Adan v County Public Service Board – Mandera & another (Employment and Labour Relations Petition E074 of 2020) [2024] KEELRC 1805 (KLR) (11 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 1805 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS PETITION E074 OF 2020

MN NDUMA, J

JULY 11, 2024

BETWEEN

NASRA ABDIRAHMAN ADAN ..... PETITIONER

AND

COUNTY PUBLIC SERVICE BOARD – MANDERA ..... 1ST RESPONDENT

COUNTY GOVERNMENT OF MANDERA ..... 2ND RESPONDENT

RULING

1. Application dated 4th March 2024 by the respondents/applicants seek an order in the following terms:-
    1. Spent
    2. Spent
    3. That this honourable court be pleased to strike out the party and party bill of costs dated 23rd October 2023.
    4. That the court do grant any other reliefs or orders it deems necessary and expedient to meet the end of justice.
    5. That costs of the application be provided
2. The application is premised on grounds (a) to (o) the nub of which is that the petition proceeded undefended and judgement was delivered on 24/2/2022 by Nduma J. in favour of the petitioner.
3.. The court among other reliefs granted the petitioner/respondent costs of the suit.
4. The applicants on 23/3/2022 filed an application seeking stay and setting aside of the judgement of the court dated 24/2/2022 and grant an order for re-hearing of the petition on merit.

5. The parties however, prior to the hearing of the said application amicably settled the matter and filed a consent dated 16th June 2022 which consent was adopted as an order of the court on 27th July 2022.

6. The consent compromised the judgement of 24/2/2022 and did not provide for an award of costs to the petitioner thus the petitioner is not entitled to party and party costs on this account.

Replying affidavit

7. In the replying affidavit of Rahab Kyenze, the deponent states that the consent agreed to on the 16th June, 2022 by the parties also addressed the issue of costs including costs due to the Petitioner's advocate which she states were to be borne by the respondent/applicantssince the Petitioner/ respondent had agreed to forfeit the salary arrears that had earlier been awarded by the Court on the 24/02/2024.

8. That the respondents/applicants in their letter Ref. Mcpsb/reinstate /01/12/2022/01 relied on the court judgment dated the 24th February, 2024 to reinstate the petitioner/respondent despite the consent by the parties. The deponent surmises that the respondents/applicants are therefore not immune to pay costs as awarded by the court in the said judgment.

9. In the supplementary affidavit, in response, Hussein Somo for the Respondents/applicants joins issue with the petitioner/respondent and deposes that the question before court is whether the Petitioner/ respondent is deserving of the Party and Party Costs and not the implementation and/ or compliance with the judgment dated 24th February 2022 or Consent dated 16th June 2022.

10. That the Petitioner/Respondent's Advocates are in essence trying to reopen the suit which the Court ought to frown upon. That the consent only provided for reinstatement of the petitioner and did not provide for award of costs. It is deposed that the letters between the parties dated 13th April 2022, 13 June 2022 and 15th June 2022 all refer to negotiations which culminated in the signing of the consent on the 16/6/2022.

Determination

11. The parties filed written submissions which the court has carefully considered together with the deposition by the parties.

12. It is beyond per adventure that the petition was wholly compromised by consent of the parties entered into between counsel for the petitioner/respondent and the respondents/applicants dated 16th June 2022.

13. The consent was adopted as an order of the court on 27/02/2022.

14. In terms of the consent, the subject matter of the petition was settled by reinstatement of the petitioner at job group 'K' and the petitioner agreed to forfeit all the arrear salary sought in the petition. This settlement was in favour of the petitioner/respondent who had incurred costs to file the suit in the first place despite compromising the claimed arrear salaries.

15. The parties did not agree on the issue of costs.

16. It follows that the issue of costs was not settled by the parties and since in terms of Order 21 rule 9 (2) of *Civil Procedure Rules*, 2010, costs follow the outcome if not expressly stated, it was quite in order for the petitioner to present a bill of costs for taxation by the taxing master.

17. There is no basis for the court to strike out the party and party bill of costs dated 23rd October 2023.

18. If it was the intention of the parties to agree and settle the matter of costs out of court, nothing would have been easier than to expressly state so in the consent filed the parties. They did not do so. As was stated in the case of *Frank Phipps and Pearl Phipps versus Harold Morrison* SCCA 86 of 2008 Harris JA stated: -

> As a general rule, an order obtained by the consent of the parties is binding. It remains valid and subsisting until set aside by fresh proceeding brought for that purpose. In *Kinch versus Walcott and others* [1929] A. C. 482 it was held, "The bringing of fresh proceedings would normally be guided on the obtaining of the consent order by fraud, mistake or misrepresentation."

19. In the present matter, the eventuality spoken of above has not arisen and the court is guided by the express words of the consent document and no additional agreement out of the four corners of the consent document may be implied from it.

20. Accordingly, this application lacks merit and is dismissed with costs.

DATED AT NAIROBI THIS 11TH DAY OF JULY, 2024.

MATHEWS NDERI NDUMA

JUDGE

Appearance:

Mr. Kilenge for petitioner/respondent

Mr. Oduor for the respondents/applicant.

Mr. Kemboi Court Assistant