



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

WINDING UP CAUSE NO. 19 OF 2011

IN THE MATTER OF COMPANIES ACT (CHAPTER 486, LAWS OF KENYA)

AND

IN THE MATTER OF PAYLESS CAR HIRE AND TOURS

RULING

Costs

[1] This ruling relates to whether costs should be awarded to the Petitioner. The Petitioner submitted that, before the commencement of these proceedings, it made written and verbal demands for payment of the outstanding sums from the Company. But, despite receiving the demands, the Company totally ignored those demands, hence, this petition. They only made a proposal for payment of the sum due after the petition had been filed. Therefore, the Company is to blame for the filing of this petition and should pay costs of the petition. Again, during the pendency of this petition, the Company made proposals to pay the debt and the Petitioner accepted the proposals. But all these promises were in vain because they paid much later and after the Petitioner had fixed the Petition for hearing on several occasions. The Petitioner stated that the court record attests to these facts. The Petitioner averred that it has always been ready to proceed with the Petition to its logical conclusion. For those reasons, the Petitioner urged the court to follow the rule of thumb, that is, costs follow the event and award costs. To them, the event was the filing of the petition pursuant to which the Company reluctantly paid the outstanding debt. The Petitioner has also incurred costs in filing this Petition which could have been avoided had the Company responded to the Petitioner's demand. Therefore, the Petitioner says is entitled to costs to be taxed by the taxing master.

The Company says it should not pay costs

[2] The Company submitted that the Petitioner herein filed its petition on 29th June 2011 seeking to wind up the company on the reason that the company was unable to pay its debt of Kshs. 1,719,320. The company then filed a chamber summons application to strike out the petition as the same had been presented without issuing the statutory Notice. By consent of the Parties the petition was stayed and the application by the company was canvassed and a ruling delivered dismissing the application with costs. The company meanwhile continued to pay the entire debt. Essentially the petition was spent upon payment thereof and costs are not payable. The Petitioner is entitled only to costs of the application which were awarded by the court in its ruling dated 23rd May, 2013. The Advocates (Remuneration) (Amendment) Order provides for a fee of Kshs.12,000/= as cost to be awarded in such applications. They

should be paid costs of the application of Kshs,12,000/- which is reasonable award. Otherwise the taxing master will have to tax costs upon presentation of a bill of costs.

DETERMINATION

[3] Costs follow the event. However, costs are not awarded as a matter of right but at the discretion of the court. The discretion of the Court is, however, exercised judicially and judiciously; not capriciously; not whimsically but upon defined legal principles. The judicial decisions on this subject are legion, and I need not multiply them. Except to state that the phraseology '*Cost follow the event*' has been sufficiently described in judicial as well as literary works available on the subject. I am content to cite a work of Kuloba J (as he then was), *Judicial Hints on Civil Procedure* 2nd edition at page 99 that;

“The words “the event” mean the result of all the proceedings to the litigation. The event is the result of 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 judgment in the whole or in part.

Object of awarding costs

[4] And as a general rule, the object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. Costs are, thus, a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action. Costs should not, therefore, be made merely as a penal measure unless it is meant to purge non-compliance or non-adherence by the party with orders of court or requirements under the law. Nonetheless, costs will be denied to the successful party in the suit if such party is guilty of misconduct or omission or neglect, or vexatious or oppressive conduct. On this, see the decision by the Supreme Court in **Jasbir Singh Rai & 3 others v Tarclochan Singh Rai & 4 others [2014] eKLR** that costs are not used to penalize the losing party but for compensating the successful party for trouble taken in prosecuting a suit. The legal policy behind these rules is that, it is the right of an aggrieved party to come to court to have his rights vindicated and to be able to recover all costs which have been occasioned by the party on the wrong. If I understood the arguments by the Company, they are seeking to reverse this legal philosophy to one which is preposterous; one which portends that a wronged party should come to court at his own risk; or that resort to judicial process should be a painful exercise for the wronged party while painless for the party in the wrong. The Petitioner's right had been infringed by the Company and was entitled to enforce its rights as it did. Due demand notice was issued but in vain, hence this petition. As a result, the Petitioner incurred expenses. Although the Company paid, it was intermittent, on several broken promises and after the petition was filed. I note also that the application to strike out the Petition was dismissed with costs. The Petitioner is not guilty of any misconduct. All these factors are important when a court is considering the question of costs. Accordingly, looking at the result of the entire litigation, the Petitioner is the successful party and is, therefore, entitled to costs of the petition as well. The fact that the Company paid the entire sum after the petition was filed or that the Petitioner met little or no resistance does not make the Petitioner any less than a successful party. Indeed, it is not a necessary factor in awarding costs that tumultuous or spirited defence or contest was put up against a party as each party is entitled in law to defend its stand point in a matter whether in highly dramatic manner or in aloof manner. That is a matter of style which does not matter in awarding costs. See what Justice Kuloba in *Judicial Hints of Civil Procedure* wrote that;

“Furthermore a successful party cannot be deprived of his costs merely because the suit proceeded ex parte or uncontested. This is to say, 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 taken into account if other good reason exists.

The giving or absence of notice to sue, before a suit is instituted is a relevant consideration in awarding costs. This is a circumstance in which quite apart from misconduct, costs can be refused to a successful party.

[6] Accordingly, I find and hold that the Petitioner is entitled to costs of the Petition. I award him costs to be taxed by the taxing master or agreed between the parties. This is in addition to the costs of the application which were awarded by Havelock J.

Dated, signed and delivered in court at Nairobi this 11th day of May 2015.

F. GIKONYO

JUDGE