 2019.**

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Mungai for Mr. Muraguri for the Plaintiff/Respondent

Ms. Opakasi for Leila for the Defendant

Mr. Zamzam for Mr. Muchoki for the 1<sup>st</sup> Interested party

Mr. Kairaria for Mrs. Wambugu for the 2<sup>nd</sup> and 3<sup>rd</sup> Interested parties

Dennis.....Court Assistant