

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

ELR APPEAL NO. E061 OF 2024

SANA INDUSTRIES LIMITED.....APPELLANT/APPLICANT

VERSUS

REGINA KANINI NZIOKIRESPONDENT

(Being an Appeal against the Ruling and order of Honourable C.K. KISIANGANI

delivered on 7th February, 2024 at Ruiru Law Courts arising from Ruiru MCELRC

NO.E007 OF 2023

CORAM

Before Lady Justice J.W. Keli

C/A Otieno

ORIGINAL

RULING

1. The court on the 31st January 2025 allowed the appeal herein and entered judgment for the appellant/applicant as follows:-

***“IN THE UPSHOT THE COURT GRANTS THE ALTERNATIVE PRAYER AS
FOLLOWS:-***

- a. *The default judgment entered on 28th September, 2023 be and is hereby set aside.*

b. The Memorandum of Response dated 31st July, 2023 by the Appellant be and is hereby deemed to be properly filed and served.

c. The suit being RUIRU MCELRC E007 OF 2023 is hereby reopened for hearing inter parties before a different Magistrate and Appellant be and is hereby granted leave to defend the proceedings on merit.

d. The decretal sum deposited in court be released to the appellant henceforth.

e. Cost of the appeal to the respondent.”

2. The appellant aggrieved with the Court's order as to costs filed the instant application dated 30th May 2025 under section 16 of the Employment and Labour Relations Court Act, and Rule 74 of the Employment and Labour Relations Court (Procedure) Rules 2024 seeking for the following Orders-

a) THAT this Honourable Court be pleased to review its judgment delivered on the 31st January 2025 to the extent that it awarded costs of the appeal to the Respondent.

b) THAT the said order on costs be set aside and substituted with an order awarding costs of the appeal to the Appellant as the successful party.

c) THAT pending the hearing and determination of this application, the Honourable court be pleased to stay the taxation of the Bill of Costs arising from the said judgment and which comes up for mention on 3rd June 2025 before Hon. Fredrick Nyamora.

d) THAT costs of this application be provided for.

3. The application is founded on the judgment that was delivered on 31st January 2025. The applicant states that despite the Appellant emerging as the successful party, the

Honourable court awarded costs to the Respondent. That the award did not come with justification and this prompted the Appellant to make this application.

4. The respondent opposed the application by way of replying affidavit dated 17th June 2025 and stated that the application for review was unmerited as the court re-opened the suit and she was thus entitled to costs for the inconvenience.

5. The application was canvassed by way of written submissions.

6. The issue for determination was whether the award of costs in the appeal to the respondent was proper.

7. Section 16 of the Employment and Labour Relations Court Act provides for the review power of the court as follows: '*The Court shall have power to review its judgements, awards, orders or decrees in accordance with the Rules.*' Rule 74 of the Employment and Labour Relations Court (Procedure) Rules 2024 provides the procedure for review as follows: -'*74. (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—*

(a) if there is discovery of a new and important matter or evidence which, despite the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;

(b) on account of some mistake or error apparent on the face of the record;

(c) if the judgment or ruling requires clarification; or

(d) for any other sufficient reason.

(2) An application for review of a decree or order of the Court under sub-rule (1) shall be made to the judge who passed the decree or made the order sought to be reviewed or to any other judge if that judge is not attached to the Court station

(3) A party seeking review of a decree or order of the Court shall apply to the Court by way of notice of motion supported by an affidavit and shall file a copy of the Judgment or decree or ruling or order to be reviewed.

(4) The Court shall, upon hearing an application for review, deliver a ruling allowing or dismissing the application.

(5) Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.’’

8. The issue for review was straightforward, being whether there was an error in the award of costs to the respondent, the appeal having been successful. The general principle in litigation is that costs follow the event. While the general principle in litigation is that **costs follow the event**, meaning the losing party pays the winning party's legal costs, a court has the discretion to deviate from this rule. The court's primary objective in awarding costs is to ensure justice and fairness, not to automatically punish the loser. This discretion is exercised judiciously and is not a matter of a judge's personal whim. The court agreed with the decision cited by the applicant as follows- ‘In Kiteme v Kimanthi (Civil Appeal 61 of 2019) [2023] the court analyzed the issue of costs as follows;

‘14. As a general rule though costs is a question of discretion, a successful party to a case is entitled to costs unless there are good reasons advanced by the trial court not to award costs to the successful litigant.’’In the Party of Independent Candidates of Kenya v Mutula Kilonzo & 2 others [2013] eKLR the High Court quoted case of

Nedbank Swaziland Ltd v Sandile Dlamini No (144/2010) [2013] SZHC30 (2013)

Maphalala Judge on the issue of costs: *"It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs is a matter in which the trial judge is given discretion But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, is a rule which should not be departed from without the demonstration of good grounds for doing so."*

9. In the instant case, the appellant had an alternative prayer. The court on consideration of the merit of the appeal, allowed the alternative prayer as follows:- ***'IN THE***

UPSHOT THE COURT GRANTS THE ALTERNATIVE PRAYER AS FOLLOWS:-

- a) The default judgment entered on 28th September, 2023 be and is hereby set aside.***
- b) The Memorandum of Response dated 31st July, 2023 by the Appellant be and is hereby deemed to be properly filed and served.***
- c) The suit being RUIRU MCELRC E007 OF 2023 is hereby reopened for hearing inter parties before a different Magistrate and Appellant be and is hereby granted leave to defend the proceedings on merit.***
- d) The decretal sum deposited in court be released to the appellant henceforth.***
- e) Cost of the appeal to the respondent."***

10. The impugned default judgment was a result of the Appellant being granted leave to file a response outside the deadline in the lower court. The appellant was at fault for failing to file the response on time. The court further reopened the case for a hearing

on its merits. If the party seeking to reopen the case is doing so because of their own failure, mistake, or negligence (e.g., they did not attend a hearing, failed to file a document, or did not serve the other party properly), the court will almost always order that party to pay the other side's costs for the application to reopen. This acts as a punitive measure to compensate the innocent party for the unnecessary legal costs and time incurred due to the fault of the other side. These costs are commonly referred to as throwaway costs.

11. The Court was of the considered opinion that the respondent needed to be compensated as they would incur further legal costs and time expenditure due to the granting of the alternative prayer to reopen the suit and file a response out of time. The court considered this justified exercise of judicial discretion on costs in favour of the respondent rather than the appellant, despite their victory, and to deviate from the usual principle in litigation that costs follow the event.

12. For the above reasons, the court finds the application to be without merit and dismisses it with costs to the respondent.

13. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18TH
DAY OF SEPTEMBER, 2025.**

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Applicant:- Iredi

Respondent:- Kang'ethe

ORIGINAL