THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISC APPLICATION NO. 432 OF 2010

ARISING FROM CIVIL SUIT NO. 145 OF 2010

KATON MANUFACTURERS LTD}.....DEFENDANT/APPLICANT

VERSUS

LIAO NING MIDDLE EAST}

PAPER COMPANY LIMITED}.....RESPONDENT/PLAINTIFF

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA

RULING

The respondent filed High Court Civil Suit NO 145 of 2010 against the applicant for recovery of **Uganda Shillings 73,174,750** on the 26th of April 2010. On the 4th of June 2010 the Registrar of the Commercial Court entered judgment in default of filing a defence for the amount claimed in the amount claimed in the plaint together with interest at the rate specified and costs of the suit under order 9 rules 5 and 6 of the Civil Procedure Rules. Execution process was issued against the applicants. The applicants then filed High Court Miscellaneous Application No's 432 and 433 of 2010.

The applicants obtained a stay of execution pending hearing of their application to set aside the ex parte decree. When the application come before me, I observed that pleadings of the parties and affidavit evidence of the applicant did not seriously content the amount claimed but averred that the same had been

paid and they attached evidence of several payments made to the plaintiff with cheques numbers in support of that assertion. On the 2nd of February 2011 when the matter came for hearing, Mr. Wafula Francis an accountant of the applicant was in court and the Respondent's managing director Mr. Wang was in court. Geoffrey Kavuma appeared for the Respondent while Dennis Ndiomugenyi appeared for the applicant. On the question put by court to the parties whether they could reconcile their accounts, the representative of the parties agreed that this might resolve the dispute. A meeting between the parties was scheduled for the 15th of February 2011 to reconcile accounts and report to court on the progress of this effort. The matter was next mentioned in court on the 23rd of March 2011. When the application was mentioned, the informed me that they had reached an agreement and they prayed that a consent order should be entered accordingly. A consent order was entered by the court in which inter alia the applicant has agreed to pay the Respondent **US $ 6,572.** while the claim of the applicant based on VAT was to be paid upon presentation of evidence that they paid VAT on the sums paid. It was agreed that the parties would address court on the question of costs only.

After the consent had been flagged off by the representatives of the parties and entered by court, counsel for the parties disagreed on who should have the costs of the suit. I adjourned the matter to the matter to the 30th of March 2011 for a formal address by counsel on the question of costs only before I could rule on the matter.

When it came for address on the question of costs Counsel Dennis Ndiomugenyi appeared for applicant/defendant while Counsel Alfred Okello Oryem for the represented the plaintiff/respondent.

The Respondent/plaintiff's Counsel submitted that there is another file where the defendant is actually represented and that is application No 432 of 2010 while the applicant was unrepresented in the main suit. That application sought to set aside the entire ex parte process in the main suit including the decree which is in the region of about 90 million shillings. When the application came for hearing with

advice of court, the parties reconciled their figures despite the facts of the case. In this settlement the issue of costs was not addressed.

Counsel submitted that costs were incurred on behalf of the plaintiff to prosecute the case, which fact is undisputable because the record of Civil suit 145 shows that a bill was prepared, filed and taxed by the court for Uganda shillings 8, 543,418/= downwards and an award of shillings 3,456,438/- was made. He further submitted that the agreement was intended to settle the claim in the man suit from which this application arose. The plaintiff sought court intervention to recover the undisputed sum and the plaintiffs lawyers extended legal services to the plaintiff who ha consequently incurred costs. Costs by law follow the event. That is the import of section 27 Civil Procedure Act which also says that costs are at the discretion of court.

Counsel Oryem submitted that the outcome of the negotiations and consent order was that the suit succeeded and the plaintiff is therefore entitled to costs. The background to this court is that the plaintiff did not only have to come to court to receive its money but when through a protracted process where even it received cheques from the defendant who turned around and countermanded them. It had to instruct counsel to set aside an ex parte decree only for the applicant/defendant judgment debtor to come and concede that it owed money to the defendant. For those reasons he prayed that I exercise my discretion to award costs to the plaintiff who is the respondent in this application.

On the figures, for the main suit it was already taxed by this court and drastically reduced from 8 million to 3 million. He prayed that I uphold the figure taxed.

Counsel Dennis strongly opposed the prayer for costs and prayed that each party bears its own costs. According to him the costs taxed in the main suit cannot stand because there was no service of the summons and pleadings on the defendant. By the time the defendant knew that there was a suit against it, it was when the bailiffs had come to execute the decree in the main suit on 9th July 2010. Counsel has referred to the fact that cheques were issued but these cheques were issued primarily as security so that the defendant instructs counsel to take proceedings of the present application. Moreover the said cheques were

immediately countermanded after a stay of execution was granted by Justice Kiryabwire pending the hearing of this application. The Applicants counsel submitted that cheques were not issued to pay the defendant SHS 73,174,750/- and the court bailiffs also received cash as part of the costs in that they were paid SHS: 2,500,000/=. The applicants counsel requested me to peruse the applicants application in which it denies the entire suit sum as claimed but concedes that it had already paid SHS: 60,000,000/=. Counsel referred me to paragraph 12 of affidavit of the applicant. That the respondent owes applicant 1,075,500/= under annexure "D" which is the proposed written statement of defence and payments listed under paragraph 4 (c) thereof with evidence attached. The proofs of payments are also summarised in the document attached at the hearing. Counsel also pointed out that the same summary is found in annexure "C" of the proposed WSD attached to affidavit in support of the notice of motion.

The applicants counsel further submitted that the issue of costs does not arise because the decree which was being executed had been obtained ex parte and if there had been proper notice; to the defendant they would have paid or answered the claims. After the compromise the decree cannot stand. Warrant of attachment in the principal sum of shillings 73,174,750, interest of 10,671,318/= and costs of shillings 3,456,238/= giving a total of Uganda shillings 87,302,506/= had been issued. The reason why they oppose the payment of costs is because in the main suit, they had not been served. Secondly he submitted that the claim in the suit is false and the 10 million in interest was arrived at from a false claim of 73 million.

As far as the main application is concerned counsel submitted that the applicant has proved that it never owed shillings 73 million and the figures following it. That since there was no notice served on it; it would be unfair for the applicant to pay costs because if there was any demand the parties could have reached an amicable settlement as they did in court.

Section 27 of the CPA provides for costs that a successful party is entitled to. It also gives court discretion whether to pay costs or not. When the application came for hearing, the applicant yielded because the plaintiff who originally

claimed shillings 73 million conceded that he only owed US$ 6,572. So that was 73, million it is now reduced to about 14 million. On the basis since that there was no service; each party must bear its own costs. Counsel prayed that it would be fair since the parties settled the suit that each party should bear its costs. Without prejudice the submitted that the figure used in taxation was Shs 73,000,000/= if the taxing master knew it was a claim of **6,572 $** the amount taxed would have been far less. In conclusion he submitted that it was fair and just that an order be made as to no costs be given or that each party should bear its own costs.

In rejoinder the respondents counsel submitted that the applicant's counsel had dwelt a lot on the merits of the application and his submissions are founded on alleged failure to serve. He pointed out that the file of civil suit 145 has three affidavits of service and there is another dated 10th of May 2010 serving the plaint. Attached to the affidavits is proof of service. Another dated 8th July shows that the notice to show cause why execution should not issue was served and there is a stamp of the defendant. There is therefore proof of service.

He criticised his learned friend for thinking in his opinion that the award of costs was a percentage of the original claim. He pointed out that when one looks at the bill of costs, item one was claiming instruction fees of shillings 5.1 million and 4 million was taxed off and an award was made of shillings 1.9 million. The work that had to be done to access the amount conceded by defence would have been the same whether it was 73 or 5 million or figures conceded.

As far as the issue of settlement and each party to bear its own costs is concerned, the entitlement does not arise from the settlement but from the fact that he had to come to court and only by doing so had the respondent accessed money conceded by the defendants. Costs should include the application to set aside.

The settlement does not compromise the suit. Even to arrive at the figure of US 6.755 dollars the plaintiff had to instruct counsel, who did all the work including the application to set aside. For which the plaintiff is still entitled to costs. At best that could reduce the instruction fees. Court has to access the appropriate instruction fees.

