

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM**

COMMERCIAL CASE NO.135 OF 2019

GULF AGGREGATE (T) LTD.....PLAINTIFF

VERSUS

CHINA RAILWAY CONTRACTION
ENGINEERING GROUP CO.LTD..... DEFENDANT

*Last Order: 06/09/2021
Ruling: 01/10/2021*

CONSENT JUDGEMENT

NANGELA, J.:

This consent judgement arises from a Plaint filed in this Court wherein the Plaintiff prayed as follows, that the Defendant be ordered to pay:ea

- (a) **TZS 233,959,790.09**, being payment for building materials supplied by the Plaintiff to the Defendant;
- (b) interest on the above sum at a rate of 20% per annum from 14th October 2020 to the date of judgment.

- (c) interest on the decretal sum at the rate of 7% from the date of judgment till full and final payment;
- (d) general damages;
- (e) costs of this suit; and
- (f) any other relief as the Honourable Court may deem fit and just to grant.

On the 29th April 2021, the parties appeared before me represented by Mr Filbert Akaro, learned advocate, who appeared from the Plaintiff and Mr Paul Makanga, learned advocate appearing for the Defendant. In the course of addressing this Court, Mr Akaro told the Court that, the Plaintiff has so far been paid the amount he was claiming from the Defendant in full, only that the parties had locked horns on the issue regarding who shall pay the costs of this suit. The two learned counsels prayed for time to finalise their remaining issue.

On the 21st day of May 2021, the parties appeared in Court. The Court was informed that they are on the right course of settling this matter amicably. On the material date, I made an order that, the parties should file their Deed of Settlement in Court if at all they have managed to resolve their dispute. I also directed that, the remaining issue can be argued before this Court if they will fail to resolve it amicably.

On the 30th day of June 2021, a duly executed Deed of Settlement made under Order XXIII Rule 3 of the Civil

Procedure Code, Cap.33 R.E 2019 was filed in Court. In that Deed of Settlement the parties have agreed on five basic things which, except for the issue of payment of costs, are meant to settle their dispute. In particular, the parties have agreed as hereunder:

- (a) that, as of the date of executing the Deed of Settlement, the Defendant has already paid in instalment, the whole principal sum of **TZS 233,950,790.09**, being payment for building materials supplied by the Plaintiff to the Defendant and the Plaintiff acknowledges to have received the same;
- (b) that, in consideration of the amicable settlement, the Plaintiff has waived and relinquished her claims in reference to interests on the principal and decretal sum, being from the date of breach to the date of judgement and from the date of judgment to the date of full payment respectively; as well as claims for general damages;
- (c) that, settlement of the principal sum does not include costs of the suit which have been left for determination by the Court.

- (d) Upon duly filing of this Deed of Settlement in Court, it shall be recorded in Court and upon being recorded it shall serve as a Court's Decree, and, the Court shall be moved to mark the suit as having been "settled out of Court" on terms of the Deed of Settlement.
- (e) The Deed of Settlement contains the entire agreement by and between the parties, and no party shall be bound by any undertaking, representation, warranties, promise or the like that are not recorded herein.

On 09th August, the advocates representing the parties herein appeared in Court. Mr Odhiambo Kobas, learned counsel appeared for the Plaintiff, while Mr Rico Adolf appeared for the Defendant. On the material date the parties informed me that the issue of whether the Defendant shall bear the costs of this suit could not be resolved, hence calling upon the Court's intervention.

I allowed the parties to submit before me on that point of contention which I was of the view that needed not detain this Court much. That being said, this judgment, apart from being evidence of registration of their Deed of Settlement, in line with the requirements of Order XXIII Rule 3 of the Civil Procedure Code, Cap.33 R.E 2019, does also resolve the

contentious issue for which submissions were made before the Court by the learned counsel for the parties.

As regard the issue of payment of costs of this suit, it was Mr Kobas' submission that the Defendant must shoulder all the costs associated with this suit. He submitted that, under section 30 of the Civil Procedure Code, Cap.33 R.E 2019, payment of costs is a matter which is left to the Court's discretion.

In his view, the circumstances of this case would attract costs and the Court should be called upon to exercise its discretion of in favour of the Plaintiff. He argued that, much as the parties have settled the principal amount, this suit would not have been filed had the Defendant, in the first place, heeded to the demand letter which called upon him to pay that amount. He concluded his submission by contending, therefore, that, the Defendant must furnish costs.

In reply, Mr Rico was very brief. He conceded that, legally, the powers to grant costs fall under section 30 of the Civil Procedure Code, Cap.33 R.E 2019. He urged this court to decline the prayer for costs and, instead, he was the view that, an order should be give to the effect that each part should bear its own costs.

He assigned two basic reasons for his position which were, that:

- (i) in essence, the defendant's decision to pay the whole disputed amount once was to avoid the parties being involved in costs of litigating the matter, and;
- (ii) the matter at hand has been settled amicably by the respective parties at its preliminary stages, even before it reached the stage of first pre-trial conference.

On the basis of the above two reasons, Mr Rico urged this Court to decline costs and order that each party should bear its own costs.

In a swift rejoinder, Mr Kobas argued that, the Defendant's submissions are an afterthought. He contended that, had the Defendant been willing to pay on his own volition, he should have paid the principal sum at the time when the demand notice was served upon by the Plaintiff. Since the Defendant failed to pay at that time and waited until the Plaintiff filed a case in Court, the Defendant must bear the costs.

