

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

COMMERCIAL CASE NO.107 OF 2020

WELLWORTH HOTELS AND LODGES LTDPLAINTIFF
VERSUS

EAST AFRICA CANVANS COMPANY LTD.....1st DEFENDANT
STIRLING ARVING HORSELY.....2nd DEFENDANT
ROBERT JAMES FLOWERS.....3rd DEFENDANT
GARY MCINTYRE.....4th DEFENDANT
ECO-STEEL AFRICA LTD.....5th DEFENDANT

Last Order: 28/10/2021.
Ruling date: 02/11/2021.

RULING

NANGELA, J.:

This suit was instituted in this Court on the 5th of November 2020. Plaintiff's prayers before this Court, as against all Defendants, jointly and severally, are as follows:

- (a) a Declaratory Order that the Defendants are in breach of a contract entered between the 1st Defendant and the Plaintiff;

- (b) Special damages for business frustration caused, amounting to **TZS 100,000,000.**
- (c) A full reimbursement of **USD (\$)** **443,508.60;**
- (d) Special damages for losses incurred, in an amount of **USD (\$)** **1,357,045.18;**
- (e) Interest at commercial rate of 22% from the date of breach of contract until the filing of the suit;
- (f) Interest at commercial rate of 22% from the date of filing the suit until the date of judgement;
- (g) Interest at Court's rate of 12% from the date of judgement until the full satisfaction of the decree;
- (h) Legal fees of the **USD (\$)** **20,000.00** (twenty thousand USD).
- (i) General damages;
- (j) Any other relief that the Honourable Court deems fit and just to grant.

On the 21st April 2021, the 1st to 4th Defendants filed their Joint Written Statement of Defence (JWDS). The 5th Defendant filed his separately. Even so, she filed it on the same date as the rest of the Defendant. By way

of Notices filed in this Court on the day of filing their WSDs, all Defendants raised preliminary objections to challenge the maintainability of the suit filed by the Plaintiff.

In particular, the 1st to 4th Defendants' objections were to the effect that:

1. The Plaintiff does not disclose any cause of action against the 1st, 2nd, 3rd and 4th Defendants.
2. The Plaintiff is defective for contravening the provisions of Order VI Rule 15(3) of the Civil Procedure Code, Cap.33 R.E 2019.

As regards the Notice filed by the 5th Defendant, the same raised objections, to wit, that:

1. the Plaintiff is incompetent for misjoinder of Parties;
2. the Plaintiff does not disclose any cause of action against the 5th Defendant; and
3. the Plaintiff is defective for contravening the provisions of Order VI Rule 15(3) of the Civil Procedure Code, Cap.33 R.E 2019.

On the 28th October 2021 the matter was called on for the hearing of the preliminary objections raised by the Defendants. On the material date, Ms Winjaneth Lema, learned counsel appeared for the Plaintiff. The 1st to 5th Defendants enjoyed the services of Mr Heriel Munisi, learned advocate.

When Ms Lema rose to address the Court, she conceded to all preliminary objections. She however, prayed to withdraw the suit from the Court without costs and with leave to re-file it.

For his party, Mr. Munisi did not object to the concessions made by Ms Lema. However, he raised issues with the prayer to withdraw the suit from the Court and the non-payment of costs. He pressed for costs, arguing that, initially, the Defendants were dragged into this Court by the Plaintiff in Commercial case No.5 of 2020 which was struck out. Later, the same case was re-filed as Commercial case No.107 of 2020. He urged this Court to grant an order for costs.

In a brief rejoinder, Ms Lema maintained her plea for award of no costs. She rejoined that, much as she agrees that the suit was previously filed as Commercial Case No.5 of 2020 and the same was struck out by this same Court, the suit was re-filed by Mr Maka, advocate, who was, by then, the leading counsel.

She submitted that, the Plaintiff has acted reasonably by conceding to the preliminary objects instead of arguing them, a fact which would have been wastage of the precious time of both the Court and the Defendants' counsel. She rejoined further that, the matter has not been determined on merits, and, for that matter, the Court should be left to exercise its discretion and award no costs.

Having heard the submissions, the issue here is only one pegged on the aspect of costs. Should this Court grant costs if the Plaintiff withdraws the suit from this Court or if the suit is struck out?

Let me first make it clear that, once the parties have filed their respective pleadings and the Defendants have raised preliminary objections, the Plaintiff cannot ask for a withdrawal of the suit from the Court even if that is his/her suit.

To allow a withdrawal after the preliminary objections have been duly filed and ready to be argued, would mean that, the withdrawal was prompted by the objections filed by the Defendants and, hence, a technical attempt to pre-empt the objections already filed in Court.

In my view, having conceded to the preliminary objections, the right course is to leave the matter to the Court to take the necessary actions to the suit, which is to have it struck out either with or without costs, depending of the circumstances of each case. In this case, the Defendants' counsel has pressed for costs. On the other hand, the Plaintiff's counsel has argued against that prayer.

In law, costs are awarded at the discretion of the Court. Section 30 (1) and (2) of the Civil Procedure Act, Cap.33 R.E 2019, is alive to that. It is also stated under that provision that, where the Court decides not to grant costs, the law directs that, the court shall state its reasons in writing.

For an elaborate discussion on costs, see the case **Gulf Aggregate (T) Ltd vs. China Railway Contraction Engineering Group Co. Ltd**, Commercial Case No.135 of 2019, (unreported) and **Joseph Eliuta Mahawi and Another vs. Serengeti Breweries Limited**, Misc. Comm. Appl. No.138 of 2021 (unreported).

Undoubtedly, it has, as well, been an established principle 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.

However, as I said, since costs are awarded at the discretion of the Court, the discretion must be exercised judiciously. In view of that, and, as I earlier stated here above, any refusal to grant costs once a party has pressed to be paid costs, must be supported by reasons.

In her submissions, Ms Lema has asked this Court not to grant costs following the concession she made about the preliminary objections. She has argued that, by conceding she has saved the time of this Court. Besides, she contended that, the matter had not been heard on merit.

In my view, had the matter been withdrawn earlier enough before the filing of the objections and the written statements of defence that would have made a difference. However, since the Defendants have engaged an advocate and, the respective advocate has filed the requisite pleadings for the Defendant and has made about sixth appearances before this Court, denying them

costs if the matter is to be struck out, will not be in the interest of justice.

In any case, the reasoning of Ms Lema could only be entertained had it been that I was dealing with a matter related to taxation of costs, but unfortunately that is not the case.

It follows, therefore, that, since costs are to follow the event, the prayers for costs which has been floated and vehemently defended by Mr. Munisi cannot be brushed aside. Exercise of discretion is a judicial endeavour which calls for a judicious application of whatever discretionary powers the Court might have been vested upon by the law.

In view of the above, this Court settles for the following orders:

1. That, this Commercial Case No.107 of 2020 which was filed by the Plaintiff in this Court on the 5th of November 2020, is hereby struck out.

2. The striking out of the suit is with costs to the Defendants.
3. The matter shall proceed in respect of the counterclaims by the Defendants on a date fixed by the Court.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 02ND DAY OF
NOVEMBER, 2021



A handwritten signature in blue ink, appearing to read "Deo John Nangela". The signature is written over a horizontal dotted line.

DEO JOHN NANGELA
JUDGE,
High Court of Tanzania (Commercial Division)
02 /11/2020