I have carefully considered the submissions of both parties and in my judgment the first issue to tackle is whether the agreement of the parties settled or compromised the suit. The applicant's application was intended to set aside the ex parte decree. Attached to the application is a list of payments made by the applicant/defendant which was to prove that the claim in the plaint had been paid before the suit was filed. It is to be noted that annexure "D" which is the intended defence averred in paragraph 4 thereof that the applicant did not owe the sum in the plaint as it had paid for the goods claimed in the plaint. It is on the basis of this claim that I asked the parties to reconcile their accounts and report to court. Pursuant to the reconciliation effort they established that the defendant only owed the plaintiff US $ 6,572. A consent judgment for the said amount was accordingly ordered.

The consent compromised the suit and there was not need to specifically set aside the ex parte decree. It is just by legal effect that the ex parte decree does not stand. In fact the consent is the final judgment of the court in the main suit. I do not agree with the applicants counsel that I should take into account the issue of whether there was service or not. This issue remained controversial as service was an issue to be tried in the application. The application was not heard and instead the parties compromised the suit. The application succeeded in part because it reduced the ex parte decree to an amount of US $ 6.572 taking into account what had happened between the parties thus far. I also do not agree with the Respondents counsel that I should take into account the orders of the court including taxation in the main suit made ex parte. The settlement finally compromised the suit leaving only the question of costs.

Both counsel agreed that section 27 of the Civil Procedure Act gives me discretion in the award of costs. It provides as follows:

> 27. (1) 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 incident to all suits shall be in the discretion of the court of 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. The fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of such power.

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.

The section is subject to such conditions and limitations as may be prescribed. Such conditions and limitations may be found under the Advocates Act and the Advocates remuneration and taxation of costs rules. Otherwise the section generally gives the court wide discretion in the award of costs. Costs are ordinarily awarded to a successful litigant. Generally speaking, costs shall follow the event as provided for in the proviso to the section. In the case of **Makula international Ltd vs. Cardinal Nsubuga (1982) H.C.B. 11** which cited with approval the case of **Premchant Reichard Ltd vs. Quarry Services of East Africa No. 3 (1972) E.A**. 162. The court agreed that a successful litigant ought to be fairly reimbursed for costs he has had to incur. The discretion under section 27 has however to be exercised judicially. In the case of **Uganda Development Bank vs. Muganga Construction Company Limited (1981) H.C.B 35,** Manyindo J as he then was held that costs under section 27 (1) of the Civil Procedure Act should follow the event unless the court otherwise orders. That the discretion given by the above section should be judicially exercised. A judge has discretion to deny a successful party costs.

In the case of **U.T.C vs. Outa (1985) HCB** – it was held that S. 27 gives a Judge wide discretion in the award of costs. A successful party should be awarded costs unless the Judge for good reason otherwise orders. The facts were that the respondent filed 3 separate suits against the same defendant. Two of the suits on the same cause of action were struck out and the respondent was refused the costs of the dismissed suits. On appeal it was held that the judge in refusing to award costs of the dismissed suit did not act judicially because the reason that counsel did not apply for costs was not "good reason" within the proviso of section 27 (1) of the Act where costs may follow the event unless the judge for *good reason* otherwise orders.

I see no reason to depart from the usual practice that costs should follow the event. To depart from the "costs follow the event" general rule, there has to be a good reason why the plaintiff should be denied costs. The suit succeeded partially and the plaintiff has been awarded US $ 6.572. I must however note that the ex parte proceedings in so far as they proceeded in the absence of the applicant/defendant and resulted into an award of 73 million shillings cannot be taken into account in the taxation of costs. This is because the ex parte decree no longer stands and for all intents and purposes has been compromised by the consent order or settlement of the parties dated 23rd of March 2011. Costs should be taxed afresh as if the applicant/defendant has been heard in the main suit and appearances are the appearances in this application. For the above reasons the plaintiff is awarded costs in High Court Civil Suit No. 145 of 2010 while each party shall bear its own costs in Miscellaneous Application No. 432 of 2010.

Ruling read, signed and delivered in court the 5th of April 2011 at 2.30 pm.

Hon. Mr. Justice Christopher Madrama

Ruling delivered in the presence of:

Alfred Okello Oryem for Respondent

Mbonyegenyi's absent

Ojambo court clerk

Hon. Mr. Justice Christopher Madrama