



Muchiri v African Agricultural Technology Foundation (AATF) & another (Employment and Labour Relations Cause 663 of 2019) [2024] KEELRC 2696 (KLR) (25 October 2024) (Ruling)

Neutral citation: [2024] KEELRC 2696 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 663 OF 2019
AN MWAURE, J
OCTOBER 25, 2024**

BETWEEN

CAROLINE MUCHIRI CLAIMANT

AND

**AFRICAN AGRICULTURAL TECHNOLOGY FOUNDATION (AATF) 1ST
RESPONDENT**

QUALIBASIC SEED COMPANY (QBS) 2ND RESPONDENT

RULING

1. The Claimant/Applicant filed a Notice of Motion dated 31st May 2024 seeking the following orders that: -
 1. The application be certified urgent, service thereof be dispensed with at the first instance.
 2. This court be pleased to vacate, review, and/or set aside orders made before the Employment and Labour Relations Court on 16th June 2023 allowing granting stay of execution pending the hearing and determination of the appeal of the orders issued by the Honourable Court in its ruling delivered on 18th August 2022
 3. The Honourable Court does give disposal of the substantive Claim
 4. Costs be in the cause

Claimant/Applicant's case

2. The application is supported by the affidavit deponed by Caroline Muchiri, the applicant.



3. The Applicant avers that she instituted this cause vide a Statement of Claim dated 3rd October 2019 and filed a Notice to Produce dated 13th November 2020 requesting the respondent to avail all relevant documents especially as contained in the notice to produce.
4. The Applicant avers that on 18th August 2022, this Honourable Court delivered its ruling ordering the Respondents to produce the requested documents but, the Respondents had appealed to the Court of Appeal against the production of the documents as per paragraphs 3 and 5 of the Notice to Produce.
5. The Applicant avers that the respondent made an application before this Honourable Court for stay of proceedings pending the hearing and determination of the application and in its ruling dated 16th June 2023 the court granted the respondent a stay of execution of the production orders pending the hearing and determination of the appeal.
6. The Applicant avers that the appeal and stay of execution orders have gravely affected her pursuit of this suit as she cannot take any action towards the hearing and logical disposal of the matter.
7. The Applicant avers that she no longer desires to pursue the production of documents as listed under paragraphs 3 and 5 of the Notice of Produce which is the substance of the appeal and proceed with the substantive claim.
8. The Applicant avers that she has withdrawn the Notice to Produce, the Appeal is overtaken by events and prays that this Honourable Court set reviews and/or set aside the orders allowing the substantive claim to proceed.

Respondents' case

9. In opposition to the application, the respondent filed a replying affidavit deposed by one Keziah Chomba, the respondents' legal officer.
10. He avers that the respondents do not object to the withdrawal of the notice to produce in respect of items 3 and 5 but object to the same being made without an order as to costs.
11. He avers that the respondents have incurred costs in litigating this matter and believe they should be compensated by way of costs.
12. He avers that the applicant should bear the costs of the notice of withdrawal and the review application because the applicant's actions led to unnecessary costs in this Honourable Court and Court of Appeal.
13. He avers that respondents claim that the costs would not have been incurred if the applicant had not sought the production of items 3 and 5 in the notice to produce.

Applicant submissions

14. The applicant submitted that as per the respondents' replying affidavit, the respondents are not opposed to the withdrawal of the Notice to Produce.
15. The applicant submitted that Section 27 of the *Civil Procedure Act* provides that costs of a suit or other proceedings are always at the court's discretion. In *Samson K.A Tim V D.M. Machage* [2019] eKLR the Court stated that;

“It is a settled principle of costs that costs follow the event, meaning that the successful party takes the costs unless the Court for sufficient reason orders otherwise. In considering this exercise of the discretion, the Court may properly take into account the length of time that the suit or proceedings has been going in Court before the withdrawal or other



determination; the nature of the relief sought; the steps taken in the proceedings; the stage of hearing of the suit or proceedings; the need to promote access to justice by indigent suitors; and other sufficient reason in the interest of justice.

