



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL CASE NO 17 OF 2014

CECILIA KARURU NGAYU.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA.....1ST DEFENDANT

CREDIT REFERENCE BUREAU AFRICA LTD.....2ND DEFENDANT

RULING

Before me for determination is the issue of costs as between the plaintiff and the second defendant and the plaintiff. It's interesting that the suit against the second defendant had not been withdrawn, compromised or settled and as matters stand now the suit against the second defendant and indeed both defendants is still pending. Since costs follow the event, an issue does arise as to whether the court can determine costs before a suit is formally determined. I will make a determination on this issue later in this ruling.

It's imperative at this stage to enumerate the steps taken by the parties since the inception of this suit. By a notice of motion dated the 2ND July 2014 the plaintiff herein sued both defendants seeking the following orders against the defendants jointly and severally:-

- a. *A declaration that the seizure and sale by private treaty of the plaintiffs motor vehicle registration No. KAW 363 K, Toyota Hilux Pick Up was un procedural, unlawful and malicious and sale be set aside and i the alternative, damages to issue to the plaintiff.*
- b. *That the defendant be compelled by court to delist the plaintiff as a delinquent within the 2nd defendant's data base forthwith.*
- c. *That costs of this suit be provided for.*
- d. *Interests.*

Upon being served the second defendant filed a memorandum of appearance and a defence on 14th October 2014. The defence raised pertinent issues of law and fact and called for the plaintiffs claim against the second defendant to be dismissed. The first defendant also filed a defence and a counter claim.

On 29th September 2015, the second defendant filed a notice of motion seeking orders *inter alia* that it be struck off from these proceedings. No grounds of objection or replying affidavit have been filed in response to the said application which is still pending in court.

When the matter came up in court on 7th October 2015, counsel for the plaintiff informed the court that the matter was being mentioned to confirm a consent between the plaintiff and the first defendant, a position that was confirmed by counsel for the first defendant. However, counsel for the second defendant insisted that the second defendant was not a party to the proposed consent and asked for time to consider her position.

A mention date was fixed for 23rd October 2015 with a view to recording a consent, but on that day counsel for the second defendant did not make it to court, hence a further mention date as schedule for 17th November 2015 but again on that day counsels did not attend court and counsel holding brief asked for a further mention date and a further mention date was fixed for 26th January 2016.

On the said date counsel for the plaintiff and the second defendant attended court and proposed to file written submissions for the court to determine the issue of costs between the plaintiff and the second defendant. Only counsel for the second defendant filed their submissions on the issue. Counsel for the plaintiff promised to file theirs at the end of the day but did not file.

Having taken into account the submissions by counsel for the second defendant and the facts of this case as outlined above, it's important at the outset to reproduce below the provisions of section 27 of the Civil Procedure Act^[1] which provides as follows:-

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 give all the necessary directions for the purposes aforesaid; and the fact that the court 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 direct.

In *Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd*^[2] this court held as follows:-

"The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case."^[3]

Thus, it is imperative to bear in mind the various steps taken by the parties in the case so as to appreciate the trouble taken by both parties since the suit was filed. I have already outlined the various steps above, I need not repeat the same here. I find useful guidance in the following passage from the **Halsbury's Laws of England**,^[4]

"The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice"(Emphasis added).

Writing on the same subject *Mr. Justice (Retired) Kuloba*^[5] stated:-

"Costs are {awarded at} the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise..."

To my mind there appears to be no clear or prescribed definition of what constitutes “good reasons” that will justify the courts departure, in awarding costs, from the general rule that ‘costs follow the event.’ Discussing the same point, the supreme court of Kenya in the case of *Jasbir Singh Rai & Others vs Tarlochan Rai & Others*^[6] observed that:

“in the classic common law style, the courts have to proceed on a case by case basis, to identify “good reasons” for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs.....”

The reason for the above reasoning is that in public litigation, a litigant is usually advancing public interest as opposed to personal gain.

