



REPUBLIC OF KENYA



South Kenya Conference of the SDA Church & another v Bichanga (Employment and Labour Relations Appeal 11 of 2020) [2023] KEELRC 719 (KLR) (22 March 2023) (Judgment)

Neutral citation: [2023] KEELRC 719 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
EMPLOYMENT AND LABOUR RELATIONS APPEAL 11 OF 2020**

**S RADIDO, J
MARCH 22, 2023**

BETWEEN

SOUTH KENYA CONFERENCE OF THE SDA CHURCH 1ST APPELLANT

PASTOR LENARD AENCHA 2ND APPELLANT

AND

PASTOR JULIUS MOTURI BICHANGA RESPONDENT

(Appeal from the Ruling and Order of Hon E.A. Obina (Principal Magistrate dated and delivered on the 15th day of July 2020 in the original KISII CMCC E&LRC Cause No. 14 of 2020)

JUDGMENT

1. Pastor Julius Moturi Bichanga (the Respondent) sued the South Kenya Conference of the SDA Church and Pastor Lenard Aencha (the Appellants) before the Principal Magistrate, Kisii on June 25, 2020, alleging unlawful disciplinary action.
2. Filed together with the Memorandum of Claim was a Motion under a certificate of urgency.
3. The Principal Magistrate heard the Motion ex-parte and issued an interim injunctive order. The Magistrate further directed the Respondent to serve the Appellants ahead of the inter-partes hearing on July 14, 2020.
4. On July 1, 2020, the Respondent sent to the Court a Notice of Withdrawal of the Cause.
5. The Respondent did not serve the Notice upon the Appellants and on July 2, 2020, the Appellants filed a Response to the Memorandum of Claim, and a Motion seeking a stay of the ex-parte injunction which has been granted on June 25, 2020.
6. The Duty Magistrate directed that the Appellants Motion be served for hearing on July 7, 2020.



7. When the parties appeared before the Principal Magistrate on July 7, 2020, the Respondent informed him of the Notice of Withdrawal and that it (the Notice) had not been served upon the Appellants.
8. The Appellants indicated that the Notice had only been served in Court (a copy was served in Court) and urged the Court to award them costs if the Notice was accepted.
9. In a Ruling delivered on July 15, 2020, the Principal Magistrate accepted the Withdrawal and awarded the Appellants Kshs 10,000/- as costs (because the Respondent had failed to notify the Appellants of the Notice of Withdrawal in good time).
10. The Appellants were aggrieved with the order on costs, and they lodged a Memorandum of Appeal with the Court on July 23, 2020 contending that:
 - (1) Having found and held that the Respondent herein, had not effectively served (sic) the Notice of Withdrawal of Suit by the time the Appellants filed the requisite Responses and the Notice of Motion Application challenging the Jurisdiction of the Court and having noted the nature of the Responses filed, the Learned Trial Magistrate erred in law in proceeding to and Assessing Costs Due and Payable to the Appellants in the sum of Kshs 10,000/= only.
 - (2) Having returned an Order and/or finding that the Appellants were entitled to Costs, which Order the Learned Trial Magistrate Decreed, the Learned Trial Magistrate erred in law in proceeding to and undertaking Assessment of the Costs awarded, albeit pre-maturely and before the filing of the requisite Request/Bill of Costs, in accordance with the law. Consequently, the Assessment of Cost by the Learned Trial Magistrate, was carried out and/or undertaken in Vacuum.
 - (3) In Assessing Costs due and payable to the Appellants in the sum of Kshs 10,000/= only, (even prior to the lodgment of the Bill of costs), the Learned Trial Magistrate failed to take cognizance of the Provisions of the Advocates Remuneration Order, 2014, which stipulates and/or prescribes the requisite charges pertaining to and/or concerning each and every Legal steps/ Actions, undertaken by a Litigant (Read the Appellants).
 - (4) In arriving and/or Assessing the Appellants' Costs at the paltry and contemptuous figure of Kshs 10,000/= only, under the banner of (sic) doing the best I can, the Learned Trial Magistrate failed to take into account relevant and appropriate factors, which no doubt, would have illuminated the Learned Trial Magistrate's Legal perspective and/or otherwise appreciation of the applicable Principles in the Assessment of (sic) Costs.
 - (5) In any event, the Learned Trial Magistrate failed to properly and/or otherwise Judicially exercise his Discretion, in the Assessment of Costs and thus same became Arbitrary, whimsical and otherwise Injudicious. Consequently, the exercise of Discretion, in the process of Assessing Costs, albeit in the absence of the requisite Bill of costs, amounts to abuse of Discretion.
 - (6) The Learned Trial Magistrate having properly evaluated the consequences of (sic) the proceedings and also the Ex-parte Order, which had hitherto been issued by the Court and having similarly appreciated the obligations upon the Appellants to instruct and/or engage counsel, the Learned Trial Magistrate thus erred in law in failing to award a commensurate recompense on account of Costs to the Appellants.
 - (7) At any rate, the Learned Trial Magistrate erred in law in proceeding to entertain and/or carry out Assessment of Costs, albeit without affording the Parties and in particular, the Appellants, the opportunity to address the Court on the proposed Quantum of Costs, due and/or payable, in accordance with the applicable Advocates Remuneration Order.



