



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL CASE NO. 13 OF 2015**

**BELOICO HOLDINGS LIMITED.....PLAINTIFF**

**=VERSUS=**

**1. GENTION AG**

**2. MASAI MARA WILDERNESS LODGE LIMITED.....DEFENDANTS**

**R U L I N G**

1. The question that has arisen in this matter is whether the Defendants are entitled to costs after the Plaintiff withdrew the suit.
2. In the Plaint dated 20<sup>th</sup> January, 2015, the Plaintiff prayed for a permanent injunction restraining the Defendants from utilizing its premises known as Black Marlin Resort situated on L.R. No.13053 pending the outcome of the ongoing Arbitration in Switzerland.
3. The prayer for injunction was premised on the ground that pending the outcome of the arbitration, the suit property should be preserved “to mitigate losses”.
4. Contemporaneously with the Plaint, the Plaintiff filed an Application dated 20<sup>th</sup> January, 2015 in which it was seeking for a temporary injunction.
5. On 23<sup>rd</sup> February, 2015, the Defendant's advocate filed an Application in which it sought to stay or vary the ex parte orders that were granted to the Plaintiff.
6. While the two Applications were pending, the Defendants filed another Application dated 2<sup>nd</sup> October, 2015 in which it was seeking to have the Plaint struck out with costs.
7. The second Application by the Defendants was premised on the ground that the arbitrator had decided the dispute between the two conclusively in favour of the Defendants. That is when the Plaintiff's advocate opted to withdraw the suit.
8. In opposing the issue of paying costs, the Plaintiff's advocate filed Grounds of Opposition in which it was averred that the suit was merited because it was instituted for purposes of obtaining interim measures of protection as provided for under Section 7 of the Arbitration Act; that the circumstances of the case do

not warrant the award of costs to the Defendants and that the Application by the Defendants for striking out the suit does not meet the requirements of Order 2 Rule 15 (c) and (d) of the Civil Procedure Rules.

9. Counsel for the Plaintiff' submitted that the court should examine the circumstances under which the suit was filed; that the Plaintiff has complied with the award; that the suit has been overtaken by events and that the Plaintiff's intention was only to preserve the suit property.

10. Counsel submitted that each party should pay its own costs. Counsel relied on several authorities which I have considered.

11. The Defendants' advocate submitted that the Defendants are entitled to costs; that the suit was an abuse of the court process and that the nature of the prayers in the Plaint were to determine the dispute while the arbitration proceedings were on going.

12. I have considered the authorities that were filed by the Defendants' advocate.

13. In determining the issue of costs, whether the Plaintiff should pay the court is entitled to look at the conduct of the parties, the subject of litigation and the circumstances which led to the institution of the legal proceedings and the events which eventually led to their termination. In other words, the court may not only consider the conduct of the party in the actual litigation, but the matters which led upto litigation. **(See Hussein Janmohamed & Sons Vs Twentsche Trading Overseas Trading Co. Ltd (1967) EA 287.**

14. It is not in dispute that this court did not have any opportunity to hear the matter and the three Applications.

15. Since the matter and the Motions were never heard on merit, the court cannot, in deciding the issue of costs, address the merits of the suit.

16. It is trite that in the normal cause of proceedings, a party who withdraws a suit pursuant to the provisions of Order 25 of the Civil Procedure Rules ought to pay costs, unless the court orders otherwise.

17. The Plaintiff has not cited any law or authority which suggests that in a suit pertaining to the obtaining of interim measures of protection pending the hearing and determination of Arbitration, a party who loses or withdraws such a suit cannot pay costs.

18. In any event, the Plaint that was filed by the Plaintiff was seeking for both prohibitory and mandatory injunctions pending the hearing and determination of the ongoing arbitration. The Plaint also had a prayer for costs.

19. It follows that in a case where the plaintiff was not only seeking for prohibitory orders of injunction but also for mandatory orders, the scope of the prayers went beyond interim measures of protection, whose intention is to preserve assets or evidence which are likely to be wasted if conservatory orders are not issued.

20. Having prayed for costs in the Plaint, it also follows that the Defendants were entitled to costs in the event the Plaintiff did not succeed in its claim, or withdrew the claim as it did in this matter.

21. Having considered the pleadings and the facts before me, I am of the view that the Defendants are entitled to the costs of the withdrawn suit.

22. For those reasons, I direct that the Plaintiff should pay to the Defendants the costs of the suit.

Dated, signed and delivered in Malindi this **14<sup>th</sup>** day of **July**, 2016.

**O. A. Angote**

**Judge**