



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 64 OF 2018**

(Before Hon. Lady Justice Hellen S. Wasilwa on 3<sup>rd</sup> October, 2019)

**CHARLES LANGAT.....CLAIMANT**

**VERSUS**

**COLAS EAST AFRICA LIMITED.....RESPONDENT**

**RULING**

1. The Application pending for determination is the Notice of Motion Application dated 27<sup>th</sup> February, 2019. The Application is filed Under Order 45 Rules 1, 2 and 3, Order 25 Rules 2 and 3 of the Civil Procedure Rules, 2010, Section 3A of the Civil Procedure Act, Article 159 of the Constitution of Kenya, 2010 and all enabling provisions of law.

2. The Application seeks the following Orders:-

- 1. THAT the Honourable Court be pleased to review the order of 4<sup>th</sup> October, 2018 to the extent of granting costs of the suit to the Applicant.**
- 2. THAT this Honourable Court be pleased to grant such further orders as it shall deem fit and just to grant.**
- 3. THAT the costs of this Application be awarded to the Applicant.**

3. This Application is premised on the grounds **THAT:-**

- a. On 4<sup>th</sup> October 2018, the Honourable Court marked the matter herein as withdrawn but failed to make an order as to costs of the suit.**
- b. This was preceded by the filing of the Notice of Withdrawal dated 10<sup>th</sup> September, 2018 and filed on the same day before the Honourable Court by the Claimant.**
- c. By the time the suit was withdrawn, the Applicant had taken steps to oppose the Claim herein and filed a statement of Response dated 7<sup>th</sup> March, 2018 to the Statement of Claim and further filed a Notice of Motion Application dated 18<sup>th</sup> June, 2018 seeking to strike out pleadings for being unsigned and/or undated.**
- d. 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 orders.**
- e. Any party that withdraws a suit is obligated to meet the costs of the suit.**
- f. On the 4<sup>th</sup> October, 2018, the Applicant's counsel's firm failed to diarise the matter, hence the failure to attend Court and the consequent order made.**
- g. Further the mistakes of an advocate should not be visited upon the client.**
- h. The Application herein has been made timeously and without unreasonable delay.**

i. The Applicant has defended and opposed the suit herein from the onset and incurred expenses in its defence and ought to be reimbursed for the expenses incurred in instructing counsel to represent it.

j. There is sufficient reasons to warrant the review of the order of this Court made on 4<sup>th</sup> October, 2018.

k. It is in the interest of justice that this Application be allowed and the orders sought be granted.

4. The Application is supported by the Affidavit of **CLAPTON EVANS KAGIMU** sworn on 27<sup>th</sup> February, 2019, in which he reiterates the averments made in the Notice of Motion Application.

5. The Respondent/Applicant filed a Supplementary Affidavit of **CLAPTON EVANS KAGIMU** sworn on 3<sup>rd</sup> April, 2019, in which he states that this matter was on 4<sup>th</sup> October, 2018 marked as withdrawn in the absence of the Respondent/Application. He further stated that the Court failed to give directions on the issue of costs on the said date.

6. He contended that failure by the Counsel on record for the applicant was an inadvertent error as he had failed to diarise the matter a result of which the consequential order of 4<sup>th</sup> October, 2018 was made.

7. He further urged this Honourable to allow the instant Application stating that the mistake of Counsel of not diarising the matter should not be visited upon their client whose intention all along has been to defend itself in this matter.

8. In conclusion, the Respondent/Applicant urged this Honourable Court to exercise its discretion and allow the instant application in the interest of justice.

9. The Claimant despite being served with the Application herein failed to respond to the same.

10. The Respondent/Applicant thereafter filed his written submissions to the Application dated 27<sup>th</sup> February, 2019.

#### **Respondent's/Applicant's Submissions**

11. It is submitted by the Respondent/Applicant that the instant application is merited and that the same ought to be allowed as prayed as it has been demonstrated that the Applicant has taken steps to defend this matter and further that non-attendance by counsel was occasioned by an inadvertent error that should not be visited upon his client. For emphasis the applicant cited the decision of **Belinda Muras & 6 Others Vs Amos Wanaina (1978) KLR.**

12. The Respondent/Applicant further relied on the Authority of **Philip Chemwolo & Another Vs Augustine Kubebe (1982-88) KLR** where the Court stated:-

**“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit.”**

13. The Respondent/Applicant urged this Honourable to exercise its discretion and allow the Application as prayed. To fortify its argument the Respondent/Applicant cited the Authority of **CMC Holdings Limited Vs Nzioki (2004) 1 KLR 173.**

14. The Respondent/Applicant contended that it is entitled to costs of this suit having defended the same. It is further contended that the issue of costs is discretionary as provided under Section 27 of the Civil Procedure Act, 2010 which provides that costs follow the event. The said section provides:-

**“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.”**

15. The Respondent/Applicant further contended that due to its failure to attend Court on 4<sup>th</sup> October, 2018 when the matter was marked as withdrawn under Order 25 Rule 3 of the Civil Procedure Rules, 2010, the Court failed to make an order as to costs. The Applicant avers that it was on that basis that the instant Application was filed. For emphasis the Respondent/Applicant cited the case **Fredrick Nyamweya Nyangweso Vs Desh Moraa & Another (2004) eKLR** where the Court observed that:-

**“...it is true that according to s. 27 CPA costs follow the event. The same section however also provides that costs will be at the discretion of the Court which means that though costs follow the event the Court has to make an order for costs. The Court did not make any order for costs when it made the withdrawal order. It was therefore left to the Respondent to request the Court to make an order for costs.”**

16. The Respondent/Applicant further relied on the cases of **Kay Construction Company Limited Vs Eco Bank Kenya Limited & 6 Others (2015) eKLR** and **Republic Vs Senior Pririncipal Magistrate, Mombasa and Ors Ex- parte Nicholas Katumo Peter Mombasa Civil Application (JR) No. 65 of 2013** for emphasis.

17. The Respondent/Applicant further submitted that he is entitled to the costs of this suit having defended the suit from the onset. It is further the Applicant's prayer that the orders sought in the instant Application be allowed as prayed. To fortify its argument the Applicant relied on the Authority of **Pacis Insurance Company Ltd Vs Francis Njeru Njoka (2018) eKLR** and **Samuel Karuga Vs Sarkish Flora Limited (2016) eKLR**.

18. In conclusion, the Applicant urged this Honourable Court to exercise its discretion in its favour and review the orders issued on 4<sup>th</sup> October 2018 and award the costs of the Claim filed as well as costs of the Application herein.

19. I have examined all the averments of the Applicant herein. Indeed, on 4/10/2018 I marked this matter as withdrawn. I did not make any orders for costs, which the Respondent herein are seeking.

20. Under Section 27 of Civil Procedure Act, costs follow the event. It is however also true that the issuance of costs is discretionary by Court. I exercised my discretion then by not awarding costs or being silent on the said issue. Nothing really has charged since then that would necessitate review of this Court's orders. I therefore find the application not merited and I dismiss it accordingly.

**Dated and delivered in open Court this 3<sup>rd</sup> day of October, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Miss Likoye for Respondent – Present

Claimant – Absent