



Bukusu v Kizito (Civil Case 493 of 2013) [2024] KEHC 6354 (KLR) (Civ) (31 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6354 (KLR)

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

CIVIL

CIVIL CASE 493 OF 2013

AN ONGERI, J

MAY 31, 2024

BETWEEN

ELIZABETH ANNE BUKUSU PLAINTIFF

AND

LUBANO KIZITO DEFENDANT

RULING

1. The parties filed a partial Mediation Agreement and they filed submissions on the outstanding issue of costs.
2. The parties filed written submissions as follows; the plaintiff submitted that the matter herein was a defamation suit filed by the plaintiff against the defendant vide a plaint dated 4/11/2013 which the defendant responded vide its statement of defence. The parties proceeded to attempt mediation and they were able to agree on some issues save for the issue of costs.
3. The plaintiff submitted that as a general rule the principle on costs is that the same follows the event and, in this case, the civil claim has been partly resolved by the parties.
4. The plaintiff argued that the plaintiff's right to cost has not been extinguished by virtue of entering into a partial mediation agreement with the defendant. In support the plaintiff cited *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR where the court while looking into a matter where



consent had been recorded opined that Consent does not extinguish one's right to costs and stated as follows:

"...[12] I need to discuss one important issue: the law on compromise, and the work of David Foskett, Q.C of Gray's Inn at page 77 of his book *In the Law and Practice of Compromise* is relevant that;

"An unimpeached compromise represents the end of the dispute or disputes from which it arose. Such issues of fact or law as may have formed the subject-matter of the original disputation are buried beneath the surface of the compromise. The court will not permit them to be raised afresh in the context of new action."

But, it does not necessarily mean that, where parties have entered into consent to settle a proceeding, no costs should be awarded, or there is no successful party in the matter. The incidence of settlement by consent of the parties, to my mind, is just but a vital factor the court should consider, within the circumstances of each case, in deciding whether costs are payable or not. A consent recorded in settlement of a proceeding is not an automatic disentitlement of costs and I, would, therefore, hesitate profoundly to make any generalized propositions on the law that consent is an automatic disentitlement of costs without reference to the context of the particular case."

5. The defendant alternatively submitted that there are also instances where costs are not awarded but for good reasons this was the position in *Jasbir Singh Rai and others v Tarlocham Rai & others* [2014] eKLR where the court observed that

"in the classic common law style, the courts have to proceed on a case by case basis, to identify "good reasons" for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs..... "

6. The defendant argued that the supreme court did not lay out all the "good reasons" that justified departure from the general rule that 'costs follow the event' as the same will vary from case to case. However, looking at the general jurisprudence on the issue of costs, the defendant submitted that there are certain guiding principles that courts have found to be useful in the determination of the issue.
7. These are the conduct of the parties, the subject of litigation, the circumstances which led to the institution of the proceedings, the events which eventually led to their termination, the stage at which the proceedings were terminated, the manner in which they were terminated, the relationship between the parties and the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of the *Constitution*.
8. The defendant submitted that both the plaintiff and the defendant are both medical doctors. They are also lecturers at the university of Nairobi and consultants in their area of specialization. The subject of litigation was defamation and the circumstances which led to the institution of these proceedings was an email sent by the defendant.
9. The mediation was successful as the matter was resolved. The results of the mediation session were multiple because there was forgiveness, reconciliation and parties are now fostering new working relationship. It was the defendants argument that since the manner in which the proceedings were terminated was via mediation, then all parties were winners.
10. I have considered the submissions by both parties on the issue as to who should pay the costs of this suit.



11. The sole issue pending determination is who should bear the costs of this suit.
12. This matter was resolved amicably by the parties at mediation and therefore each party is a winner.
13. As a general rule, the principle on costs is that the same follow the event but, in this case, the claim has been resolved by the parties at mediation. Since mediation is a confidential process, it would not be appropriate for this court to inquire into the details of the mediation process herein.
14. The plaintiff argued that their right to cost has not been extinguished by virtue of entering the mediation agreement with the defendant.
15. This case was settled amicably and therefore it is not in the interest of justice to condemn any of the parties to pay costs.
16. There is need to promote reconciliation amongst disputing parties pursuant to Article 159 (2) (c) of the Constitution and for also to promote amicable resolution of disputes.
17. The issue of costs should not negate the benefits of mediation and for that reason, I direct that each party bears its own costs of this suit.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 31ST DAY OF MAY, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant

