



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL SUIT NO. 23 OF 2015

JOHN NJOGU GACHAU.....PLAINTIFF

VERSUS

RT.REV.JOSEPH MWANGI KAGUNDA.....1<sup>ST</sup> DEFENDANT

ANGLICAN CHURCH OF KENYA.....2<sup>ND</sup> DEFENDANT

JUDGMENT

**INTRODUCTION**

1. The plaintiff filed this suit against the defendants seeking damages for defamation; the matter was referred for mediation and on the 4/07/2019 a Mediation Settlement Agreement dated the 26/02/2019 was adopted as an order of this court; the only question that was reserved by the mediator for determination by this court was on the issues of facilitation and costs.

**ISSUES FOR DETERMINATION**

2. Therefore the only issues found for determination by this court shall be the facilitation period, the amount payable and costs;

**ANALYSIS**

**The facilitation period and the amount payable:**

3. In this instance the facilitation was one of the terms agreed upon under the mediation settlement agreement and it was to be paid by the respondents without admission of liability to the plaintiff; the parties were unable to agree on the period and sum to be paid and therefore it was left to this court to determine;

4. This court has judicial notice of the award made in favour of the plaintiff in a suit filed against the same respondents in the Employment and Labour Relations Court; and therefore any payment herein should not be construed as compensation for loss of employment;

5. This court reiterates that any payment made herein is done as a favour and without legal obligation and the amount is but as compensation for injury to his feelings and also to assist the plaintiff in getting back on his feet again;

6. In calculating the period for payment this court takes into consideration the period the plaintiff was relieved of his duties which was in August, 2015 and he stayed out in the cold for a period of four (4) years; this court will award a facilitation payment to the plaintiff for a period of eight (8) months which translates to two months for each year he was out of service; in calculating the ex-gratia sum payable to the plaintiff this may be agreed upon by the parties; in the event the parties are unable to agree on an amount then it shall be based on the plaintiff's gross monthly pay at the time he was relieved of his duties; the amount may be payable in lump sum or monthly;

7. Interest shall be applicable on this sum at court rates effective from the date of filing suit;

**Costs:**

8. The question of costs remains to be dealt with; Section 27(1) of the Civil Procedure Act gives this court the discretion to determine by whom and to what extent the costs are to be paid; the proviso to the section states that costs shall follow the event unless the court shall for good reason otherwise order;

9. It is trite law that a successful party is entitled to costs as of right unless found to have been guilty of misconduct; but other than

misconduct any other good reason found can justify a departure from this rule; therefore it is necessary to examine the circumstances and facts of this instant case so as to make a determination on this issue;

10. In this instance the matter proceeded for hearing and during the course of the hearing this court suggested mediation as a solution which was found to be acceptable by the plaintiff and the defendants; and a settlement was reached and the agreement was adopted as an order of the court; none of the parties provided any authorities or decisions which say that costs of mediation proceedings are governed by the same principles as costs for civil proceedings;

11. Nevertheless this court reiterates that the exception to the principle rule is left to the discretion of the court; and taking into consideration that this suit was remedied out of court and for the sake of healing and closure this court is satisfied that this is a suitable case in which this court should exercise its discretion by awarding no costs to the plaintiff; therefore each party shall bear his/its own costs.

#### **FINDINGS & DETERMINATION**

12. From the foregoing this court makes the following findings and determination;

(i) This court finds that the plaintiff is entitled to facilitation for a period of eight (8) months; the amount payable to be agreed or in default the sum equivalent to the plaintiff's gross monthly pay at the time he was released from service; facilitation shall be payable by Respondents and not parish.

(ii) Interest thereon on (i) shall be at court rates from the date of filing suit;

(iii) Each party shall bear their own costs;

Orders Accordingly.

**Dated, Signed and Delivered at Nyeri this 7<sup>th</sup> day of November, 2019.**

**HON.A.MSHILA**

**JUDGE**