Kunga v Remu Microfinance Bank Limited (Cause 185 of 2016)
[2024] KEELRC 13332 (KLR) (5 December 2024) (Ruling)

Neutral citation: [2024] KEELRC 13332 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 185 OF 2016

L NDOLO, J

DECEMBER 5, 2024

BETWEEN

BERYL KUNGA ..... CLAIMANT

AND

REMU MICROFINANCE BANK LIMITED ..... RESPONDENT

RULING

1. By a judgment delivered on 9th May 2024, I dismissed the Claimant's claim against the Respondent and partially allowed the Respondent's Counterclaim against the Claimant to the tune of Kshs. 1,428,220. I further directed that each party would bear their own costs.

2. It would appear that the Respondent was dissatisfied with the order on costs and therefore moved the Court by way of Notice of Motion dated 23rd May 2024, seeking review/revision of this order. In this regard, the Respondent asks that the Claimant be directed to pay the costs of the suit.

3. The application is supported by an affidavit sworn by the Respondent's Chief Operations Officer/ Acting CEO, Ruwan Rodrigo and is based on the grounds that:

    a. Judgment was delivered on 9th May 2024, dismissing the Claimant's case in its entirety and allowing the Respondent's Counterclaim. In essence, the judgment was in favour of the Respondent. However, the Court ordered that each party should bear their own costs;

    b. The Respondent found the order on costs to be prejudicial and unfair, given that it will have to meet all litigation costs that were incurred by its Advocates in opposing an unmerited claim;

    c. The Respondent is fully aware that the Court had the ultimate discretion in awarding costs; however, the Court ought to have taken into consideration the provisions of Section 27 of the *Civil Procedure Act*, which states that costs follow the event;

d. It was only fair that costs be awarded to the Respondent as the successful party. The Court was silent on the reasons for denying the Respondent costs;

e. The Respondent contends that the order on costs as given in the judgment was an error and mistake on the face of the record, and therefore, the Respondent now seeks a review of that order;

f. If the orders sought are not granted and the order as to costs is left as it is, it will encourage litigants to file frivolous suits knowing that no adverse orders as to costs will be granted against them;

g. In light of the above, it is only fair, just and in the interest of justice that the orders sought are granted;

h. This application has been made without unreasonable delay;

i. No prejudice will be suffered by the Claimant if the application is allowed.

4. The Claimant opposes the application by her replying affidavit sworn on 9th August 2024. She depones that the application does not meet the threshold for review.

5. The Claimant states that the application is devoid of merit for the following reasons:

a. That an error or mistake apparent on the face of the record is one that is self-evident and does not require elaborate arguments, to be stablished;

b. That from the application, the Respondent believes that the Claimant's claim was unmerited and the Respondent was the successful party and ought to have been awarded costs. This is akin to asking the Court to sit on appeal over its decision and reverse it;

c. That the fact that the Respondent believes that this Court should have reached a different conclusion and/or given reasons for denying costs and/or that the decision was prejudicial and unfair are matters fit for appeal rather than review, which is limited in scope.

6. The Claimant depones that the application requires the Court to give reasons for denying the Respondent costs and re-analyse its decision to establish whether or not the Respondent is entitled to costs, which is beyond the scope for review.

7. The Claimant refers to Section 27(1) of the *Civil Procedure Act*, which provides that costs follow the event, unless the Court directs otherwise. She states that costs are at the discretion of the Court and are not a matter of right.

8. The Claimant takes the view that because that the Respondent's Counterclaim was not allowed in its entirety, but succeeded only in part, none of the parties is entitled to costs.

9. The jurisdiction of this Court to review its own decisions is donated by Section 16 of the *Employment and Labour Relations Court Act* and Rule 74 of the Employment and Labour Relations Court (Procedure) Rules.

10. Rule 74(1) of the Procedure Rules provides 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; or

b. on account of some mistake or error apparent on the face of the record; or

c if the judgment or ruling requires clarification; or

d. for any other sufficient reason.

11. In the body of its application, the Respondent cites an error or mistake apparent on the face of the record, as the ground upon which it seeks review. In its written submissions however, the Respondent appears to change course, suggesting that the applicable ground is in fact (c) being, any other sufficient reason.

12. It is a basic principle of law that parties are bound by their pleadings. A party cannot therefore plead one thing and proceed to submit on another. Nevertheless, even if one were to allow the Respondent some latitude on the applicable ground for review, the ground of 'any other sufficient reason' must be interpreted in light of the other grounds. This was the holding in the decision in Republic v Advocates Disciplinary Tribunal Ex Parte Apollo Mboya [2019] eKLR relied upon by the Respondent itself.

13. By its application, the Respondent expresses its dissatisfaction with my order contained in the judgment dated 9th May 2024, that each party bears their own costs. Although in principle costs are awarded to the successful party, the Court has room to exercise discretion within the circumstances of each case.

14. In employment matters specifically, social justice and the need to preserve industrial peace is often a consideration. In the present case, it is also true that neither party was fully successful. At any rate, the Respondent's application questions the exercise of judicial discretion which cannot be a matter for review, as its resolution would call for elaborate legal arguments.

15. As held in National Bank of Kenya Limited v Ndung'u Njau [1997] eKLR an erroneous view or conclusion of law cannot be a proper ground for review.

16. A similar holding was made by the Court of Appeal, in its decision in Nyamogo & Nyamogo Advocates v Kogo (2001) EA 173, as follows:

> " 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."

17. If I was wrong in making the order on costs, I have no capacity to correct myself; that is the preserve of the Court of Appeal. The Respondent's application dated 23rd May 2024 is therefore declined with yet another order that each party will bear their own costs.

18. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY DECEMBER 2024

LINNET NDOLO

JUDGE

Appearance:

Mr. Kibungei for the Claimant

Mr. Kithi for the Respondent