



**Teachers Service Commission v Musungu (Civil Appeal
131 of 2017) [2022] KECA 851 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KECA 851 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 131 OF 2017
W KARANJA, PO KIAGE & F TUIYOTI, JJA
APRIL 28, 2022**

BETWEEN

TEACHERS SERVICE COMMISSION APPELLANT

AND

ISSA JOHN MUSUNGU RESPONDENT

*(Being an Appeal from the Ruling of the High Court of Kenya,
Employment and Labour Relations Court at Kisumu, (Maureen
Onyango, J.) dated 29th September, 2016 in CAUSE NO. 58 OF 2014)*

JUDGMENT

1. On 24th November, 2014 Wasilwa J, dismissed the respondent’s suit with costs in Kisumu Industrial Court Cause No. 58 of 2014. Following that success, Teachers Service Commission (the appellant or TSC) filed a party and party bill of costs and an order for the sum of 159,901/= was made in its favour by the Taxing Master on July 24, 2015.
2. As the costs remained unpaid, TSC moved the Judge supposedly under section 6 of the *Advocates Act* (the Act) for an order that the taxed costs be deemed as judgment of the court. The application was not opposed and it must have come as a surprise to TSC when, on September 29, 2016, Maureen Onyango J, suo motu, dismissed the application.
3. In dismissing the application, the Judge reasoned: -

“Ordering the claimant to pay fees to the respondent, the Teacher Service Commission would be in breach of rules 4, 5 and 6 of the Advocates (practice) rules in so far as Teachers Service Commission is an unqualified person and Calvin Anyuor has not demonstrated that there is an agreement between him and the respondent in terms of Rule 4(ii) of the Rules”.



4. This Appeal challenges that decision on three grounds. That the Judge acted without jurisdiction by reversing and/or interfering with a judgment emanating from a Court/Judge of concurrent jurisdiction; the Judge erred in law by awarding reliefs not pleaded in the application of April 26, 2016; and that the learned Judge misdirected herself on the import and tenor of Rules 4, 5 and 6 of the [Advocates Practice Rules](#).
5. This first appeal raises issues of law only. The respondent never filed submissions and, although served, did not attend the plenary hearing. As regards those of the appellant, it has turned out to be needless for the Court to rehash those arguments for reasons that become apparent shortly.
6. In moving the Employment and Labour Relations Court(ELRC) for the orders, TSC stated that it was doing so under the auspices of section 6 of the [Advocates Act](#) and the much overworked section 3A of the [Civil Procedure Act](#). In the affidavit in support of the application and at its hearing, TSC stated that the purpose of the motion was that the orders sought would enable it recover the unpaid costs without the need of filing a separate suit for recovery of the costs. That stated objective reveals insurmountable difficulties in the procedure it adopted.
7. For a start, section 6 of the [Advocates Act](#) was long repealed by Act No 12 of 1995 and even before its repeal, the provision was on matters touching on the Council of Legal Education and had nothing to do with enforcement of costs. In effect the motion before the trial court was founded on a wrong footing.
8. Second, this Court is aware of section 51(2) of the Act which empowers a court to summarily enter judgement in accordance to a certificate of costs. It reads: -

2. The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.

This provision, however, would not be helpful to TSC because it is available to an advocate desirous of a summary procedure in seeking costs from his client. No similar procedure exists for enforcement of a certificate of party and party costs and there has to be doubt as to whether the application made by TSC had any anchor in the Act.

9. At the time the party and party costs in favour of TSC were taxed on 24th July 2015, the ELRC had been established. The current provision of section 13 of the [Employment and Labour Relations Court Act](#) followed an amendment to the previous provision by the [Statute Law \(Miscellaneous Amendments\) Act](#), 2014 (Act No. 18 of 2014) and reads:
 13. Enforcement of court orders

A judgement, award, order or decree of the Court shall be enforceable in accordance with the rules made under the *Civil Procedure Act*.
10. This provision was effective from December 8, 2014 as per the commencement provision of the statute and it is clear to us that at the time TSC moved the ELRC, through the motion of April 28, 2016 for the orders that its costs be deemed judgment of the court, a straightforward procedure for execution of its certificate of costs existed under the Civil Procedure Rules on execution of decrees and orders made to give effect to Part 111 of the *Civil Procedure Act*.



11. Even under the previous regime of law, and by dint of Rule 31 of The *Industrial Court (Procedure) Rules*, 2010, execution of party and party costs would still be under the provisions of the [Civil Procedure Act](#) and Rules. Rule 31 of the now past Industrial Court (Procedure) Rules, 2010 read;
31. (1) The Registrar shall issue an execution order and a warrant of arrest.
Execution and warrants.
(2) Rules on execution of an order and a decree applicable in the High Court shall be applicable to an order and a decree of the Court.
12. Whichever way one looks at it, the procedure adopted by TSC was unknown in law and only served to confuse issues. It seems rather strange for TSC to seek another judgement on costs when it already had an enforceable certificate at hand. The answer that the application by TSC should have met was, in our view, not a consideration on merit, but a striking out order. Having come to that conclusion, it is unnecessary for us to consider the other issues raised in this appeal.
13. The order that commends itself to us is to set aside the dismissal order of September 29, 2016 and substitute it with an order striking out the application dated April 28, 2016. Each party to bear its own costs of this appeal.

DATED AND DELIVERED IN KISUMU THIS 28TH DAY OF APRIL 2022.

W. KARANJA

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JUDGE OF APPEAL

O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

