



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Onyango & 22 others v Nakuru County Government & 2 others (Miscellaneous Application E005 of 2021) [2023] KEELRC 409 (KLR) (16 February 2023) (Ruling)

Neutral citation: [2023] KEELRC 409 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
MISCELLANEOUS APPLICATION E005 OF 2021
HS WASILWA, J
FEBRUARY 16, 2023

BETWEEN

ALEXANDER ONYANGO & 22 OTHERS APPLICANT

AND

NAKURU COUNTY GOVERNMENT 1ST RESPONDENT

NAKURU COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

CECM PUBLIC SERVICE TRAINING AND DEVOLUTION . 3RD RESPONDENT

RULING

1. Before me for determination is the respondents/applicants notice of motion dated October 18, 2022, filed pursuant to sections 1A, 3A, & 27 of the *Civil Procedure Act* and order 27 of the *Civil Procedure Rules*, seeking the following orders; -
 1. Spent.
 2. That this honourable court be pleased to interpret the ruling delivered by Hon Justice Wasilwa On November 30, 2021 dismissing the respondent application dated March 10, 2021 with no directions as to costs to the applicant.
 3. That this honourable court be pleased to give direction that costs follow event.
2. The application is supported by the grounds on the face of the application and the affidavit sworn on October 8, 2022 by Karungu Peninah, the applicant advocate and based on the following grounds: -
 - a. That this court dismissed the respondent's application dated March 10, 2021 on the November 30, 2021 with no direction as to costs.



- b. He stated that costs follow the event and therefore that the defending party in the application ought to have been awarded costs as per the provisions of section 27(1) of the *Civil Procedure Act*.
 - c. She reiterated that they defended the dismissed application *vide* their replying affidavit sworn on April 8, 2021. she thus urged this court to allow the application and grant them costs of the application.
3. The application is opposed by the applicants through the 1st applicant, Alexander Onyango, replying affidavit deposed upon on the January 16, 2023. In the said affidavit, the deponent avers that the court made a sound ruling in making no orders for costs because the respondent/ applicant herein on several occasions requested the applicant/ respondent’s advocates for a meeting to negotiate the issues.
 4. That the negotiations were done in three sister files being ELRC Misc No E005 of 2021, petition No 13 of 2017 and petition 12 of 2017. He stated that the applicant wrote the letter dated July 27, 2021 proposing terms of settlement which were consented upon on the December 8, 2021 and filed in court on the December 9, 2021.
 5. The deponent contends that the parties entered into the said consent and agreed to have the employees hired on permanent and pensionable terms and for each part to bear its own costs and thus the applicants herein cannot now demand costs went they consented to each party paying its own costs.
 6. The application was disposed of by written submissions with the respondents filing on the January 16, 2023 and the applicants on the January 23, 2023.

Applicants Submissions.

7. The applicants submitted on only one issue; whether they are entitled to costs and submitted that costs follow events as stipulated under section 27(1) of the *Civil Procedure Act*. He argued that since the application was dismissed, the applicant should have been awarded costs in accordance with the law. To support this argument, they relied on the case of *Republic v Rosemary Wairimu Munene (ex parte applicant) v Ihururu Dairy Farmers Co-operative Society Ltd* judicial review application No 6 of 2004 where Mativo J held that

“costs is the discretion of the court and is used to compensate the successful party for the trouble taken in prosecuting or defending the case and not to penalize the losing party. This position was adopted by the court in *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another* [2016] eKLR.”

8. The applicant also relied on the case of *Party of Independent candidate of Kenya & another v Mutula Kilonzo & 2 others* [2013] eKLR where the court relied on the South African case by Murray C J in the case of *Levben Products v Alexander Films (SA) (PTY)Ltd* 1957 (4) SA 225 (SR) at 227, who stated as follows:

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial judge is given discretion (*FrippvsGibbon & Co.*, 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”



9. On that basis, the applicants submitted that it is their replying affidavit that shed more light on the facts of the case and informed the court of the other matters pending before court, which prompted the court to dismiss the application directing the respondent to file the same in the other file. Thus the efforts used in filing the replying affidavit and defending the application ought to be rewarded in form of costs.

Respondents Submissions.

10. The respondent submitted that costs should not issue because the claim herein together with other sister files between the parties were compromised by consent after the court had issued its orders. It was argued that since the dispute was negotiated and settled and a consent adopted by the court, which consent included costs, cost cannot be issued thereafter.
11. To support its argument, the respondents relied on the case of *Little Africa Kenya Limited v Andrew Mwiti Jason* [2014] eKlr where the court relied on the case of *Rufus Njuguna Miringu & another v Martha Muriithi & 2 others* [2012] Eklr where the learned judge stated,
- “...consent cannot be interpreted to mean that one or the other party has succeeded in a suit. Even if in the present case such settlement has worked out in the defendants’ favour, the successful determination of the dispute is still attributable to both the plaintiffs and the 1st and 2nd defendants... In the circumstances, it would be just for the parties to bear their own costs of the proceedings.”
12. On that note, the respondent urged the court to disallow the application herein.
13. I have examined all the averments of the parties herein. What the applicants seek herein is an order that they be paid costs by the respondents. The application by the respondents having been dismissed with the court being silent on the issue of costs.
14. Section 27 (1) of the *Civil Procedure Act* provides as follows:-
- “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”.
15. The issue of the award of costs is indeed a discretionary remedy which the court can or cannot grant.
16. The court will in determining whether to grant costs or not depend on the circumstances of each case.



17. The matter of whether or not to grant costs is indeed an unfettered discretion of court and courts must have good reasons to depart from the approach that costs follow the event. Such reasons that may cause the court to depart from this position include;-
 - a. The conduct of the parties
 - b. The issue under consideration
 - c. The events which led to the dismissal of the case or application
 - d. The troubles if all suffered by either party before the case is dismissed e.t.c.
18. In considering these issues, I note the application was filed before this court on March 11, 2021 but the respondents intimated that they were negotiating the matter.
19. They indeed kept insisting that they were negotiating the matter until the court determined the same on November 21, 2021.
20. The respondent applicants indeed insisted the matter was under negotiation thus dragging the application for the long period. I cannot fault the applicants in the main application despite the reasons why they filed the Misc application.
21. I applied my mind to this matter. I exercised my discretion not to award costs. I see no reason as to why I should depart from that part and so I find the application unmerited and dismiss it accordingly.
22. There will be no order of costs.

RULING DELIVERED VIRTUALLY THIS 16TH DAY OF FEBRUARY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Bitok for Applicant – present

Mwangi for Respondent/Applicant – present

Court Assistant – Fred

