IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 96 OF 2016

BETWEEN

CANYON PROPERTIES LIMITED.....1ST APPELLANT

ABDULHAKIM ABDALLA ZUBEDI.....2ND APPELLANT

TWAHA ZUBEDI.....3RD APPELLANT

MOHAMMED ABDALLA ZUBEDI.....4TH APPELLANT

AND

ELIUD KIPCHIRCHIR BETT.....1ST RESPONDENT

MWENDA THURANIRA.....2ND RESPONDENT

CHINA AFRICA TOTAL LOGISTICS LTD.....INTERESTED PARTY

(An appeal from the ruling of the High Court of Kenya at Mombasa (Otieno, J.)

dated 19th August, 2016

in

H.C. COMM No. 23 of 2016)

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JUDGMENT OF THE COURT

1. In order to place this appeal in perspective, a brief background is necessary. **Eliud Kipchirchir Bett** (the 1st respondent) was requested by his client, China Africa Total Logistics Company Ltd., to identify on its behalf a suitable parcel of land for purchase around Miritini area in Mombasa. The 1st respondent approached **Mwenda Thuranira** (the 2nd respondent) who was described as a renowned real estate agent and together they identified parcels described as C.R. No. 36802 (L.R No. MN/V/2089), C.R. No. 35140 (L.R. No. MN/V/20158) and C.R. No. 49340 (L.R No. MN/V/2408) (suit property) measuring 24.6 acres belonging to Canyon Properties Ltd. (the 1st appellant). Thereafter, the respondents arranged for a site

visit by its client's representatives who gave the green light.

2. Apparently, the respondents had informed their client that the purchase price for the suit property was Kshs. 20,000,000 per acre. However, it turned out that the 1st appellant's asking price was Kshs. 15,000,000 per acre. Be that as it may, the respondents' claimed that they agreed with the 1st appellant that the difference of Kshs. 5,000,000 per acre would be the finder's fee payable to the respondents. The transaction went on smoothly and a sale agreement was executed between the 1st appellant on one part as the vendor and the respondents' client who later roped in China Africa Total Logistics Ltd. (interested party) on the other part as the purchasers.

3. According to the respondents, it was agreed that the finder's fee would be disbursed by the 1st appellant once the entire purchase price was paid. Efforts by the respondents to get the 1st appellant through its directors namely, Abdulhakim Abdalla Zubedi (2nd appellant), Twaha Zubedi (3rd appellant) and Mohammed Abdalla Zubedi (4th appellant) to execute the finder's fee agreement weren't successful. Ultimately, with the intervention of a third party, the appellants agreed that they would pay out the finder's fee as agreed.

4. After some time, the respondents learnt that the 1st appellant's advocate had received the entire purchase price and was holding the same as a stakeholder pending the transfer of the suit property. Upon approaching the said advocate he denied receipt of the said amount. Apprehensive that they were being given the run-around, the respondents filed suit in the High Court on 3rd March, 2016 seeking *inter alia* payment of the finder's fee totalling Kshs. 122,000,000 and several injunctive orders against the appellants. Simultaneously, the respondents also filed a Notice of Motion on even date seeking injunctions restraining the appellants and/or their advocate from disposing or any other way dealing with the suit property or releasing the purchase price pending the determination of the suit or in the alternative pending the payment of the finder's fee.

5. Pursuant to the said application, interim orders were issued *exparte* on 4th March, 2016 and the application was set down for *interpartes* hearing on 10th March, 2016. Come that date the appellants had not only entered appearance but had also filed a preliminary objection to the application as well as a Notice of Motion of application seeking to set aside the *exparte* orders. Similarly, the interested party had filed an application to be enjoined and a preliminary objection to the respondents' application.

6. The respondents' advocate sought an adjournment which was granted on account of the foregoing pleadings having being served in court. In addition, the court (Omollo, J.) heard submissions by the parties in respect of the interim orders which the respondents' advocate sought to be extended. The learned Judge agreed with the appellants that the orders had lapsed by operation of the law and were not capable of being extended.

