



**Nduati v Teachers Service Commission (Cause 1137 of 2017)  
[2023] KEELRC 285 (KLR) (8 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 285 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1137 OF 2017  
JK GAKERI, J  
FEBRUARY 8, 2023**

**BETWEEN**

**JANEROSE NJERI NDUATI ..... CLAIMANT**

**AND**

**TEACHERS SERVICE COMMISSION ..... RESPONDENT**

**RULING**

1. The original memorandum of claim filed on June 19, 2017 sought to restrain the respondent from retiring the claimant on the ground that she had not attained the age of 60 years.
2. A copy of the claimant's birth certificate serial No 628292 indicates that the claimant was born on February 24, 1960 and the national identity card on record has 1960 as the year of birth. It was issued in 2012.
3. According to the application for registration of teachers completed by the claimant and dated November 2, 1982, the date of birth is indicated as 1957 having been changed from 60 which is evident from the copies on record.
4. When the notice of motion application dated June 19, 2017 came up for hearing, the court granted interim orders restraining the retirement, sacking or dismissal of the claimant and a subsequent notice of motion by the respondent dated July 5, 2017 led to the discharge of the interim orders on August 6, 2018.
5. Subsequently, the claimant amended the memorandum of claim on November 5, 2021 claiming various amounts as catalogued in paragraph 12 of the claim.
6. The respondent filed a memorandum of response dated February 28, 2022 tabulating the sums paid to the claimant for the period July 1, 2017 to December 31, 2017 and January 1, 2018 to May 22, 2018 and attached the relevant documentation.



7. When the matter came up for hearing on November 8, 2021, while the claimant's counsel Mr Momanyi, holding brief for Mr Omwenga was ready to proceed, the respondent's counsel, Ngere was not as he had not responded to the amended memorandum of claim and applied for 21 days and the court granted 14 days.
8. The claimant was accorded 7 days, as necessary and hearing was adjourned to May 16, 2022 on which date Mr Omwenga was present for the claimant and Counsel Musudi held brief for Ngere for the respondent. Mr Omwenga was ready to proceed. Counsel stated that based on the respondent's response, if the sum of Kshs 485,767.00 identified as salary for 6 months had been paid, the claimant would reconsider the suit and had instructed his client to confirm the RTGS payment to Mwalimu National Sacco as per the voucher on record. Counsel prayed for an adjournment and a hearing date in 2 months' time.
9. Counsel Musudi on the other hand had no objection to the proposed course of action and a hearing date was consensually fixed for September 26, 2022 on which date Mr Omwenga was present for the claimant and Mr Mulaku held brief for Ngere for the respondent.
10. Mr Omwenga confirmed that indeed the respondent had paid the amount sought by the claimant but costs were outstanding. He prayed for entry of judgement as claimed for purposes of extraction of the decree and proceed on costs.
11. Mr Mulaku on the other hand urged that his instructions were that the suit was erroneously listed as a hearing yet it was meant to be a mention to confirm payment. This was not the case. There had been no error. Mr Omwenga had previously asked for a hearing date in a 2 months' time and the same was granted as there was no objection.
12. Counsel for the respondent informed the court that since payment had been done, the matter ought to have been resolved out of court and costs would have ensued. Counsel prayed for time for the issue of costs to be resolved amicably and prayed for a mention date. He opposed the entry of judgment in the claimant's favour.
13. According to Mr Omwenga, costs should follow the event.
14. A mention was slated for October 27, 2022 and Mr Omwenga for the claimant and Ngere for the respondent were present.
15. Mr Omwenga informed the court that the purpose of the mention was for the court to make a determination on costs as the amount due to the claimant was paid in June 2022.
16. Counsel Ngere stated that there was no case before the court.
17. Evidently, the parties could not agree on the costs.
18. It is trite law that costs are a matter of discretion of the court.
19. According to *Halbury's Laws of England*, 4<sup>th</sup> edition (re-issue), {2010}, vol 10, paragraph 16,

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice.”



