



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA.**

**CIVIL SUIT NO. 335 OF 2013.**

**CLEOPHAS MALALAH ::::::::::::::::::::;:::::::::::::::::: PLAINTIFF.**

**VERSUS**

**PATRICK KAMWESSAR**

**CLERK KAKAMEGA COUNTY ASSEMBLY ::::::: 1<sup>ST</sup> DEFENDANT.**

**MAURICE BULUMA**

**SPEAKER KAKAMEGA COUNTY ASSEMBLY :: 2<sup>ND</sup> DEFENDANT.**

**REUBEN NYANWESO**

**LEADER OF MAJORITY,**

**KAKAMEGA COUNTY ASSEMBLY :::::::::::::::::::: 3<sup>RD</sup> DEFENDANT.**

**R U L I N G.**

1. By a plaint dated 13<sup>th</sup> November, 2013 the plaintiff lodged instant suit seeking the following reliefs.
  - (c) *An injunction restraining the defendants from holding or conducting unprocedural sitting of the Assembly;*
  - (b) *An injunction restraining the defendants, their agents and/or servants from acts of sabotage or breach of security against the plaintiff;*
  - (c) *Any other relief the Hon court deems fit to grant.*
2. Alongside with plaint there was a motion contemporaneously filed. The respondents responded by filing defence and affidavits in opposition to the suit and the motion.
3. The motion was later canvassed and dismissed with costs on 20<sup>th</sup> February, 2014. The suit was subsequently fixed for hearing on 18<sup>th</sup> November, 2014 at the instant of the defendant. The matter could not proceed as parties had not complied with the requirements of order 11 of the CPR 2010 and thus were directed to so comply. Instead of complying the plaintiff moved court on 18<sup>th</sup> February, 2015 for leave to withdraw the suit. The parties could not agree on issues of costs and thus were directed and they agreed same e canvassed by way of submissions which parties were to file and exchange.

4. In the court record, only the defendant has filed the submissions. When the matter came for highlighting the submissions on 28<sup>th</sup> June, 2016, the plaintiff and his advocate did not attend court despite service of notice dated 24<sup>th</sup> May, 2016.

5. The court after being satisfied with service fixed the matter for ruling a date. The issues of costs are governed by section 27 of CPA Cap 21 (1) proviso in absence of courts directions which is to the effect that:-

***“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 orders.”***

6. The basic rule in attribution of costs is that costs follow the event, and as is succinctly set out under the provisions of Section 27(1) of the Civil Procedure Act. It is imperative to bear in mind the steps taken by the parties since the inception of this suit so as to appreciate whether or not the event has taken place.

7. In considering such steps, the Court would also be guided by the merits and principles enunciated by in **Muhito Mwinyenderi Building Co Ltd & Another v Johnstone Githua Gatherer & Another (2015) eKLR** where he reiterated as follows;

***“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 he likely consequences of the order for costs.[12]”***

8. In **Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin (1997) 186 CLR 622** it was reiterated that the general principle in relation to costs where proceedings are determined without a hearing on the merits, and where it cannot be said that one party has simply capitulated, is that the Courts make no order as to costs with the intent that each party bears its own costs, unless it can be seen that one party has acted unreasonably in bringing or defending the proceedings (see also **Harkness Vs. Harkness (No 2) [2012] NSWSC 35**).

9. It was further enunciated that in rare cases, it may be appropriate to make an order for costs without a contested hearing on the merits, if the court can be almost certain that one party or the other would have won.

10. The court did not otherwise order. The court had earlier awarded defendant costs in the motion vide orders of 20<sup>th</sup> February, 2014.

11. In view of the foregoing, the costs of the instant suit have to follow the event. The event is that the plaintiff withdrew the suit and thus was not successful. The defendant therefore is entitled to the costs of the suit as provided by the proviso to section 27 of the Civil Procedure Act.

12. The court thus makes the following orders:-

*(1) The costs of the suit are awarded to the defendant;*

*(2) The interest on costs will accrue from the date of taxation to date for payment in full.*

**DELIVERED, DATED and SIGNED at KAKAMEGA this 8<sup>TH</sup> day of SEPTEMBER 2016.**

**C. KARIUKI.**

**JUDGE.**

**In the presence of:**

.....**N/A**..... **for the Plaintiff.**

.....**FWAMA** .....**for the Defendants.**

.....**ANUNDA**.....**Court Assistant.**