



Kenya Union of Commercial, Food and Allied Workers v Marumi Farmers Cooperative Society Limited (Employment and Labour Relations Cause E011 of 2023) [2024] KEELRC 2755 (KLR) (8 November 2024) (Ruling)

Neutral citation: [2024] KEELRC 2755 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E011 OF 2023
ON MAKAU, J
NOVEMBER 8, 2024

BETWEEN

KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS CLAIMANT

AND

MARUMI FARMERS COOPERATIVE SOCIETY LIMITED RESPONDENT

RULING

1. This ruling relates to the Respondent's application dated 13th May 2024 and premised on section 3A of the *Civil Procedure Act*. The applicant seeks the following orders that:
 - a. The order dated 5.4.2024 condemning the respondent to pay the costs of the suit be reviewed and set aside and there be an order that each party also bear its own costs.
 - b. The order for costs against the respondent be vacated as there was a positive finding that the respondent lawfully terminated the employment of the employee thus exonerating the respondent from blame.
 - c. The costs of this application be provided for.
2. The application is supported by the affidavit sworn on 13th May 2024 by the applicant's Chairman, Mr. Peter Kamau Mwangi. In brief the applicant contends that, since the court made a finding that the employer lawfully dismissed the claimant, the award of costs to the claimant in the judgment was punitive and it amounts to an error apparent on the face of the record. Consequently, the applicant urged the court to review the said order and direct each party to bear own costs of the suit.
3. The claimant opposed the application vide the replying affidavit sworn by its National Organizing Secretary, Mike Oranga on 26th June 2024. In brief the claimant's case is that costs generally follow the



events and since it succeeded in getting a judgment of Kshs.339,500, the award of costs was proper. Further that, there is neither a proper application for review challenging the judgment under section 16 of this Court's Act or Order 45 of the Civil Procedure Rules or Rule 33 of this Court's Rules, nor has any appeal been filed against the judgment.

Submissions

4. The applicant's Counsel submitted that the applicant had proved that the termination was lawful and hence should not have been condemned to pay costs. He placed reliance on section 27 of the Civil Procedure Act to argue that costs follow the event unless the court has a good reason to order otherwise. He further cited section 21 of the Act to urge the Court to exercise its discretion by considering the subject of the suit, circumstances that led to the institution of the proceedings, events leading the termination, and stage at which they were terminated.
5. To buttress the foregoing submission, the counsel cited the case of Party of independent Candidates of Kenya & another v Mutula Kilonzo & 2 others [2013] eKLR and Republic v Rosemary Wairimu Munene (ex-parte applicant) v Ibururu Dairy Farmers Co-operative Society Ltd where the court discussed the principles for awarding costs in a suit.
6. On the other hand, it was submitted for the claimant that section 27 of the Civil Procedure Act provides that costs shall follow the event unless the court for some good reason orders otherwise. It was argued that the main issue in the suit was "Failure by the respondent to pay terminal dues", and the Court awarded terminal dues amounting to Kshs.339,500. Consequently, it was submitted that the claimant was properly awarded costs. Reliance was placed on Haraf Traders Limited v Narok County Government (UR) and DGM v EGG (UR).

Determination

7. There is no dispute that the Court entered judgment on 5th April 2024 where I dismissed the claim for unlawful termination but awarded the claim for gratuity, leave and salary underpayment totalling to Kshs. 339,500 plus costs. The issue for determination is whether the award of costs in the circumstances amounted to an error apparent on the face of the record upon which the orders sought can be granted.
8. The application was filed in May 2024 and as such the relevant law to consider in answering the above question is the repealed Rule 33 of the ELRC Procedure Rules 2016 which provides that:
 - "(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 an 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 reasons."



9. Courts have discussed the meaning of an error apparent on the face of the record in a legion of cases. In the case of *National Bank of Kenya v Ndungu Njau* [1997] eKLR the court held that:

“A review may be granted whenever the court considers that it is necessary to correct an 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 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 the law. Misconstruing a statute or other provision of the law cannot be a ground for review.”

10. In *Nyamogo and Nyamogo v Kogo* [2001] EA 174 the Court of Appeal held that:

“An error apparent on the face of the record cannot be defined precisely and exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.”

11. In the instant case, the applicant contends that the court erred in awarding costs of the suit to the claimant after finding that the dismissal was lawful. According to the applicant, the said order for costs is punitive and therefore it should be set aside and replaced with direction that each party should bear own costs. The claimant maintains that it succeeded in its claim for terminal benefits and therefore costs should follow the events.

12. Having considered the rival contentions, the applicant is otherwise questioning the merits of the said order, which as demonstrated by the aforesaid precedents, is a good ground for an appeal and not review. The applicant is not allowed to appeal before the court which passed the impugned judgment.

13. Having said that, I must state firmly that I judiciously exercised my discretion when I awarded costs of the suit to the claimant as the successful party to the suit. Section 27 of the *Civil Procedure Act* provides that:

“27. Costs

1. Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no



jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

2. The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

14. I need not say that If the applicant was dissatisfied with the merits of that award, the best forum to impugn it lies in a Court higher than me. Consequently, the application dated 13th May is bereft of merits and hereby dismissed with costs to the claimant.

DATED, SIGNED AND DELIVERED AT NYERI THIS 8TH DAY OF NOVEMBER, 2024.

ONESMUS N MAKAU

JUDGE

Order

This ruling has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

