

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT ARUA**  
**CIVIL SUIT No. 0019 OF 2014**

5 **CANDIRU ALICE** ..... **PLAINTIFF**

**VERSUS**

10 1. **AMANDUA FENISTO** }  
2. **CENTENARY RURAL DEVELOPMENT BANK** }  
    **(U) LIMITED** } .....**DEFENDANTS**  
3. **AMOS t/a REAL AERICAN ASSOCIATES AND** }  
    **AUCTIONEERS** }

15 **Before: Hon Justice Stephen Mubiru.**

**JUDGMENT**

20 This is a judgment only on the issue of costs, the parties having entered into a consent judgment regarding the rest of the matters in dispute between them save for the question of costs in respect of which they failed to reach a compromise. The compromise on the rest of the matters in controversy was reached after the testimony of the plaintiff and one other witness, her brother in law.

25 The background to the suit is that the first defendant and the plaintiff are husband and wife, having undergone a ceremony of marriage in 1979. At the material time to this suit, they lived together in their matrimonial home situated at Alivu village, Mutu Parish, Pajulu sub-county in Arua District. The plaintiff was surprised when on 14<sup>th</sup> May 2014 the third defendant, an  
30 Auctioneer, went to her residence and summoned her to meet him at the premises of the first defendant in Arua. It is from there that she learnt that her husband, the first defendant, had mortgaged their matrimonial home to the second defendant bank, as security for a loan which he had failed to repay. The second defendant had as a result foreclosed and instructed the third defendant to realise the security by way of public auction. She later learnt that in order to obtain  
35 that loan, her husband had presented to the bank his own sister, a one Adiru Veronica, as his

wife. The bank's Loans Officer had visited their home and the bank had two photographs of her husband with his purported family, including his daughter in law, a son and a friend, standing in front of the house together with the Loans Officer.

5 The plaintiff filed this suit seeking a declaration that the mortgage was void, a permanent injunction against the sale of the mortgaged property, general damages, interest and costs. In compromising the suit, the parties agreed that the property be released from the mortgage, the defendants refrain from selling it or interfering with the plaintiff's quiet enjoyment and the first defendant pays the outstanding amount within six months. They agreed that the issue of costs be  
10 tried and decided by court.

In her submissions, counsel for the plaintiff, Ms. Daisy Patience Bandaru argued that the plaintiff should be awarded costs of the suit. Had it not been for the conduct of the defendants the case would not have arisen. The first defendant being the spouse of the plaintiff entered into a  
15 mortgage agreement with the defendant and pledged the matrimonial property that both he and the plaintiff were residing in at the time of their transaction. He went out of his way and made his own sister to sign the spousal consent which was an intention to defeat the interests of the plaintiff. As for the second defendant, it has a fully fledged legal department which ought to have ensured that all laid down procedures and the law would be followed. The second defendant did  
20 not diligently carry out the transaction in issue. there is no indication that they verified the first defendant's information.

There is nothing to show that they went on ground to establish the facts for had they done so they would have realised that the first defendant was merely lying with an intent to defraud the bank.  
25 that omission occasioned an injustice to the plaintiff who had no option but to seek legal redress. The defendants ought to pay the costs of the suit. This is a case of 2014 which came before this court severally. Hearing of the plaintiff's case had reached an advanced stage. It was only then that the defendants entered into the consent after three years in court. At the time of institution of the case, the plaintiff who was a civil servant was based in Gulu as her last station. She was  
30 subjected to incurring travel expenses. This costs would have been minimised had they cooperated early. They should meet the costs of the suit.

In response, counsel for the first and second defendants, Mr. Paul Manzi submitted that the law on costs is in section 27 of *The Civil Procedure Act* and it has two limbs; costs follow the event except that they may be disallowed because of the conduct of the parties. The Court has discretion. The plaintiff should not be awarded costs because of her conduct before the suit was  
5 filed. Annexure "A" to the defence which is a statutory declaration of marital status. Para 2 she said that she is not married. It was a different transaction for a different loan and she stated that she was not married. The bank was under the assumption that she was not married. The bank thus fell prey to the misleading information of the first defendant Annexure "C1" to the defence. Amandua presented himself as married to Abiru Veronica. The bank assumed the plaintiff was  
10 single. She did not come with clean hands.