In the above cited case,^[7] this court cited the decision in the *Party of Independent Candidate of Kenya vs Mutula Kilonzo & 2 others*,^[8] where the court citing two leading decisions on the subject held *inter alia* that:-

*“It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is a matter in which the trial Judge is given discretion.But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the **exercise of good grounds for doing so.**”*

In my view section 27 of the Civil Procedure Act provides the general rule which ought to be followed unless for good reason to be recorded. The said section in my view does not make distinctions between determinations made by consent or on courts own determination or withdrawals. This position is well stipulated by *Richard Kuloba* in the above cited book where he observed that:-

“the fact that the unsuccessful party did not contest the case is not in itself a ground for refusal of costs but it is a factor that can be take into account if other good reason exists” (Emphasis added).

However, the only consideration is the “event” as was held in the supreme court of Uganda in *Impressa Ing Fortunato Federice vs Nabwire*^[9] where the court stated:-

*“The effect of section 27 of the Civil Procedure Act is that the Judge or court dealing with the issue of costs in any suit, action, cause or matter has absolute discretion to determine by whom and to what extent such costs are to be paid; of course like all judicial discretions, the discretion on costs must be exercised judiciously and how a court or judge exercises such discretion depends on the facts of each case. If there were mathematical formula, it would no longer be discretion... while it is true that ordinarily, costs should follow the event unless for some good reason the court orders otherwise, the principles to be applied are- (i) under section 27 (1) of the Civil Procedure Act, costs should **follow the event unless the court orders otherwise**. This provision gives the judge discretion in awarding costs but that discretion has to be exercised judicially. (ii), A successful party can be denied costs if it is proved that but for his conduct the action would not have been brought... It is trite law that where judgement is given on the basis of consent of parties, a court may not inquire into what motivated the parties to consent or to admit liability.....”*

Also of useful guidance is the decision in the Ugandan case of *Re Ebuneiri Waisswa Kafuko*^[10] where the court held as hereunder:-

“The judge in his discretion may say expressly that he makes no order as to costs and in that case each party must pay his own costs. If he does not make an order as to costs, the general rule is that he shall order that he costs follow the event except where it appears to him in the circumstances of the case some other order should be made as to the whole or any part of the costs. But he must not

apply this or any other general rule in such a way as to exclude the exercise of the discretion entrusted to him and the material must exist upon which the discretion can be exercised. The discretion, like any other must be exercised judicially and the judge ought not to exercise it against the successful party except for some reason connected with the case. It is not judicial exercise of the judge's discretion to order a party who was completely successful and against whom no misconduct is even alleged to pay costs."

To my mind, in determining the issue of costs, the court is entitled to look at *inter alia* (i) the conduct of the parties, (ii) the subject of litigation, (iii) the circumstances which led to the institution of the proceedings, (iv) the events which eventually led to their termination, (v) the stage at which the proceedings were terminated, (vi) the manner in which they were terminated, (vii) the relationship between the parties and (viii) the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of the Constitution.^[11] In other words the court may not only consider the conduct of the party in the actual litigation, but the matters which led to the litigation, the eventual termination thereof and the likely consequences of the order for costs.^[12]

I have considered the above points and the arguments advanced by the second defendant and in my considered opinion the conduct of the parties prior and after filing this suit is a relevant issue. It is not in dispute that suit was initiated seeking the orders enumerated above, that the plaintiff and the first defendant have agreed to compromise the case without involving the second defendant and in a manner that does not affect the second defendant. The plaintiff has not expressed willingness to withdraw the suit against the second defendant nor has they filed objections to the application seeking to strike off the second defendant from these proceedings.

As stated above in cases whereby the parties enter into a consent, the court does not go further to inquire the reasons for the consent, this court is not bound to dig into the reasons why the plaintiff seeks to resolve the matter with the first defendant, nor can an adverse inference be made against the plaintiff while determining costs. The only relevant issue is whether or not the second defendant is entitled to costs. The court is only interested in determining whether or not the second defendant is entitled to costs for the steps taken as enumerated earlier.

The question that arises is whether or not the act of recording the intended consent is an event within the phrase "**costs follow the event.**" It is not in dispute that the plaintiff and the first defendant have agreed to resolve the case.