- (8) The Issue of the Assessment of Costs and/or Quantum thereof, (which is distinct from award of Costs), having not been canvassed and/or deliberated upon by the parties and in particular, the Appellants, the Venture by the Learned Trial Magistrate and the consequential Assessment of Costs at the contemptuous Kshs. 10,000/= only, was thus arrived at without affording the Appellants a Fair Hearing. Consequently, the finding bespeaking the Assessment of Costs, contravenes Article 50(1) of the Constitution, 2010.
- (9) The Learned Trial Magistrate erred in law in failing to itemize and/or otherwise provide the Legal basis and/or Reasons, underpinning the Assessment and consequential certification of the Appellants' Costs at the paltry Kshs 10,000/= only. Consequently, the scheme and/or otherwise formula applied by the Learned Trial Magistrate, remains unknown and/or otherwise strange.
11. This Court gave directions on the Appeal on January 19, 2023 and February 16, 2023 (the Record of Appeal was filed on February 14, 2023).
12. The parties' submissions were not on record by the agreed timelines.
13. The Appellant had suggested that the Appeal be prosecuted through submissions and the failure to file submissions leads to the conclusion that the Appellant was not interested in prosecuting the Appeal.
14. On that singular ground, the Court is of the view that the Appeal should fail.
15. However, on the assumption that its view is wrong, the Court will consider the merits of the Appeal based purely on the Record of Appeal.
16. Section 27 of the Civil Procedure Act sets the guideline as far as the award of costs under the Act is concerned
17. The section provides:
- 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.
18. Under the regime, the award of costs is at the full discretion of the Court provided that costs shall follow the event unless otherwise decreed by the Court.
19. The order by the Principal Magistrate to award costs was therefore sound in law.
20. With regard to the assessment of costs before the subordinate Courts, if costs are awarded, the applicable framework is given by schedule 7 of the Advocates (Remuneration)(Amendment) Order, 2014. The assessment is primarily based on the sum found as due.



21. In the Memorandum of Claim which was withdrawn, there was no monetary claim. Instead, the only substantial order sought was a declaratory order.
22. However, in the Motion which was filed with the Cause, the Respondent had prayed for 2-substantive but interim injunctive orders.
23. In such a scenario, the notes to schedule 7 have given guidance.
24. Note 2 of the Schedule is in the following terms:
 2. In any suit or appeal by the nature of which no specific sum is sued for, claimed for, or awarded in the judgment (other than proceedings falling under paragraph 3 below); such costs as the court in its discretion but not less than Kshs 20,000 if undefended or unopposed and (subject to any special order for good reason connected with the nature and importance or the difficulty or the urgency of the matter) not to exceed Kshs 50,000.
25. From the note, it is apparent to the Court that unless the Court decides otherwise, if the suit is undefended, the costs must not be less than Kshs 20,000/- and not more than Kshs 50,000/-.
26. In the case at hand, the Appellants had evinced an intention to defend the Cause by filing a Response on July 2, 2020. They had also served the Respondent on July 3, 2020 with their own application seeking a stay.
27. The Notice to Withdraw had been filed on July 1, 2020, and had not been served by July 7, 2020.
28. The Appellants would not have gone to the trouble of filing a Response and the setting aside application if the Respondent had been diligent and served them with the Notice of Withdrawal.
29. However, had the Principal Magistrate considered note 2 of the schedule, he would not have awarded the Kshs 10,000/-, an amount less than the Kshs 20,000/- for undefended suits.
30. The Principal Magistrate consequently fell into error of law and the Court so would have found.
31. Since the Cause and the Motion did not go beyond the ex-parte hearing and considering the filing of the Response and the attendances before the Principal Magistrate, this Court is of the view that costs of Kshs 30,000/- would have been appropriate.
32. Before concluding, the Court observes that at the time of giving directions on February 16, 2023, it ordered the Appellant to notify the Respondent of the day's directions.
33. There is nothing on record to show that the Appellant brought the directions to the notice of the Respondent.

Conclusion and Orders

34. From the foregoing, and considering the Appellant's failure to prosecute the Appeal, it is dismissed with no order on costs.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 22ND DAY OF MARCH 2023.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances



For Appellant Oguttu Mboya, Ochwal & Partners
For Respondent Nyangacha & Associate Advocates
Court Assistant Chrispo Aura