A court has the discretion to award costs and against which parties. She now admits that she is married to the first defendant and that the property at the risk of sale is their marital property. part of the confusion was caused by the first defendant by lying that she was married to his sister  
15 Veronica. Each of the parties this ought to bear their own costs. In the alternative, if the court awards costs, they should be paid by the first defendant. In case they are at fault, they should pay only a third.

In reply, counsel for the plaintiff submitted that the statutory declaration "C1" by Amandua, it is  
20 dated 23<sup>rd</sup> April 2013 when he applied for a loan resulting in this suit. On the other hand the statutory declaration by Candiru Alice was made on 10<sup>th</sup> August 2014. More than a year after the transaction between the bank and the first defendant. It is not feasible that the bank was misled by the plaintiff in entering into that transaction with Amandua. At that time she had no dealings with the Bank. She had not made the statutory declaration. At the time she made it she was  
25 married to the first defendant. I submit therefore that the bank was still negligent and cannot fault the plaintiff.

In deciding this issue this court is guided by the provisions section 27 (1) of *The Civil Procedure Act* which confers upon a Judge, the discretion and full power to determine by whom and out of  
30 what property and to what extent costs incident to all suits are to be paid, and to give all necessary directions for that purposes. Despite this very wide discretion, as a general rule the

successful party in contested proceedings is usually entitled to an award of costs. It is the accepted general rule of our law that, in the absence of special circumstances costs follow the event. Ordinarily, costs follow the event and a successful litigant receives his or her costs in the absence of special circumstances justifying some other order (see *Ritter v. Godfrey (1920) 2 KB* 5 47). However, this rule will yield where considerations of fairness require it.

It is generally the case that the primary factor in deciding the question of the award of costs is the outcome of the litigation. That is, the unsuccessful party will usually be required to pay the successful party's costs of the proceedings and the courts will only depart from this rule if 10 special circumstances are shown to exist. It is considered though that too robust an application of the principle that costs follow the event encourages parties to increase the costs of the litigation, since it discourages parties from being selective as to the points they take because if parties will recover all their costs as long they obtain a decision in their favour, they will be encouraged to leave no stone unturned in their efforts to win (see for example *Phonographic Performance Ltd* 15 *v. Rediffusion Music Ltd [1999] 2 All E.R. 299 at 313 -315*).

On the other hand, using costs as a penalty imposed on the unsuccessful party may discourage parties with plausible defences to suits filed against them from asserting them, yet in all litigation the version of one party will be right and that of the other will be wrong. Nevertheless, to contest 20 an issue in which one is unsuccessful, while not always unreasonable, is nonetheless sometimes less reasonable than to have conceded it and accordingly in the general scheme of things, the unsuccessful party is responsible for his or her own costs. By extension, it is not reasonable for the unsuccessful party to expect the successful party to have conceded the issue, hence his or her usual responsibility for the successful party's costs. The court may as well exercise its discretion 25 in awarding costs as a means of enhancing proper use of the scarce and expensive court resource.

In considering the exercise of its discretion and whether to "otherwise order," Devlin J *Anglo-Cyprian Trade Agencies Ltd v. Paphos Wine Industries Ltd, [1951] 1 All ER 873* formulated the relevant principle as follows:

30 No doubt, the ordinary rule is that, where a plaintiff has been successful, he ought not to be deprived of his costs, or, at any rate, made to pay the costs of the other side, unless he has been guilty of some sort of misconduct. (emphasis added).

The general proposition for that reason is that the unsuccessful party seeking to be absolved of liability to pay the successful party's costs of the proceedings bears the burden of proving special circumstances. The unsuccessful party faces the task of persuading the court that the particular facts and circumstances before the court warrant the making of an order absolving it of liability to pay the successful party's costs.

