



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

HCCC NO.11 OF 2014

CALBERT LIMITED **PLAINTIFF**

VRS

ESTELLA COMPANY **DEFENDANT**

RULING

The plaintiff filed this suit seeking ksh.2,573,076/- from the defendant. The plaintiff also sought costs of the suit and interest. The defendants duly entered appearance and filed a statement of defence on 22/5/2014. On 26th March, 2015, a director of the Plaintiff Company, one Cattani Alberto wrote a letter to the Deputy Registrar of the Malindi High Court. The letter reads as follows:-

“26th March 2015

The Deputy Registrar

High Court of Kenya

MALINDI

Dear Sir,

RE: HCC NO.11 OF 2014

CALBERT LIMITED -VERSUS - ESITELA COMPANY LIMITED

Please refer to the above matter. This is to notify the court and all the advocates concerned that the claim of the plaintiff company has been settled in full by the defendant and it was agreed between the plaintiff and the defendant that each party shall bear its own party and party costs.

Yours faithfully,

CATTANI ALBERTO

DIRECTOR

CALBERT LIMITED

CC: Mwaure & Mwaure Wahiga & Co.

Advocates

MALINDI

Kilonzo & Aziz Company

Advocates

MALINDI”

The record shows that the defendant issued post dated cheques in favour of the plaintiff. Parties kept on mentioning the matter until when the last post dated cheque was honoured. On 4/9/2014, parties appeared before Justice Meoli and indicated that the matter could be marked as settled as all cheques had been cleared. The issue of costs was to be settled between the parties. Counsel for the plaintiff filed a bill of costs that was objected to by the defendant's advocate. Parties agreed to submit on the issue of costs. Counsel for the plaintiff maintains that the plaintiff was the successful party and was therefore entitled to costs. The suit was filed due to the defendant's failure to meet certain obligations. The fact that a consent was filed in court meant that the plaintiff's suit had succeeded. The plaintiff's rights had been infringed. Counsel relies on the Case of **Morgan Air Cargo Ltd v Evrest Enterprises LTT [2014] eKLR, Nrb HCCC No.179 of 2013**. In that case the court held that where a plaintiff is successful in his suit, then the plaintiff is entitled to costs of the suit as a matter of course.

Counsel for the respondent maintains that the suit was compromised. Since parties compromised the suit, there was no winner and the issue of costs should not arise. The dispute has been resolved and the court should stop at that stage. There is no proof that the letter settling the matter was a forgery.

The main issue for determination is whether the plaintiff should be awarded costs. Section 27 of the Civil Procedure Act states 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 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.

(2) The court or judge may give interest on costs at any rate and exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

Miss Marubu, counsel for the plaintiff maintains that the plaintiff's suit was successful and therefore costs should be awarded. The record shows that it is the plaintiff who wrote to the court to have the dispute marked as settled in full. On the issue of costs, the letter indicate that it was agreed between the plaintiff and the defendant that each party bears its own party and party costs. The letter is dated 26th March 2015 and was copied to both counsels.

The record shows that the dispute was marked as settled on 4/9/2014. the letter dated 26/3/2015 was written after the matter had been marked as settled. Parties were to settle the issue of costs. The plaintiff confirmed in its letter that costs were to be settled by each party. It is clear to me that counsels for the plaintiff should get their costs from their client. The letter shows that the plaintiff was to settle its advocate's costs. Since there is no evidence that the plaintiff has failed to pay the costs, I do find that counsel

for the plaintiff is not entitled to any costs. It is the plaintiff who made the court to record that it will

meet its own advocate's costs. Miss Marubu can file a bill of costs against her client and even annex the letter by her client indicating that the plaintiff was going to pay costs.

Article 159 of the Constitution calls upon the courts to encourage alternative dispute resolution mechanism. Parties agreed to resolve their dispute on their own. This is encouraged by the court. The two parties agreed to settle their own advocates' costs. It would be unfair to call upon the defendant to meet the plaintiff's costs. This shall be contrary to the parties' own settlement.

In the end, I do find that the defendant cannot be called upon to pay the plaintiff's costs. As per the consent, each party shall meet their own costs.

Dated, signed and delivered at Malindi this 15th day of October, 2015.

SAID J. CHITEMBWE

JUDGE