Does the filing of the suit and the various steps taken by the parties and the intended resolution of this suit by recording the intended consent as aforesaid amount to an event as envisaged under section 27 Civil Procedure Act cited above. Justice (Retired) Richard Kuloba^[13] in the earlier cited book states as follows:-

"The words "the event" mean the result of all the proceedings to the litigation. The event is the result of the entire litigation. It is clear however, that the word "event" is to be regarded as a collective noun and is to be read distinctively so that in fact it may mean the "events" of separate issues in an action. 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, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it. An issue in this sense need not go to the whole cause of action, but includes any issue which has a direct and definite event in defeating the claim to judgement in the whole or in part"

At page 101 of the same book, Kuloba authoritatively states as follows:-

"The law of costs as it is understood by courts in Kenya, is this, that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part-no omission or neglect, and no vexatious or oppressive conduct is attributed to him, which would induce the court to deprive him of his costs-the court has no discretion and cannot take away the plaintiffs right to costs. If the

defendant, however innocently, has infringed a legal right of the plaintiff, the plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course”

In my view, the above paragraph applies equally where a defendant has been wrongfully sued or in circumstances of the present case. To my mind, the second defendants’ actions enumerated above show that they are not guilty of any misconduct. It matters not that the case was withdrawn or compromised or intended to be compromised as in this case, what matters is whether the second defendants are entitled to costs for the trouble undertaken by them in defending these proceedings. In this connection, I am guided by the decision in the case of *Orix (K) Limited vs Paul Kabeu & 2 others*^[14] where it was held *inter alia*:-

“.....the court should have been guided by the law that costs follow the event, and the plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied costs or the successful issue was not attracting costs. None of the deviant factors are present in this case and the court would still have awarded costs to the plaintiff, which I do.”

As mentioned earlier, the plaintiff has not formally withdrawn the case against the second defendant but the parties have asked the court to determine the issue of costs. In my view, it would have been more prudent to determine the proceedings one way or the other so that the order on costs does not remain hanging in the air. Considering the need to bring proceedings to an end and bearing in mind the fact that by asking the court to determine on costs both the plaintiff and the second defendant have impliedly or expressly confirmed that no other issues are pending, I find it necessary to make orders terminating the case so as to create ground for the order on costs. In so doing I have considered the confusion that may be created in making an order on costs in a pending case. I hold the view that the logical position would be to make an order striking off the second defendant from these proceedings with costs to the second defendant.

Considering the entire chain of events from filing this suit up to the time the parties left the issue to the court to determine, the numerous court attendances cited above I find no reason to deny the second defendant costs and in exercise of my discretion in a manner that meets the interests of justice for both parties in the circumstances of this case, and guided by the law and relevant authorities, I hereby make the following orders:-

- i. **That** the second defendants be and are hereby struck off from these proceedings.
- ii. **That** the plaintiffs do pay to the second defendant the costs of this case to be agreed or taxed by the taxing master of this court.

Orders accordingly

Right of appeal 30 days

Dated at Nyeri this 8th day of February 2016

John M. Mativo

Judge

[1] Cap 21, Laws of Kenya

[2] Judicial Review application no 6 of 2014

[3] Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & others {2014} eKLR

[4] 4th Edition (Re-issue), {2010}, Vol.10. para 16

[5] Judicial Hints on Civil Procedure, 2nd Edition, (Nairobi) Law Africa) 2011, page 94

[6] Supra note 4

[7] Supra note 2

[8] HC EP No. 6 of 2013

[9] {2001} 2 EA 383

[10] Kampala HCMA No. 81 of 1993 cited by Odunga J in Pet No 466 of 2014 cited above, see note 11

[11] See Odunga J in JR No. 466 of 2014 between Republic vs Kenya National Highway Authority & Others , Ex parte Kanyingi Wahome

[12] See Hussein Janmohamed & Sons vs Twentsche Overseas Trading Co. Ltd {1967} EA 287 and Mulla 12th Edition AT Psage 150

[13] Richard Kuloba, Judicial Hints on Civil Procedure, 2nd Edition, page 99

[14] {2014}eKLR