



**Kamuti v Freight Wings Limited (Cause 1199 of 2018)
[2024] KEELRC 1659 (KLR) (28 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1659 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1199 OF 2018
SC RUTTO, J
JUNE 28, 2024**

BETWEEN

JOHN KAMUTI CLAIMANT

AND

FREIGHT WINGS LIMITED RESPONDENT

RULING

1. By way of a Judgment delivered on 11th November 2022, this Court found in favour of the Claimant/Applicant and awarded him:
 - a. Compensatory damages equivalent to seven (7) months' gross salary being Kshs 203,700.00.
 - b. One (1) month's salary in lieu of notice, being the sum of Kshs 29,100.00.
 - c. Salary for the month of April, 2018 being the sum of Kshs 29,100.00.
 - d. Payment for unutilized leave days being the sum of Kshs 9,700.00.
 - e. The total award is Kshs.271,600.00.
 - f. Interest on the amount in (e) at Court rates from the date of Judgment until payment in full.
 - g. The respondent shall also bear the costs of the claim.
2. Consequently, the Claimant/Applicant filed the instant Application seeking an order of review in the following manner:
 - a. In the summary of the final orders under paragraph 72 of the Judgment there be an order (g) to the effect that "the Counter-claim be and is hereby dismissed in its entirety".
 - b. Costs of the Counter-claim be to the Claimant.



3. The Application is premised on the grounds appearing on the face thereof and the Affidavit of John Kamuti, the Claimant herein. Grounds in support of the Motion are that the Judgment has omissions, mistakes and/or errors apparent on the face of the record in that, in the summary of the final orders of the court there is no order for dismissal of the Counterclaim. That further, the Court did not pronounce itself on the issue of costs of the Counterclaim.
4. That it is mete and just that costs of the Counterclaim be awarded to the Claimant for the reasons that both the Claimant and Respondent had a legitimate expectation that whichever party that would be successful would be awarded costs of the claim and Counterclaim as the case may be.
5. That there is the need to compensate the Claimant who has unreasonably been put to expense in defending a huge, frivolous claim without any reasonable prospects of success.
6. Further, that the Respondent failed to take the Statement of a crucial witness during its investigations prior to the suit, without any basis totally ignored reports of anomalies and remedial suggestions made to the management by the Claimant and failed to lead any evidence to prove the alleged loss subject of the Counterclaim and that the same was occasioned by the Claimant.
7. That further, the Respondent has the financial ability to pay the costs of the Claim and Counterclaim.
8. The Respondent countered the Application through the Affidavit of its Human Resource Manager, Mr. Arthur Mwangi. It is Mr. Mwangi's deposition that the suit and Counterclaim were heard together hence the Judgment dated 11th November, 2022 considered and determined both of them. In his view, there was no omission by the Court in respect of pronouncing itself on the issue of costs on the Counterclaim.
9. He further avers that the Claimant cannot now attempt to state that there is an error apparent and mistake of the face of the record at no fault of the parties.
10. Mr. Mwangi further contends that there is no discovery of new and important matter or evidence which was acquired by the Applicant after the exercise of due diligence after the delivery of the judgment.
11. It is his further assertion that there is no clarification that has been sought by the Claimant and he has not given sufficient reason why it took him close to five months to file the present Application.
12. He is further advised by his Advocate on record which advice he verily believes to be true and correct that the grounds raised by the Claimant do not form the basis for review of this Court's decision but rather are grounds of appeal. He contends that the Applicant is asking the Court to sit on its Appeal which is a scenario not allowed in law.
13. He further avers that failure of the Court to dismiss a Counterclaim with costs is not a ground for review of the orders of the Court and where the Court has not pronounced itself on an issue before it, the inference is that the issue has been declined therefore cannot form the basis of a review.
14. Mr. Mwangi further states that failure by the Court to award costs for the Counterclaim was deliberate and it meant that each party was to bear their own costs for the Counterclaim.
15. He further avers that it is a cardinal principle of justice that litigation must come to an end and this being a 2018 matter it is now close to seven years since the matter was filed in Court. That where no proper basis has been laid to re-open the Judgment on account of error, the Court should proceed and confirm the Judgment.