7. Subsequently, the respondents' application and the preliminary objections thereto were scheduled for hearing on 21st June, 2016 but for some reason the matter was adjourned and fixed for a mention on 11th July, 2016. During the said mention the respondents through their advocate and by dint of a Notice of Withdrawal on record sought to withdraw the suit and the application with no orders as to costs. While the appellants did not object to the withdrawal they argued that the same could only be subject to costs.

8. The learned Judge (Otieno, J.) in declining to award costs in his own words expressed thus;

> ***"I have no doubt that as at the date of the withdrawal the suit had not been fixed for hearing hence the plaintiffs were within their legal rights to have it withdrawn without recourse to the defendants. I further interprete order 25 rule 2(2) to carry the spirit of section 27 of the Act that it vests with the court to make an order on costs of a withdrawn suit.***
>
> ***As costs follow events the event envisaged by the law is whether or not a party has succeeded so that the costs are awarded not to punish the unsuccessful party but to reimburse the successful***

party the costs incurred in protecting his rights. In the instant case, the matter did not reach the point of determination by the court and it was withdrawn at the earliest opportunity for the reasons the plaintiffs say, were informed by long standing relationship between them and the interested party. In fact by the statement of defence filed on behalf of the 1st defendant at paragraph 4 &5 tacitly conceded that the plaintiff could have acted as intermediaries in the sale between it and the interested party. It cannot be, therefore, said prima facie, that the plaintiff had no justification to bring the action. My finding is that having ended as it did no party has been adjudged successful or unsuccessful and there is no event that costs must follow.

The court takes notice that it has a duty to encourage alternative methods of dispute resolution. Where parties take such initiatives without prompting and the suit is terminated, the initiating party need to be commended. I have made the foregoing comments as a way of ascertaining that the relationship between the parties as well as their actions leading to termination of the litigations are factors to be considered in the courts exercise of discretion in making an order on costs.

The court takes notice that it has a duty to encourage alternative methods of dispute resolution. Where parties take such initiatives without prompting and the suit is terminated, the initiating party need to be commended. I have made the foregoing comments as a way of ascertaining that the relationship between the parties as well as their actions leading to termination of the litigations are factors to be considered in the courts exercise of discretion in making an order on costs."

9. Ultimately, the learned Judge in his Ruling rendered on 19th August, 2016 declined to award costs to the appellants after the respondents withdrew their suit. It is that decision that has provoked the current appeal which is anchored on the grounds that the learned Judge erred in law and fact by-

- ***Failing to appreciate that costs follow the event.***
- ***Failing to appreciate that steps had been taken by the appellants in the proceedings including filing of defence, interlocutory pleadings, replying affidavits and submissions.***
- ***Directing each party to bear its own costs.***

In arriving at his decision, the learned Judge exercised his discretion in favour of the respondents. It is trite that an appellate court will not interfere with such exercise of discretion unless as was stated by this Court in ***Carl Ronning vs. Societe Navale Chargeurs Delmas Vieljeux (The Francois Vieljeux) [1984] KLR 1*** it is satisfied either;

a) The judge misdirected himself on law, or

b) That he misapprehended the facts, or

c) That he took account of considerations of which he should not have taken an account, or

d) That he failed to take account of consideration of which he should have taken account, or

e) That his decision, albeit discretionary one, was plainly wrong.

See also ***Mrao Ltd vs. First American Bank of Kenya Ltd& 2 others [2003] eKLR***.

10. The bone of contention is not whether the respondents were entitled to withdraw their suit but whether the appellants should have been awarded costs following such a withdrawal. This appeal therefore is in respect of one issue only- whether the learned Judge exercised his discretion judicially in declining to award costs to the appellants. As a general proposition, the right of a party to discontinue or withdraw his claim cannot be questioned. There are many circumstances when a plaintiff may legitimately wish to discontinue or withdraw his claim. Addressing a similar issue, the Supreme Court of Nigeria in ***Abayomi Babatunde vs. Pan Atlantic Shipping & Transport Agencies Ltd. & Others, SC 154/2002*** identified

those circumstances to include situations where:

> ***i. a plaintiff realizes the weakness of his claim in the light of the defence put up by the defendant,***
>
> ***ii. a plaintiff's vital witnesses are not available at the material time and will not be so at any certain future date,***
>
> ***iii. where by abandoning the prosecution of the case, the plaintiff could substantially reduce the high costs that would have otherwise followed after a full-scale but unsuccessful litigation, or***
>
> ***iv. a plaintiff may possibly retain the right to re-litigate the claim at a more auspicious time if necessary.***

