

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 15 OF 2016

MUNYAKA KUNA COMPANY LIMITED.....PLAINTIFF

VERSUS

HERMAN KIMANI & 6 OTHERS.....DEFENDANTS

RULING

On 28th May, 2018 both counsel for the parties appeared before the court and presented consent dated 13th February, 2018 in the following terms,

“This matter be marked as withdrawn.

The issue of costs to be addressed and determined by the court.”

That consent was adopted as the order of the court which further directed counsel to agree on costs but in the event of no agreement submissions to be filed. No agreement was reached and both parties have filed submissions relating to costs.

The plaintiff is a limited liability company, while the defendants are either shareholders and or directors thereof. The first action to invoke the authority of the court was by the plaintiff against the defendants. This was after the defendants moved to hold an annual general meeting which was considered by the plaintiff to be illegal. It is important to observe that from the time this suit was filed in January, 2016 to date, summons to enter appearance are still in the court record, and the time within which they should be served has now expired. This means the defendants have never entered an appearance or filed a defence to the claim.

Several applications are on record by both sides which have not been conclusively heard and determined. This matter was subsequently referred to mediation but again the parties failed to reach a settlement. Eventually reason prevailed, and the parties agreed to change the status of the company from a private limited liability to a public company.

Although the plaintiff is a separate legal entity, the relationship to the defendants may be said to be academic or artificial. This is because it is the defendants who may convene the meetings to facilitate the operations of the plaintiff. Many a times it is the differences between the members and or directors of a company that trigger the disputes such as the one before this court.

Having said so, where parties have met and a consent order is arrived at, there are no losers or winners in the circumstances. Section 27 of the Civil Procedure Act provides for costs in civil proceedings. Such costs shall be at the discretion of the court but in most cases costs of any action shall follow the event, unless the court, for good reason, orders otherwise.

I note that parties herein hired counsel to prosecute or defend the applications on record. Some truce must have been reached before the suit was withdrawn. There was some meeting of minds which led to that order. These are parties who have been and shall continue to operate together for some time.

In the case of **Rufus Njuguna Miringu & Another vs. Martha Muriithi & 2 Others (2012) e KLR** the court stated as follows,

“Consent cannot be interpreted to mean that one or the other party has succeeded in a suit. Even if in the present case such a settlement has worked out in the defendants’ favour, the successful determination of the dispute is still attributable to both the plaintiff and the 1st and 2nd defendants..... In the circumstances, it would be just for the parties to bear their own costs of the proceedings.” See also **Little Africa Kenya Limited vs. Andrew Mwiti Jason (2014) e KLR**

Having taken into consideration the pleadings herein, the applications and submissions of the parties and the special relationship between the plaintiff and the defendants, I am inclined to order, which I hereby do, that each party shall bear their own costs.

Dated, signed and delivered at Nairobi this 1st day of November, 2018.

A. MBOGHOLI MSAGHA

JUDGE