



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL CASE NO. 3 OF 2018

JOHN MUTHEE MWANIKI.....PLAINTIFF

VERSUS

KENYA MALIK LIMITED.....1ST DEFENDANT

GIANT AUCTIONEERS.....2ND DEFENDANT

BASELINE AUCTIONEERS.....3RD DEFENDANT

R U L I N G

1. This is a ruling on the payment of costs upon withdrawal of this case by the plaintiff.
2. This suit was filed by the plaintiff in 30/04/2018 through R. Muthike Makworo & Co. Advocates. The claim was for a host of orders among them loss of user for motor vehicle registration number KCM 984M at the rate of Kshs.12,000/- per day from the date of repossession to the date of release.
3. The 2nd respondent entered appearance and filed defence through Eddie Njiru & Co. Advocates.
4. The plaintiff applied to withdraw the case with no orders as to costs before the notice of motion was heard inter parties. This was on 23/05/2018 in the presence of the counsel for the 2nd respondent. The 2nd defendant conceded to the application but demanded to be paid its costs. The court made an order in granting withdrawal that the plaintiff pays costs to the 2nd defendant. But still gave the parties time to discuss and agree on who was to pay costs.
5. The parties failed to agree the court allowed to address the court on the subject matter. T
6. The plaintiff explained that at the time of filing the suit, the vehicle was held by the 2nd defendant on instructions of the 1st defendant during the pendency of the suit released it to the 3rd defendant who advertised it for sale.
7. The 1st and 2nd defendants were served with a court order restraining them from selling the vehicle. The vehicle was then released to the plaintiff by the 3rd defendant on instructions of the 1st defendant.
8. The plaintiff argues that he was not on the wrong and should not pay costs to the 2nd defendant. The 2nd defendant was acting on the instructions of the 1st defendant and ought to be paid costs by the said 1st defendant. According to the plaintiff it is the 1st defendant who caused all the drama that led to the 2nd defendant incurring costs.
9. Ms. Makworo cited section 27 of the Civil Procedure Act arguing that costs are at the discretion of the court. She relied on the case of **LITTLE AFRICA KENYAN LTD VS ANDREW MWITI JASO [2014] eKLR** on the principles of awarding costs.
10. The 2nd defendants counsel argued that the plaintiff ought to pay costs to the 2nd defendant for it is him who withdrew the case. Mr. Njiru relied on Section 27 of the Civil Procedure costs which provides that the defendant is entitled to costs on withdrawal of a suit. He also gave a suggestion that the court may order the plaintiff and the defendant to share the costs.
11. I wish to cite the relevant law Section 27(1) of the Civil Procedure Act which provides:-

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.

12. The provision places at the discretion of the court the awarding of costs and incidentals in all suits. The provision explains that all costs shall follow the event unless the court for good cause otherwise orders.

13. In the case before me, the event was the withdrawal of the case that was done at a very early stage. The 2nd defendant opposed the withdrawal of the case with no order as to costs and prayed to be awarded costs for having defended the suit.

14. The order of the court that the plaintiff was to meet the costs of the 2nd defendant was based on Section 27(1) of the Act but was subject to review since the parties indicated they would attempt to sort out the issue.

15. Upon failing to agree, the court was addressed by the plaintiff and the second defendant. After hearing the counsels for parties, I am convinced that the costs should not follow the event and that the court ought to be guided by the provision to Section 27(1) of the Act. The proviso empowers the court for good cause to make a decision as to who is to pay the costs or whether such costs will be shared.

16. I have listened to the grievances of the plaintiff as to the fact that the attachment was unlawful according to him. He obtained a court order which was served on the 1st and 2nd defendant on 24/04/2018. On the same day, the 2nd defendant was served, it released the vehicle to the 3rd defendant who advertised it for sale. The conduct of the 2nd defendant which was in total disregard of the court order was not in good faith. This allegation was not denied by the 2nd defendant.

17. It is commendable that the plaintiff and the defendant later got together and agreed to settle the matter out of court. The plaintiff then agreed to withdraw the suit.

18. The decision of the court on award or otherwise of costs will be influenced by different circumstances. In this case, the conduct of the defendants was motivated by ill-will. The 1st defendant did not defend the suit and this court cannot condemn him unheard by making any orders as to costs on him.

19. Having that background in mind, I am of the considered opinion that each party should meet its own costs in this case. The earlier order of the court as to costs made on 23/05/2015 is hereby set aside.

20. The suit stands withdrawn with no order as to costs.

21. It is hereby so ordered.

DATED, DELIVERED AND SIGNED THIS 16TH DAY OF JULY, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Mbogo for E. Njiru for 2nd Defendant