



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION- MILIMANI

CIVIL SUIT NO. 11 OF 2017

SAVANNAH CEMENT LIMITED.....PLAINTIFF

-VERSUS-

NEW AGE DEVELOPERS &

CONSTRUCTION COMPANY LIMITED.....1ST DEFENDANT

GM KARIUKI HARDWARE LIMITED.....2ND DEFENDANT

RULING

PLAINTIFF'S SUBMISSIONS

Pursuant to this Court's directions made on 19th September 2019, the Plaintiff submissions are as follows;

1. The Plaintiff filed the application dated 2nd May 2017 seeking judgment on admission. The application was heard and allowed by a ruling delivered by the court on 20th May 2019.
2. In allowing the ruling, the court directed parties to agree on the question of costs and in default of agreement, the matter would be determined by the court.
3. The parties have failed to agree on the question of costs. The plaintiff's position is that as the successful party, it is entitled to costs while the Defendants' position is that the question of costs should await an appeal they intend to file in the Court of Appeal. These rival positions were clearly articulated by the parties when they appeared in court on 19th September 2019.
4. The foregoing impasse has makes it necessary for the court to determine the issue of costs.

THE LAW ON COSTS

5. First, award of cost is a question of discretion of the court. Secondly, the discretion ought to be exercised judiciously and in line with the rule, "costs follow event" (see **Brian Asin & 2 others -vs- Wafula W. Chebukati & 9 others [2017]** and **Cecilia Karuru Ngayu -vs- Barclays Bank of Kenya & Another [2016] eKLR**)

6. The Plaintiff submits that the word "event" denotes the success of litigation. Simply put, the party who has succeeded in litigation is entitled to costs. This position is underscored in Justice (Retired) Kuloba's Judicial Hints on **Civil Procedure, 2nd Edition at page 99** where the author opines –

"The words "the event" mean the result of all the proceedings to the litigation. The event is the result of entire litigation. 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..."

RESPONDENTS' SUBMISSIONS

The Respondent submitted that although there is eminent good sense in the basic rule of costs, that costs follow the event, it is not an

invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion.

In the case of Jasbir Singh Rai & 3 others –vs- Tarlochan Singh Rai & 4 others SC Pet.No. 4 of 2014; [2014]eKLR , the Court in diverging from this general principle expressed itself as follows;

“...The law does not require the Supreme court to adhere to the costs-follow-the-event principle. This is clear from certain provisions of Statute Law. The Supreme Court Act, 2011 (Act No. 7 of 2011), by section 21 (2) thus provides:

“In any proceedings, the Supreme Court may make any ancillary or interlocutory orders, including any orders as to costs as it thinks fit to award...”

Further that this element of the judicial mandate is to be found in other laws as well. Thus the **Civil Procedure Act (cap 21, laws f Kenya)**, the primary law of judicial procedure in civil matters, thus stipulates (**section 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 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”

DETERMINATION

This Court delivered Ruling on application of judgment on admission on 20th May 2019. This was as a result of admitted facts by the Plaintiff on the Respondent’s claim. The admissions as disclosed from the Defendants correspondence and pleadings did not include admission on the issue of costs.

The parties through Counsel were granted an opportunity to canvass the issue of costs as it was not part of the admitted issues.

Parties are unable to agree hence the submissions on the question.

Section 27 of the Civil Procedure Act prescribes as proviso;

“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”

The Parties through Counsel submitted on the issue of costs, the judicial discretion may only be exercised if any special issues have been raised by the Defendant for the Court to consider. In the absence of any circumstances for the Court to consider and exercise judicial discretion in the Defendant’s favour, the Court shall grant costs in favour of the plaintiff who obtained judgment in their favour following hearing and determination of application of entry of judgment on admission.

DELIVERED SIGNED & DATED IN OPEN COURT ON 15TH NOVEMBER 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

NO APPEARANCE.....FOR THE PLAINTIFF

NO APPEARANCE.....FOR THE 1ST DEFENDANT

NO APPEARANCE.....FOR THE 2ND DEFENDANT

MS JASMINE – COURT ASSISTANT