20. According to Kuloba J (retired) in *Judicial Hints on Civil Procedure*, 2<sup>nd</sup> edition 2011 at page 94,  
“Costs are (awarded) at the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise.”
21. Similar sentiments were expressed in *Party of Independent Candidate of Kenya v Mutula Kilonzo & 2 others* HCEP No 6 of 2013.
22. According to Mativo J. (as he then was) in *Biashara Sacco Society Ltd & 2 others v Dickson Miricho Kibagi* (2016) eKLR,  
“To my mind, in determining the issue of costs, the court is entitled to look at *inter alia*
- i. the conduct of the parties
  - ii. the subject of litigation
  - iii. the circumstances which led to the institution of the proceedings
  - iv. the events which eventually led to their termination
  - v. the stage at which the proceedings were terminated
  - vi. the relationship between the parties and
  - vii. the need to promote reconciliation among the disputing parties pursuant to article 159(2)(c) of the Constitution of Kenya, 2010. In other words, may not only consider the conduct of the party in the actual litigation, but the matter which led to the litigation, the eventual termination thereof and the likely consequences of the order for costs.”
23. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co Ltd* (1967) EA 287.
24. In the context of the Employment and Labour Relations Court, costs are addressed by section 12(4) of the *Employment and Labour Relations Court Act, 2011* which provide that:  
In proceedings under this Act, the court may, subject to the rules, make such orders as to costs as the court considers just.
25. Regulation 29(1) of the *Employment and Labour Relations Court (Procedure) Rules, 2016* provide that;  
“The court shall be guided by section 12(4) of the Employment and Labour Relations Court Act and the Advocate (Remuneration) Order in awarding costs.”
26. Clearly, the court is not bound by the age old principle in civil litigation that costs follow the event as urged by Mr Omwenga.
27. It is not in dispute that payment of the sums for 2017 and 2018 by the respondent resolved the case and as aptly captured by Mativo J (as he then was) in the *Biashara Sacco Society Ltd* Case (*supra*);  
“Just like cases whereby the parties enter into a consent, the court does not go further to inquire the reasons for the consent, this court is not bound to dig into the reasons why the appellant withdrew the case, nor can an adverse inference be made against the appellant



while determining costs. The only relevant issue is that it had the effect of resolving this case . . .

The court is only interested in determining whether or not the appellant or the respondent is entitled to costs for the steps taken by both parties as enumerated earlier.”

28. Undoubtedly, the respondent’s act of making payments to the claimant addressed the substratum of the claim and resolved the issue which is overly creditable.
29. From the documentary evidence on record, it is evident that the respondent was guided by the documents in its position which were completed by the claimant. It is unclear why the claimant did not furnish the respondent with a copy of the national identity card or birth certificate when she was employed in 1982 or subsequently until the issue of retirement came up.
30. Relatedly, the claimant had been notified of the retirement date previously.
31. There is no evidence on record to show that the claimant was unaware of the date of birth she had given to the respondent and should have applied for rectification early enough to obviate such eventualities.
32. In the court’s view, the claimant’s indolence precipitated this action as the issue would have been addressed earlier and the Government had a mechanism for addressing the issue as evidenced by the Directorate of Personal Management Circular Ref No DPM/7/7/43A Vol IV (125) dated November 15, 1982.
33. In a nutshell, the respondent acted as it reasonably could base on the information at its disposal, yet the claimant had documents showing the contrary. Most significantly, the respondent resolved the dispute.
34. Thus, although the claimant had a legitimate case against the respondent, the respondent cannot be faulted for the actions it took and it would be injudicious to condemn it with costs.
35. In the circumstances of this case, it is only fair that each party bears own costs.
36. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 8<sup>TH</sup> DAY OF FEBRUARY 2023**

**DR. JACOB GAKERI**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 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.