The special circumstances envisaged ordinarily involve some sort of misconduct on the part of the successful party. "Misconduct" in this context means misconduct relating to the litigation, or the circumstances leading up to the litigation. Such behaviour may be of a procedural or substantive nature. "Procedural" relates to the process; "substantive" relates to the issues arising on the suit. It is conduct that is reprehensible or worthy of reproof or rebuke, either in the circumstances giving rise to the cause of action, or in the proceeding, which makes the denial of such costs, desirable as a form of chastisement. Such conduct may include;- a suit not brought bona fides, but rather as a vehicle to force or coerce the other party to bend to the plaintiff's will; prosecutes the matter solely for the purpose of increasing the costs recoverable; when the successful party by its lax conduct effectively invites the litigation; unnecessarily protracts the proceedings; resistance to or lack of co-operation with the other party in providing information; raises points of law or fact or serves documents belatedly prompting otherwise avoidable adjournments; obtains relief which the unsuccessful party had already offered in settlement of the dispute; where a reasonable settlement offer was made but was rejected on unreasonable grounds; where the successful applicant had failed on more issues than he had succeeded, that may make it reasonable that he or she bears the expense of litigating that portion upon which he or she has failed (see *Forster v. Farquhar (1893) 1 QB 564*) where "issue" does not mean a precise issue in the technical pleading sense but any disputed question of fact or of law; where there is unreasonable delay or employment of delaying tactics to prolong the trial, and so on. That said, it should be remembered at all times that the power of the court to award costs is an unfettered discretionary power and there is not a closed category of circumstances which justify an order departing from the usual approach of the court. What is not in doubt though is that exercise of the discretion not to award costs in circumstances of impropriety in the manner in which the litigation was conducted, manifests a resolve by the courts to require high standards of the parties, and their lawyers, in selection of issues proffered for adjudication.

The general rule that a successful party will be deprived of costs only for misconduct in the proceeding is not absolute, although it would follow that pre-litigation conduct alone is not a basis on which an award of costs may be denied. Apart from anomalous examples in the equity jurisdiction, such as when it is discovered that the successful party had shown attributes of  
5 dishonesty or exhibited acts that are contrary to public morality, there are very few, if any, exceptions to the usual order as to costs outside the area of discrediting misconduct either in the circumstances giving rise to the cause of action, or in the proceeding itself.

It emerges from reviewing available authority that there is no absolute rule with respect to the  
10 exercise of the power conferred by section 27 (1) of *The Civil Procedure Act* that, in the absence of discrediting conduct, a successful party is to be compensated in full by the unsuccessful party. Nor is there any rule that there is no jurisdiction to order a successful party to bear the costs of the unsuccessful party.

15 Although a party against whom an unsustainable claim is prosecuted is not to be forced, at his peril in respect of costs, to abandon every defence he or she is not sure of maintaining, and opposed to his or her adversary only the barrier of one hopeful argument and is entitled to raise his or her earthworks at a reasonable point along the path of assault, courts expect constructive co-operation and dialogue between the parties at all stages. Parties should actively review their  
20 cases, respond promptly to changing circumstances and provide a clear explanation of a revised stance or position. Parties should be willing to accept the possibility that a view taken in the past can no longer be supported and act accordingly at the earliest opportunity, even at the risk of an application for costs being made. The courts therefore have regard to whether there was failure along the way to accept a reasonable offer.

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In the instant case, I have not found any misconduct on the part of the plaintiff relating to the litigation, or the circumstances leading up to the litigation, neither is there any evidence that anywhere during the course of this litigation the plaintiff was made a reasonable offer of settlement which she rejected on unreasonable grounds. The defendants have not discharged the  
30 burden of proof cast on them. No special circumstances exists to warrant departure from rule that “costs follow the event.”

It was submitted by counsel for the first and second defendants that because the plaintiff lied on oath about her marital status when she submitted a declaration to the second defendant dated 10<sup>th</sup> August 2014, on grounds of public policy she should be denied the costs of this suit. I have perused that document and found that it is unrelated to the circumstances leading up to this litigation. The attributes of dishonesty that are contrary to public morality exhibited by the plaintiff's conduct in making the false declaration not being connected to this case, cannot be the basis for denying her the costs of the suit. Being the successful litigant in light of the terms of the compromise, and there not having been proved any discrediting conduct on her part, the costs of this suit are therefore awarded to the plaintiff.

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However, public policy favours promotion of quick and amicable settlement of disputes. In circumstances such as this where the parties have compromised all the substantive matters in controversy between them, to award full costs to the successful party would amount to an unjust result. A party compromising a suit is entitled to expect some discount in costs, depending on the stage of the proceedings at which the compromise is reached, how involved and complex the matter was, and such other relevant considerations. I do not find this to be a complex matter either factually or on matters of law. In my view it is one which ought to have been compromised much earlier than this. Nevertheless the defendants shall be allowed a 20% discount on costs in light of the spirit of compromise they have exhibited. The plaintiff is therefore awarded only 80% of the costs of the suit.

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Dated at Arua this 27<sup>th</sup> October, 2017.

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Stephen Mubiru  
Judge,  
27<sup>th</sup> October, 2017