Ibrahim SCJ, while considering an application for leave to withdraw a notice of appeal under ***Rule 19*** of the ***Supreme Court Rules*** which allows a party, at any time before judgment, to withdraw any proceedings with leave of the Court in ***John Ochanda vs. Telkom Kenya Ltd. SC APP. No. 25 of 2014 (unreported)*** stated,

> ***"I do hold the view that a prospective Appellant is at liberty to withdraw a Notice of Appeal at any time before the Appeal has been lodged and any further steps taken. No proceedings have commenced strictly. I am also of the view that just like under the Civil Procedure Rules or Court of Appeal Rules, the right to withdraw or discontinue proceedings or withdraw a Notice of Appeal respectively ought to be allowed as a matter of right subject to any issue of costs, which can be claimed by the respondents, if any." (Emphasis added).***

The above sentiments were accepted and followed by the Supreme Court in ***Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR*** where it was reiterated that:

> ***"A party's right to withdraw a matter before the court cannot be taken way. A court cannot bar a party from withdrawing his matter. All that the court can do is to make an order as to costs where it is deemed appropriate."(Emphasis added).***

11. The appeal was disposed of by way of written submissions with brief highlights. Urging the appeal before us, Mr. Omar, learned counsel for the appellants, begun by stating that ***Order 25*** of the Civil Procedure Rules governs withdrawal of suits. Of relevance was ***Order 25 Rule 2*** since the matter had been set down for hearing. Expounding on the argument, he submitted that when the respondents' application came up for hearing on 10th March, 2016 parties made their respective arguments on the issues of adjournment of the hearing and status of the interim orders. He referred the Court to *Black's Law dictionary* which defines a hearing as –

> ***"A judicial session usually open to the public, held for the purpose of deciding issues of fact or law, sometimes with witnesses testifying…"***

He tore into the merits of the suit terming it frivolous and one that was doomed to fail for the simple reason that there was no privity of contract between the respondents and the appellants. In the circumstances the respondents ought to have been allowed to withdraw their suit subject to payment of costs. He contended that the learned Judge holding otherwise failed to exercise his discretion properly. Towards that end, Mr. Omar relied on the persuasive decision of the High Court in ***Kay Construction Limited vs. Eco Bank Kenya Ltd. & 6Others [2015] eKLR*** wherein Gikonyo, J. held,

> ***"Costs follow the event, they are therefore, discretionary and not awarded as a matter of course. The discretion must, however, be exercised judicially and judicious (****sic****); not capriciously; not whimsically but upon define****(sic)*** ***legal principles. Also, it should be noted that the purpose of costs is not to punish the losing party, rather to compensate the successful party for the trouble***

taken in the proceeding of defending the suit…"

He urged us to allow the appeal**.**

12. On his part, Mr. Masila learned counsel for the interested party, supported the appeal. He submitted that the *exparte* orders which were initially issued affected the interested party hence it applied and was joined in the suit. Upon being joined the interested party filed its defence as well as an application before the respondents withdrew the suit. In his view, the learned Judge applied the wrong provision of the law hence arriving at a wrong conclusion. It was settled that a party who has defended a suit is entitled to costs.

13. In opposing the appeal Mr. Mutubia, learned counsel for the respondents, reiterated that the applicable provision was *Order 25 Rule 2* of *the Civil Procedure Rules*. In as much as withdrawal of a suit is upon such terms as to costs, costs are not awarded as of right. Buttressing that line of argument, he made reference to *Judicial Hints on Civil Procedure, 2nd Edition by Richard Kuloba* at page 106 where it is stated;-

"A defendant has no right to costs unless the court has in tis 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."

Relying on the persuasive authority of the High Court in ***Rosaline Njeri Macharia vs. Daima Bank Limited*** *[2012] eKLR*, Mr. Mutubia urged that a court ought to be guided by certain factors in deciding whether to award costs. The factors as delineated in the aforementioned case were:-

"…

a. The nature of the allegations a plaintiff has made against a defendant.

b. The nature of the claim and the likelihood of success.

c. The nature of liability that would attach against a defendant if he does not defend the claim.

d. The nature of the defence, if any, filed by the defendant and

e. The stage at which the suit is being withdrawn or discontinued."