16. Order 25 of the Civil Procedure Rules, 2010 allows for the withdrawal of suits. The applicant submitted that items 3 and 5 were withdrawn before the parties filed any response or submissions to the appeal, as it was not set for a hearing. Therefore, the applicant further submitted that the principle of costs following the event should apply, and since the event to which costs would follow has not occurred, the costs should not be awarded. The applicant cited the case of *Sonko V Clerk, County Assembly of Nairobi & 12 others* (Petition 14 (E021) of 2021 [2022] KESC 17 (KLR) (19 May 2022) in support of that proposition.
17. The Applicant submitted that each party should bear its own costs, or the decision on costs should be postponed until the main suit is heard as the court does not have the jurisdiction to make any orders regarding the proceedings before the Court of Appeal, including costs, based on the established court hierarchy.

Respondents' submissions

18. The respondents only issue of determination was who should bear the costs of the Application, the Notice to Produce and its withdrawal.
19. The respondent submitted that it is at the discretion of the court to determine the costs of a suit or other proceedings as per Section 27 of the *Civil Procedure Act*
20. In *Nicholas Kiptoo Arap Korir Salat V IEBC & 7 Others* [2014] eKLR the Supreme Court held that:

“a party’s right to withdraw a matter before the court cannot be taken away. A court cannot bar a party from withdrawing his matter. All that the court can do is to make an order as to costs where it is deemed appropriate.”
21. The respondents submitted that there are factors that are taken into consideration when determining costs of a suit as set out in *DGM V EWG* [2021] eKLR the High Court considered the following factors when awarding costs:
 - (a) the conduct of the parties, (b) the subject of litigation, (c) the circumstances which led to the institution of the proceedings, (d) the events which eventually led to their termination, (e) the stage at which the proceedings were terminated (f) the manner in which they were terminated (g) the relationship between the parties and (h) The need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of *the Constitution*.
22. The applicant submitted that costs follow the event and cited the case *Cecilia Kaururu Nyagu V Barclays Bank of Kenya Limited & Another* [2016] eKLR the Court made reference to Richard Kuloba, *Judicial Hints on Civil Procedure*, 2nd Edition, page 99 found as follows:

“Thus the expression “the costs shall follow the event” means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it.”
23. The respondents submitted that this Honourable Court to award them the costs of the application, the Notice to Produce and the Notice of Withdrawal.



Analyse and determination

24. Having considered the application, affidavits and submissions on record, the issue for determination is whether the application before this court is merited.
25. Section 16 of the *Employment and Labour Relations Court Act* which provides for review as follows: -
- “The Court shall have power to review its judgments, awards, orders or decrees in accordance with the Rules.”
26. Further, Rule 74 (1) of the Employment and Labour Relations Court (procedure) Rules 2024 further prescribes the perquisite ingredients that warrant a review as follows: -
- “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 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.”
27. In this instant case, the Respondents are not disputing the withdrawal of the Notice to Produce therefore the court will allow to set aside the order made on 16th June 2023.
28. The main issue of contention is with regard to costs to the Application, Notice to Produce and Notice of Withdrawal.
29. It is trite law that costs follow the event and in the case of *Jasbir Singh Rai & 3 Others V Tarlochan Singh Rai & 4 Others* [2014] eKLR the court stated that: -
- “It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent- to the actual process of litigation.”
30. In this particular case, the claimant/applicant is withdrawing the Notice to produce after the respondent filed an appeal. The parties are stating in their pleadings that the appeal has not been scheduled for a hearing up to date.



31. The claimant/applicant has delayed her own suit since it was filed in 2019 and the respondent has incurred costs. The respondent also filed an appeal against the courts ruling but as earlier said, there is no date given for the hearing of the appeal. Hence the applicant has withdrawn the application and therefore the appeal is also overtaken by events as there is nothing to appeal against in the circumstances.
32. The case is still ongoing and now the court orders the costs to be in the main suit.
33. The court therefore holds the application dated 31st May 2024 is allowed and the court will vacate, review and/or set aside the orders made on 16th June 2023 and directs the suit be given a mention date for purposes of pre-trial conference but as said the costs will abate in the main suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 25TH DAY OF OCTOBER, 2024.

ANNA NGIBUINI MWAURE

JUDGE

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 has 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 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.

A signed copy will be availed to each party upon payment of Court fees.

