REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

COMMERCIAL SUIT NO. 86 OF 2018

EDIBLE FOODS DISTRIBUTORS LTD.....PLAINTIFF

VERSUS

MUHORONI SUGAR COMPANY LIMITED*(Under Receivership)***.....DEFENDANT**

RULING

On 29th October 2018 the parties recorded a consent in the following terms;

> ***"1. The Defendant/Respondent to supply the 4320 remaining bags of brown sugar to the Plaintiff /Applicant in consignments of 600 bags of 50kg brown sugar on a weekly basis commencing the week ending November 11, 2018.***
>
> ***2. In default of (1) hereinabove, execution to issue against the Defendant.***
>
> ***3. Parties to file submissions on the issue of costs."***

2. This Ruling is on the said issue of costs.

3. Pursuant to the provisions of **Section 27(1)** of the **Civil Procedure Act**, the court or Judge shall have full power to determine by whom and out of what property, and to what extent costs of and incidental to all suits, shall be paid.

4. But when called upon to determine what order was appropriate the court should bear in mind the following words which the Supreme Court uttered in its Ruling in the case of **JASBIR SINGH RAI & 3 OTHERS Vs TARLOCHAN SINGH RAI & 4 OTHERS, PETITION NO. 4 OF 2012**;

> ***"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."***

4. According to the defendant, there is no doubt that the principle is that costs ordinarily follow the events. To that extent, the parties are in agreement.

5. However, the defendant expressed the view that the Plaintiff was not the *"successful party."*

6. The defendant believes that the Plaintiff would only have been deemed successful if the reliefs it asked for had been granted.

7. The reliefs sought in the Plaint were as follows;

> ***"a) A mandatory injunction compelling the Defendant to forthwith supply and release to the Plaintiff 6080 bags of 50kg Brown Sugar;***
>
> ***b) IN THE ALTERNATIVE, judgment be entered for against the Defendant for the sum of Kshs 27,360,000.00 being the cost of***

purchasing 6080 bags of brown sugar to the Plaintiff;

c) Interest on (b) above compounded at the Commercial Banks rate of 14% since February 2017 until payment in full.

d) Costs of the suit."

8. In a literal sense, the reliefs sought were not granted in the terms which the Plaintiff had asked for.

9. The Plaintiff submitted that it is the successful party because it was the filing of the suit which prompted the expeditious settlement of the claim.

10. But the defendant's position is that the Plaintiff, even if it had been successful, could not be entitled to the costs of the suit because the Plaintiff had not issued the defendant with a Demand Notice prior to the institution of the suit.

11. It is common ground that the Plaintiff did not serve the defendant with a Demand Notice prior to filing suit.

12. Pursuant to Paragraph 53 of the Advocates Remuneration Order;

> ***"If the Plaintiff in any action has not given the defendant notice of his intention to sue, and the defendant pays the amount claimed or found due at or before the first hearing, no advocate's costs shall be allowed except on a special order of the Judge or Magistrate."***

13. In the light of that provision, the Plaintiff pointed out that the defendant could only have escaped paying costs if the defendant had either admitted or paid the amount claimed before the hearing of the Plaintiff's application for an interlocutory injunction.

14. If anything, the defendant had lodged a Defence and a replying affidavit.

15. Therefore, it was the Plaintiff's position that Paragraph 53 of the Advocates Remuneration Order was not available to the defendant, in the circumstances.

16. The defendant responded to the Plaintiff's view by pointing out that pursuant to **Order 3 Rule 2(d)** of the **Civil Procedure Rules**, it was now mandatory that all suits shall be accompanied with, inter alia, a Demand Letter before action.

17. It was the understanding of the defendant that **Order 3 Rule 2(d)** was informed by a Public Policy Principle, which is that a Plaintiff should not unnecessarily expose a defendant to an expensive and time-consuming process of litigation, yet the issues in dispute could have been resolved if a demand had been served prior to the filing of the suit.

18. I share the defendant's view on that point.

19. However, the fact that the Plaintiff filed suit before issuing a Demand Notice does not, of itself, bar a successful Plaintiff from being awarded the costs of the suit.

20. The failure to serve a Demand Notice upon a defendant before suit is filed, is only one of the considerations to be taken into account by the court when determining the most appropriate orders to make on the issue of the costs of the suit.

21. In the case of **STANLEY KAUNGA NKARICHIA Vs MERU TEACHERS COLLEGE CIVIL APPEAL NO. 84 OF 2011**, Gikonyo J. aptly summarized the correct legal position as follows;

> ***"It has never been the law that a defendant should always have notice of intention to bring suit against him before action is filed in court. There are cases which, by their very nature or due to obtaining circumstance, it is impractical to issue a notice of intention to sue or, issuing such notice of intention to sue will only be to the detriment of the interests of the Plaintiff and Justice. For instance in trade-marks and patent cases or where Anton Pillar orders or exparte temporary injunctions are the subject of the suit, issuance of notice of intention to sue will militate against the very core of litigation."***

22. In this case, the Plaintiff has not given any convincing reason to justify its failure to serve the defendant with a Notice of Intention to sue.

23. Secondly, although the first relief sought was that the defendant should forthwith, supply and release to the Plaintiff the remaining 6080 bags of brown sugar, there is no ground upon which this court can find that the issuance of Notice of Intention to sue could have either jeopardized the Plaintiff's case or could otherwise have been inconsistent with Justice.

24. By the time the defendant was served with Summons on 9th October 2018, the number of bags which had not been delivered to the Plaintiff was not 6080. That is because the Plaintiff collected 1760 bags on 8th October 2018.

25. It would therefore follow that the delivery of the sugar was not necessarily fast-tracked by the institution of the suit.

26. The following is a summary of the deliveries made by the defendant;

	Date	Quantity (in Bags)
1.	01/03/2018	560
2.	07/03/2018	1,120
3.	17/03/2018	1,120
4.	09/04/2018	560
5.	16/04/2018	560
6.	08/10/2018	1,760

TOTAL 5,680

27. Considering that over 50% of the bags were supplied before suit was filed, it cannot be said that the suit caused the defendant to make deliveries faster than it would have done if suit had not been instituted.

28. I further find that the pattern of the deliveries is not consistent with the Plaintiff's contention that the defendant was supposed to supply 10,000 bags of brown sugar promptly after the Plaintiff remitted payment for the same.

29. However, even though the parties have not provided the court with the contract between them, I find that there was a huge gap between the delivery in April 2018 and the next delivery in October 2018.

30. And whereas the onus was upon the Plaintiff to prove that the defendant was required to deliver all the 10,000 bags immediately, the defendant had the onus of proving that it was only required to make deliveries as and when it had sufficient stocks of the brown sugar packed in 50 kilogram bags.

31. Neither of the parties discharged their respective obligations, and ultimately they resolved the issues amicably.

32. In my considered opinion, the Plaintiff cannot be said to have failed just because it did not get all the reliefs it sought in the Plaint.

33. The fact that the suit was compromised in a manner in which there was now a consensus concerning how regularly the remaining sugar was to be delivered, implies that the suit helped the parties get to that stage.

34. However, it is not possible to categorically state that if the suit was not filed, the parties could not have resolved the dispute.

35. To my mind, the settlement arrived at is a win-win situation for both parties and therefore justice demands that each party should bear its own costs, and I so order.

DATED, SIGNED and DELIVERED at KISUMU This 12th day of March 2019

FRED A. OCHIENG

JUDGE