



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CIVIL SUIT NO. 197 OF 1999**

**DANIEL DAVID NJUGUNA.....PLAINTIFF**

**VERSUS**

**NATIONAL BANK OF KENYA LTD.....1<sup>ST</sup> DEFENDANT**

**RONALD MWANGI KIBUCHI.....2<sup>ND</sup> DEFENDANT**

*(By original suit/action)*

**TITLE BY WAY OF COUNTER-CLAIM**

**NATIONAL BANK OF KENYA LTD. ....PLAINTIFF**

**VERSUS**

**DANIEL DAVID NJUGUNA.....1<sup>ST</sup> DEFENDANT TO COUNTER-CLAIM**

**UP & DOWN SAW MILLS LTD.....2<sup>ND</sup> DEFENDANT TO COUNTER-CLAIM**

**RULING**

The application dated 1<sup>st</sup> March 2019 was brought by the 1<sup>st</sup> Defendant, **NATIONAL BANK OF KENYA**, against the 2<sup>nd</sup> Defendant to the Counter-claim, **UP & DOWN SAW MILLS LIMITED**.

1. The application seeks the striking out of the Respondent's Bill of Costs dated 11<sup>th</sup> April 2012.
2. The Applicant pointed out that the Judgment in this case was delivered on 22<sup>nd</sup> February 2012.
3. It was the understanding of the Applicant that the learned trial Judge did not award costs to the Respondent. Therefore, the Applicant submitted that the Respondent cannot be entitled to lay a claim for costs.
4. In answer to the application the Respondent pointed out that it was dragged into the suit, and that it therefore had to defend itself against the accusations made;

***“against it by M/S National Bank of Kenya Limited.”***

5. The record shows that it is the National Bank of Kenya Limited (hereinafter “*the Bank*”) which initiated the Counter-claim, in which the Respondent was cited as the 2<sup>nd</sup> Defendant.
6. As the Respondent submitted;

***“In a judgment in a suit where there is a counterclaim, the Judge must make a decision and render his/her judgment not only as regards the primary suit but also on the counter-claim.***

7. In this case, the learned trial Judge held that the Counter-claim was premature.

8. The trial court proceeded to dismiss the Defendants' Counter-claim with costs.

9. Apart from the order dismissing the Defendants' Counter-claim, the learned Judge made the following order;

***(f) The Plaintiff shall have the costs of this suit as well as those of the Counter-claim.***

10. Following those orders, the Plaintiff taxed his costs, and the same were, reportedly, settled by the 1<sup>st</sup> Defendant.

11. The question that now arises is whether or not the 2<sup>nd</sup> Defendant to the Counter-claim was similarly entitled to recover costs from the Bank.

12. It is the position of the bank that the trial court did not expressly state that Up & Down Saw Mills Limited was entitled to the costs of the Counter-claim.

13. I must admit that when I first gave consideration to the bank's submission, it almost persuaded me.

14. However, upon further consideration, I reminded myself that when the court dismisses an application or a suit, "*with costs*", it means something.

15. I therefore began looking at the various kinds of orders that courts usually make on the issue of costs.

#### **No order as to costs**

16. In my understanding that order means that none of the parties to the action was entitled to costs.

#### **Each Party to bear his own costs**

17. That order is a clear message to each party, that they cannot look to any other party for costs.

#### **Plaintiff to pay costs**

18. The Plaintiff was being ordered to pay the costs.

#### **Application (or suit) Dismissed with costs**

19. The party who had brought the suit or the application, which has now been dismissed, should pay the costs thereof to the other party or parties.

20. I then asked myself why the court then made the second limb of the order, in which it was specified that the Plaintiff was entitled to costs of the suit and of the Counter-claim, if the order of "*dismissal with costs*" was sufficient to award costs.

21. In my considered view, the second limb of the order for costs was necessary because the first limb was only in relation to the Counter-claim.

22. Therefore, the trial court wanted to make it clear that the Plaintiff was not just entitled to the costs of the Counter-claim, but also to the costs of the suit.

23. To my mind, the learned Judge made a conscious decision on the issue of costs, awarding costs of the Counter-claim to the Defendants to the said Counter-claim, and also awarding to the Plaintiff (only), the costs of the suit.

24. I further find that the order made on 27<sup>th</sup> July 2012 was only in respect to the applications dated 9<sup>th</sup> May 2012 and 28<sup>th</sup> May 2012. Those two applications sought stay of execution of the Judgment pending the hearing and determination of the appeal.

25. Even though the court ordered that there would be a stay of execution, it ordered the two Applicants to pay costs of the application. In effect, the orders made on 27<sup>th</sup> July 2012 do not form the basis for the Bill of Costs filed by the Respondent in the application before me.

26. The Applicant also drew this court's attention to the fact that both the Plaintiff and the 2<sup>nd</sup> Defendant to the Counter-claim, were represented by the same firm of Advocates.

27. I hold the considered view that the said statement is a red-herring, intended to divert the court's attention from the real issue.

28. I so find because the order in contention was for Party and Party Costs.

29. The trial court awarded costs to the parties, not to their advocates.

30. Therefore, it would not matter if one advocate represented more than one party, provided that the court granted costs to each party. In such a scenario, each party would become entitled to recover the costs awarded to it.

31. As the Respondent herein was awarded the costs of the Counter-claim, he became entitled to recover the said costs from the Bank. Therefore, I find no merit in the application dated 1<sup>st</sup> March 2019. It is therefore dismissed with costs.

**DATED, SIGNED and DELIVERED at KISUMU This 15<sup>th</sup> day of October 2019**

**FRED A. OCHIENG**

**JUDGE**