As regard to the fact that the suit was settled amicably, he contended that, that fact could be raised as an issue of determining the quantum of costs to be awarded by a Taxing officer but not now. He thus pressed for costs.

Having heard the rival submissions made by the learned counsel for the parties herein, the issue I am called upon to address is whether this Court should award costs to the Plaintiff in a suit which both parties entered into amicable settlement and filed a Deed of Settlement in Court, but failing to agree on that single issue.

According to **Halsbury's Laws of England**, 4th Edn., Vol 12, at page 41, the concept of costs and what it all entails was defined as signifying:

"the sum of money which the court orders one party to pay another party in respect of the expenses of litigation incurred. Except where specifically provided by the statute or by rule of Court, the costs of proceedings are in the Court's discretion."

In the case of **Johnstone vs. The Law Society of Prince Edward Island**, 2 PEIR B-28 (1988) the Canadian Court of Appeal, had the following to say regarding what costs stands for, that is to say:

"... the sum of money which the court orders one party to pay another party in an action as compensation for the expense of litigation incurred. The definition continues to the effect that costs

are awarded as compensation (i.e. reimbursement); there is, unlike damages, no *restitutio in integrum*, that is to say, no concept in costs, as there exists in damages, that the injured person should be placed, in so far as money can do so, in the same position as he occupied before the injury was suffered."

Perhaps the Indian case of **Manindra Chandra Nandi vs. Aswini Kumar Acharjya**, ILR (1921) 48 Cal 427 has succinctly given the concept of costs a better understanding of it. It was stated that:

"...whatever the origin of costs might have been, they are now awarded, not as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected, or, as Lord Coke puts it, for whatever appears to the Court to be the legal expenses incurred by the party in prosecuting his suit or his defence. The theory on which costs are now awarded to a plaintiff is that default of the defendant made it necessary to sue him, and to a

defendant is that the plaintiff sued him without cause; costs are thus in the nature of incidental damages allowed to indemnify a party against the expense of successfully vindicating his rights in court and consequently the party to blame pays costs to the party without fault. These principles apply, not merely in the award of costs, but also in the award of extra allowance or special costs. Courts are authorized to allow such special allowances, not to inflict a penalty on the unsuccessful party, but to indemnify the successful litigant for actual expenses necessarily or reasonably incurred in what are designated as important cases or difficult and extraordinary cases."

Undoubtedly in my opinion, it has long been established by the courts that, costs normally follow the event. See the cases of **Njoro Furniture Mart vs Tanzania Electricity Supply Company Ltd** [1995] T.L.R 205 and **Kioka Ltd v. De Angelis** [1969] EA 7.

Besides, according to section 30 (1) and (2) of the Civil Procedure Act, Cap.33 R.E 2019, payment of costs is at the discretion of the Court and, where the Court decides not to

grant costs, the law directs that, the court shall state its reasons in writing.

As it may be observed from the cases that sets out the principles relating to payments of costs to either the Plaintiff or the Defendant, it is clear that such payment stands as compensation by the defendant for making it necessary for the Plaintiff to sue him, or by the Plaintiff to a Defendant if the Plaintiff sued him without cause.

In this present case, the Plaintiff's counsel has argued that, even if the Defendant agreed to settle the debt by paying the claimed amount in full, the same was made payable after the filing of this present suit and not at the time when the Plaintiff sent demand notice to the Defendant.

In other words, the Plaintiff's counsel seems to be arguing that, the Defendant had unnecessarily made the Plaintiff to incur costs and, therefore, the Plaintiff must be refunded such amounts spent by way of an order for payment of costs.

In the case of **Pacis Insurance Co. Ltd vs. Francis Njeru** [2018]eKLR at page 3, the High Court of Kenya once noted, and I am fully persuaded by the holding of the Court, that:

"A party having been caused by the other to participate in a suit is entitled to costs incurred ... unless parties agree otherwise or Court on

exercising its discretion decides otherwise after giving the parties opportunity to submit on costs.”

In this present case, it is indeed the Defendant’s non-payment of the claimed amount by the Plaintiff which forced the Plaintiff to institute the current suit. Even if the parties settled the matter amicably before it went further to other processes leading to its disposal, the fact that the parties failed to agree on the issue of costs means that the Court should exercise its discretion.

In my view, I am inclined to accept the Plaintiff’s submissions and I am fully persuaded by the Kenyan decision in the case of **Pacis Insurance (supra)** as well as the Indian case of **Manindra Chandra Nandi (supra)** that, since it is the Defendant who compelled the Plaintiff to come to this Court and incur expenses or costs of filing and litigating this case to this extent, even if it did not go to its fullest stage of hearing, it is clear that costs have been incurred already.

As such, whoever causes another to incur unnecessary costs of litigating a matter, which he ought to have prevented by settling the claims well before the case was filed in Court, should be made to pay costs.

In the circumstances, therefore, an award of costs to the Plaintiff, that are to be taxed accordingly, is warranted. The fact that the matter did not proceed to the end is

immaterial at this stage. What is of relevance to me is that costs must be awarded since the Plaintiff was made to file this suit while the Defendant knew very well that the claims could have been settled well in advance when a demand notice was brought to the attention of the Defendant.

All said and done, the suit is hereby marked "**settled at the instance of the parties' Deed of Settlement,**" duly executed by the parties on the 30th day of June 2021 and filed in this Court. The Defendant is to pay all costs incurred by the Plaintiff.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 01st OCTOBER 2021



A handwritten signature in black ink, appearing to read "Deo John Nangela".

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DEO JOHN NANGELA
JUDGE