



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS

Civil Suit 692 of 1999

ROSALINE NJERI MACHARIA..... PLAINTIFF

VERSUS

DAIMA BANK LIMITED (IN LIQUIDATION)..... 1ST DEFENDANT

SAMUEL KIOKO MUUMBI..... 2ND DEFENDANT

RULING

By a Plaint lodged in court on 2nd June, 1999, the Plaintiff made various allegations against the Defendants. The 2nd Defendant was sued in his capacity as the Chairman and director of the 1st Defendant and it was alleged that he was at all times in charge of the Plaintiff's account with the 1st Defendant. Various allegations were made regarding the effect of some advances made to the Plaintiff by the 1st Defendant and how they were allegedly mismanaged, the Plaintiff prayed for various reliefs against the Defendants. The only prayer that affected the 2nd Defendant was the claim for special damages of Kshs.7,987,000/- plus interest and costs.

A joint Defence was filed on 2nd July, 1999 in which a counterclaim was lodged on behalf of the 1st Defendant for, inter alia, Kshs.85,673,188/70. The 2nd Defendant, only prayed for the case against him to be dismissed. On a date which is not clear after the 1st Defendant was placed under liquidation, each of the Defendants had to seek the services of own Advocates. The 2nd Defendant appointed Ms Kioko, Munyithya, Ngugi & Company Advocates to act on his behalf.

On 9th May, 2012, the Plaintiff and the 1st Defendant compromised the suit against the 1st Defendant whereby the case against the 2nd Defendant was withdrawn. The issue for determination is whether or not the 2nd Defendant should be paid the costs of the suit by the Plaintiff.

Mr. Abidha, learned Counsel for the Plaintiff gave the history of the suit and submitted that costs should not be paid to the 2nd Defendant for the reason that he was only a nominal Defendant, that he had only been sued in his capacity as the Chairman and director of the 1st Defendant, that after the 1st Defendant was placed under liquidation, the 2nd Defendant became inactive in the matter, that since the matter had been withdrawn it has been a situation of give and take that since the 2nd Plaintiff had only indicated that he be withdrawn from the case in the letter by his Advocates dated 4/5/2012, no costs should be awarded to him.

Mr. Matwere appearing for the 2nd Defendant submitted that it does not matter that the suit against the 2nd Defendant has been withdrawn, the fact is that he enlisted the services of an Advocate to protect his interests in the suit, that he had incurred costs. In his view costs of the suit should be ordered in favour of the 2nd Defendant.

None of the parties referred the court to any law or authorities in support of their respective claims.

The provision that provide for withdrawal and discontinuance of suits is Order 25 of the Civil Procedure Rules. Under Rule 2 thereof, the court is given unfettered discretion to allow the discontinuance or withdrawal of a suit on terms as to costs. Therefore the issue of costs is in the discretion of the court.

In the text **Judicial Hints on Civil Procedure, 2nd Edition** by Richard Kuloba it is observed at page 106 thereof:-

“A Defendant has no right to costs unless the court has in its discretion made an order of costs in his favour, and it is only when such an order is made that he can enforce it under Rule 3 of the order.”

In **J.B. Kohli and others –vs- Bachulal Popatlal (1964) EA 219** at page 230 the Court held that:-

“It is plain I think, that the saving clause of this rule gives the court an unfettered discretion is ordering terms as to costs upon discontinuance or withdrawal of an action with leave. It seems to me that a Defendant has no right to costs unless the court has in its discretion made an order for costs in his favour In my view, it is not without significance that the marginal notes to Rule 3 read ‘Decree may be issued for costs.....’”

The court went on to hold that costs are awarded at the discretion of the court and are not automatic.

Accordingly, the issue of whether or not costs of the suit are to be awarded by the court is in the discretion of the court. Like in all other discretions, that discretion has to be exercised judiciously and not capriciously. It depends on the circumstances of each individual case.

The Plaintiff’s contention is that the 2nd Defendant is not entitled to costs for the reason that he was a nominal Defendant, that he was merely sued as a chairman and director of the 1st Defendant and that after liquidation, the liquidators Advocates took over the defence of the 1st Defendant and the 2nd Defendant never took any active part in the suit.

In my view, the factors which a court has to consider in deciding whether or not to order costs, is the nature of the allegations a Plaintiff has made against a Defendant, the nature of the claim, the likelihood and nature of liability that would attach against a Defendant if he does not defend the claim. Also the court should consider the nature of the defence, if any, filed by the Defendant and the stage at which the suit is being withdrawn or discontinued.

In the present case, although the 2nd Defendant was sued as the chairman and director of the 1st Defendant, serious allegations were made against him or his conduct of the Plaintiffs account with the 1st Defendant, while all the other claims were as against the 1st Defendant, a special damage claim was made for Kshs.7,987,000/- plus interest and costs which would have attached against the 2nd Defendant if

he did not file a defence. Although it was a joint defence that was filed, the same covered the 2nd Defendant as well.

After the 1st Defendant was placed under liquidation, the 2nd Defendant was forced to seek the services of an independent firm of Advocates from those of the 1st Defendant. Of course such retention must not have been for free.

Accordingly, the fact that the 2nd Defendant was sued as chairman and director of the 1st Defendant, that did not relieve him from being liable under the claim as lodged. Had he failed to file a defence to the claim the least of liability he would have been subject to was Kshs. 7,987,000/- plus interest and costs. My view therefore is that, the capacity in which he was sued would not have relieved him of liability to the Plaintiff as claimed if he had not filed a defence to the claim.

The Plaintiff's contention that in the letter of 4th May, 2012 the 2nd Defendants letter did not demand for costs does not commend itself to me. I have carefully considered the same and I have found that nowhere in the said letter did the 2nd Defendant forego his costs.

My view, therefore is that since there were specific allegations in the Plaint that touched on the 2nd Defendant, there was a claim for Kshs.7,987,000/- plus interest and costs that would have attached on the 2nd Defendant and for the fact that the 2nd Defendant had obtained the services of an independent Advocate to defend him after the 1st Defendant was placed under liquidation, the 2nd Defendant is entitled to costs.

Such costs shall be on the claim of Kshs.7,982,000/-. Since however, the 2nd Defendant procured the services of an independent Advocate at a late stage of the proceedings, the instructions fee thereon shall be half of the scale whilst the rest shall be on scale including getting up fees, if any.

Orders accordingly.

DATED and Delivered at Nairobi this 4th day of June, 2012.

.....

A. MABEYA
JUDGE