Submissions

16. The Application was canvassed by way of written submissions. On the part of the Claimant, it was submitted that the general principle is that costs follow the event, the effect being that the party who called forth the event by instituting suit would bear the costs if the suit failed, but if that party showed legitimate occasion, by successful suit, then the Defendant or Respondent would bear the costs. In support of this argument, the Claimant placed reliance on the cases of [Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 others](#) [2014] eKLR, [Samson Ole Kisirkoi v Maasai University](#) [2022] eKLR and [Okemwa vs Intra Africa Assurance Company Limited](#) [2023] KEELRC 2427 (KLR).
17. It was further submitted by the Claimant that he is entitled to the costs of the Counterclaim, and the Judgment being silent on the issue of costs, is an error on the face of the record that should be reviewed.
18. He further contended that the failure to award the costs for the Counterclaim means that the award of Kshs. 271,600 plus costs thereof all the aggregate sum of Kshs. 371,231.55 will be nullified as he will have to pay all of it to his Advocate, and still go back to his pockets to fully pay for his Advocates costs for representing him in the Counterclaim despite having been successful in prosecuting the Claim and defending the Counterclaim.
19. On the Respondent's part, it was submitted that failure by the Court to award costs in the Counterclaim is not a ground for review of the orders of the Court. On this issue, the Court was invited to consider the determination in the case of [Omote & another v Ogutu](#) (Civil Appeal E005 of 2021) [2022] KEHC 16441 (KLR) (19 December 2022) (Ruling).
20. The Respondent further posited that by virtue of Section 27 of the [Civil Procedure Act](#), it is trite law that the issue of costs is a discretionary award that is awarded to a successful party. In support of this position, the case of [Party of Independent Candidate of Kenya & another vs Mutula Kilonzo & 2 others](#) (2013 eKLR) was referenced.
21. The Respondent maintained that the basic rule that costs follow the event is not an invariable rule and the ultimate factor on award or non-award of costs is judicial discretion.

Analysis and Determination

22. Having considered the Application, the Respondent's Replying Affidavit, as well as the rival submissions, the singular issue identified for determination by the Court, is whether the Claimant has satisfied the requirements for the grant of an order for Review.
23. Rule 33(1) of the [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#), is very explicit that the Court can only review its orders if the following grounds exist: -
 - a. if there is discovery of new and important matter or evidence which, after 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.
24. As can be discerned from the record, the gist of the Claimant's Application is that the Judgment dated 11th November 2022 has omissions, mistakes and errors on the face of the record in that the Court did not pronounce itself on the issue of costs of the Counterclaim. In the Claimant's view, they had



a legitimate expectation together with the Respondent that whichever party that would be successful would be awarded costs of the Claim and Counterclaim as the case may be.

25. In light of the Claimant's argument, the question that begs to be answered is whether he has satisfied the requirements for the grant of an order for review in light of the provisions of Rule 33(1) of this Court's Rules.
26. My understanding of Rule 33 (1) aforesaid, is that the grounds for review are restricted. As such, the jurisdiction of the Court and scope of review is quite limited.
27. In my respectful view, failure by the Court to pronounce itself on the issue of costs is not one of the grounds contemplated under Rule 33 (1). It cannot be construed to amount to a mistake or error apparent on the face of the record.
28. As was held by the Court of Appeal in the case of National Bank of Kenya Ltd vs Ndungu Njau [1997] eKLR:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it”.

29. I wholly subscribe to the position taken by the Court in the above case. Indeed, as rightly observed by the Court, the error or omission must be self-evident and should not require an elaborate argument to be established.
30. And more importantly, it will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Indeed, the decision as to whether to award costs to a successful litigant is in my view, subject to the Court's discretion and is dependent on the circumstances of each case. There is no hard and fast rule.
31. In the case herein, the fact that the Court was silent on the issue of costs does not amount to a mistake or an error on the face of the record. It simply means that there was no order as to costs.
32. If I may say, the Claimant's dissatisfaction with the failure of the Court to award costs in the Counterclaim may very well constitute grounds for appeal but certainly not review.
33. In the end, this Court finds that the Application herein is not meritorious as the Claimant has failed to satisfy the requirements for grant of an order for Review under Rule 33 (1) of the Rules.
34. Accordingly, the Application dated 16th March 2023 is dismissed with no orders as costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JUNE 2024.



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STELLA RUTTO

JUDGE

In the presence of:

Mr. Mwanthi for the Claimant/Applicant

Ms. Oduo for the Respondent

Millicent Kibet Court Assistant

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

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