He argued that the general rule that costs should follow the event was not applicable in this case. This is because the suit was not heard hence there was no successful party or loser. As far as he was concerned, the learned Judge in declining to grant costs appreciated and rightly so, that the respondents' case was not hopeless and the nature of the appellants defence was an admission. Further, the suit was withdrawn at an early stage before it was set down for hearing.

14. We have considered the record of appeal along with the rival submissions of counsel and the applicable law.

Order 25 of the ***Civil Procedure Rules*** provides for withdrawal, discontinuance and adjustment of suits. As far as is relevant to this appeal, the Order provides thus:

" 1. At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.

2 (1) Where a suit has been set down for hearing it may be discontinued or any part of the claim withdrawn, upon the filing of a written consent signed by all the parties.

(2) Where a suit has been set down for hearing the court may grant the plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just."

15. The above provisions have been discussed at length in several decisions of this Court. A case in point is ***Beijing Industrial Designing & Researching Institute vs. Lagoon Development Limited [2015] eKLR*** wherein this Court succinctly observed that-

"The above provision presents three clear scenarios regarding discontinuance of suits or withdrawal of claims. The first scenario arises where the suit has not been set down for hearing. In such an instance, the plaintiff is at liberty, at any time, to discontinue the suit or to withdraw the claim or any part thereof. All that is required of the plaintiff is to give notice in writing to that effect and serve it upon the all the parties. In that scenario, the plaintiff has an absolute right to withdraw his suit, which we agree cannot be curtailed. The second scenario arises where the suit has been set down for hearing. In such a case, the suit may be discontinued or the claim or any part thereof withdrawn by all the parties signing and filing a written consent. In this scenario, the right of the plaintiff is circumscribed by the requirement that he must obtain the written consent of all the other parties. <u>The last scenario arises where the suit has been set down for hearing but all the parties have not reached any consent on discontinuance of the suit or withdrawal of the claim or any part thereof. In such eventuality, the plaintiff must obtain leave of the court to discontinue the suit or to withdraw the claim or any part thereof, which is granted upon such terms as are just.</u>"(Emphasis added).

16. In our view, the circumstances of this case fall within the third scenario. We say so because from the record it is clear that in response to the respondents' suit and application, the appellants entered appearance; filed their respective defences; preliminary objection and an application to set aside the *exparte* orders. Furthermore, it is also evident from the record that the parties herein were heard in respect of the joinder of the interested party; extension of the interim orders and adjournment sought on behalf of the respondents. These were steps taken by the appellants to defend the suit against them and could not be ignored by virtue of the main suit having not been set down for hearing.

17. We draw guidance from the sentiments of the Supreme Court in ***Jasbir Singh Rai & 3 others vs. Tarlochan Singh Rai & 4 others [2014] eKLR*** where the court expressed itself as follows:

"It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or Respondent will bear the costs. <u>However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice.</u> The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation… Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases. <u>The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the applicant</u>." (Emphasis added)

We have outlined above the steps that had been taken in the matter before the High Court. While appreciating that the main suit had not been listed for hearing, the learned Judge ought to have considered the fact that there were appearances and actual prosecution of some applications in court which must have involved preparations on the part of counsel. In any event, the costs awarded would only cover the work already done upto the point of withdrawal of the suit. Those are relevant, pertinent issues that the learned Judge failed to consider when declining to award costs to the appellants.

18. From the foregoing, we are convinced that the circumstances of this case warranted the appellants to be awarded costs upon the withdrawal of the respondents' suit. In the end, we find merit in this appeal. The appeal ought to be allowed to the extent that the ruling dated 19th August, 2016 declining to grant costs to the appellants be set aside. The appellants shall have the costs of the withdrawn suit at the High Court but since the interested party did not file an appeal against the said decision they are not entitled to costs at the High Court. The appellants and the interested party shall have the costs of this appeal.

Dated and delivered at Mombasa this 23rd day of November, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

……..

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR