



REPUBLIC OF KENYA



KENYA LAW
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**Akuja v Turkana University College & another (Cause 15 of 2023)
[2023] KEELRC 2373 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2373 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KITALE
CAUSE 15 OF 2023
MA ONYANGO, J
SEPTEMBER 28, 2023**

BETWEEN

PROF THOMAS EKAMAIS AKUJA CLAIMANT

AND

TURKANA UNIVERSITY COLLEGE 1ST RESPONDENT

CHAIMAN TURKANA UNIVERSITY COLLEGE 2ND RESPONDENT

RULING

1. By an application dated February 9, 2023, the Applicant seeks the following orders
 1. Spent
 2. Spent
 3. Spent
 4. That there be and is hereby issued an order allowing the Respondent to respond to the Application by Wambua Kigamwa & Co Advocates for Costs.
 5. That there be and is hereby issued an order allowing the Applicant Respond to the Bill of Costs
 6. That costs be provided for.
2. The application is made under Articles 47,48, 50 & 159 of the 2010 *Constitution*, Sections 1A, 1B & 3(A) of the *Civil Procedure Act* 2010 and Order 9 & 51 of the *Civil Procedure Rules* 2010, Section 3 of the *Environment & Land Court Rules* (sic)
3. The grounds on which the application are anchored are that
 - a. That the Applicant was not notified of the filing and determination of an application for review of the Order allowing withdrawal of this suit.



- b. Previous Counsel who continued receiving process even after Advocate-Client taxation never forwarded the Application and Bill of Costs to the Applicant. Furthermore, Counsel for the Respondent was all along aware that the said firm was no longer on record for the Claimant after an acrimonious parting of ways.
 - c. That if this court does not intervene and grant the Applicant audience, there will be miscarriage of Justice as the Applicant will be gravely prejudiced.
 - d. That the law allows this court to overlook the mistakes of counsel in order to serve the ends of Justice.
 - e. That the Applicant is only interested in a comprehensive conclusion of this matter and nothing else as he is at risk of being exposed to an obviously inflated Bill for a matter that did not go for hearing
4. The application is supported by the affidavit of Thomas Akuja the applicant in which he reiterates and expounds on the grounds on the face of the application.
 5. The application is opposed by the Replying Affidavit of Wambua Kigamwa counsel for the Respondent who depones that following withdrawal of the claim through the Claimant's Notice of Withdrawal the Respondent applied for Judgment on costs through a formal application as ordered by the Judge on February 7, 2022.
 6. That the application was filed on February 16, 2022 and served upon the Advocates of the Claimant who acknowledge receipt as is evident on the face of the application.
 7. It is the averment of counsel that the application was never opposed by the Claimant and was allowed by the learned judge.
 8. It is the averment of the counsel that the application having been allowed the Claimant's option if aggrieved is to file an appeal.
 9. That in any event the order to revisit the costs is already overtaken by events through the Claimant's acquiescence by his conduct in filing written submissions on the Respondent's Party and Party Bill of Costs which submissions were filed on April 5, 2023.
 10. It is further counsels' averment that Claimant's application is incompetent as it was filed by Kosgei Muriuki & Koome Advocates who are not on record for the Claimant.
 11. Counsel prays that the application be dismissed with costs to allow the matter to proceed to taxation.
 12. The Respondent filed submissions on the Application but the Applicant did not, even after being granted leave to do so on July 24, 2023 and promising to do so in 3 days.
 13. It is the Respondent's submission that the application is an abuse of court process, the Claimant not having opposed the application for costs, and having filed submissions to the Respondent's Bill of Costs.
 14. The Respondent relies on the decision in *Moses Mwangi and 14 others v Independent Electoral and Boundaries Commission and 5 others [2016] eKLR* wherein the court discussed the importance of rules of procedure in the conduct of litigation and concluded that a Claimant would not hesitate to declare as incompetent a motion which overlooked procedural requirements.
 15. The Respondent submits that the Claimant has not sought to set aside the existing ruling on the motion for costs before seeking to respond to the said application. That the allegation that the



Claimant was not aware of the application for costs is without basis as he was represented by Mwakio Kirwa & Company Advocates who were duly served and received the motion.

16. The Respondent further invited the court to be guided by the decision in *Daniel Kaminja & 3 others v County Government of Nairobi [2019] eKLR* where Mativo J (as he then was) stated:

“A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness arises when there is no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual, practical impact.”

17. Lastly the Respondent pointed out that the application has been signed by the firm of Kosgei Muriuki & Koome Advocates which is not on record for the Claimant. That the Court ought to dismiss the application guided by the holding in *John Langat v Kipkemoi Terer & 2 Others [2013] eKLR*.

Determination

18. I have considered the record. It reflects that this suit was on December 11, 2020 fixed for hearing on April 13, 2021. However, for hearing no directions had been made by the court certifying the suit ready for hearing as of that date.
19. However, on February 1, 2021 the Claimant filed notice of withdrawals of suit dated January 27, 2021.
20. Following the filing of notice of withdrawal, the Respondent's Advocates wrote to court by letter dated March 1, 2021 applied for judgments on costs. The letter was not copied to the Claimant on his advocates.
21. The court record shows that the file was placed before the Judge on March 1, 2021 when there was no appearance for parties as they had not been notified of the date. No directions were given on that date.
22. On May 28, 2021 the suit was fixed for mention on June 14, 2021 in the presence of Counsel for the Respondent and in the absence of the Claimant's representative. The Claimant was served with a mention notice.
23. On June 14, 2021 when the parties appeared before the Judge for mention, counsel for the Respondent prayed that the court awards costs to the Respondent following the filing of withdrawal notice by the Claimant. Mr. Kirwa who appeared for the Claimant informed the Court that he would be seeking leave to withdraw from acting for his client. The case was fixed for mention on July 12, 2021 for further directions. Apparently the file was not mentioned on that date.
24. On July 13, 2021, Ms. Mibei appeared for the Claimant while the Respondent was absent. Upon application by Ms. Mibei, the Court marked the suit as withdrawn. No orders were made on costs.
25. On July 15, 2021 the Respondent, in the absence of the Claimant, fixed the suit for mention on October 4, 2021. The file was however not mentioned on that date.
26. On November 6, 2021 the Respondent's counsel again fixed the suit for mention on November 22, 2021.
27. On the mention date both parties were present. The Court directed that the matter be mentioned for directions on February 7, 2022.



28. On November 30, 2022 the Judge, in chambers and in the absence of parties made orders as follows:-
- “Let the parties negotiate and possibly agree on the issue of costs whether payable to the Respondent or not. Mention on February 7, 2022”
29. On February 7, 2022 when the matter came up before the Judge for mention in the presence of both parties, the Court directed the Respondent to file a formal application regarding the issue of costs. The court further directed the Claimant to regularise the issue of representation by filing the necessary documentation in view of the fact that counsel for the Claimant had expressed the intention to cease acting for him.
30. By an application dated February 14, 2022 the Respondent sought orders that the court be pleased to enter Judgment of the costs of the withdrawn claim in favour of the Respondents against the Claimant. The application which was filed on the same day was and fixed for hearing on March 24, 2022 with directions that hearing notice to issue.
31. On April 1, 2022 the Registry fixed the application for hearing on May 3, 2022 in the presence of the Respondent. The Registry directed that the Claimant be served. Apparently the matter was not heard on May 3, 2022.
32. On 6th May, the registry fixed the application for mention for directions on May 30, 2022. The Claimant was to be served.
33. On May 30, 2022 when the matter came up for mention before the Judge. Ms. Mibei informed the court that they no longer represented the Claimant. The court directed that the matter be mentioned further on July 4, 2022 for further direction. However on June 7, 2022 the Judge in chambers in the absence of the parties recorded as follows.

In chambers

The Court has reviewed and considered the motion dated February 14, 2022 and is persuaded that the same is merited and hereby grant the same as prayed.

34. The Respondent thereafter, on June 28, 2022, filed its Party and Party Bill of Costs. The Bill of Costs was served upon Mwakio Kirwa & Company Advocates by the court notice dated July 1, 2022. Taxation notice was served upon the said advocates on October 14, 2022.
35. The ruling on the Bill of Costs was reserved for February 9, 2023 but was arrested by the instant application which was filed on the date of the ruling and which among other orders seeks to arrest the ruling on taxation, respond to the application by Wambua Kigamwa & Co Advocates for costs and to leave to respond to the bill of costs.
36. From the Chronology of events as set out above, it is clear that the orders made on June 7, 2023 in the absence of the parties was without notice to the parties and that at that time the Claimant was not represented. He had not been properly served with the application dated February 14, 2022, and was therefore never given an opportunity to respond to the same.
37. The Claimant has rightly deponed at paragraphs 2 to 8 of his affidavit that:-
- a. That after I separated with my former advocates, they filed a Bill of Costs which I was able to defend in Misc. Cause No. E21 of 2021. When it was concluded, I was ready to have this matter concluded.



- b. That later, I learnt that the Advocates for the Respondents had gone back to court asking for costs in which case my advocates objected as the court had completed its duty with the final order of withdrawal.
 - c. That thereafter, we waited for a new application to be filed to respond to it only to realize that the matter had been fixed for ruling on a bill of costs. This came as a shock to me since I had not seen a copy of the Bill of Costs itself.
 - d. That recently, when I perused the file, I found that indeed that application had been filed and an affidavit of service showing that my former advocates were the ones receiving service
 - e. That owing to this state of things I was not fully aware in order to instruct counsel on the contents of the Bill until I retrieved a copy from the registry.
 - f. That it is obvious that all along, both advocates for the Respondent and my former advocates were aware of my need but never furnished me with a copy of the Bill. In fact, when I shared what I thought was coming up with my new advocates, they informed me that the same was the former Bill that the court had concluded.
 - g. That I now humbly request this court to allow me defend both Application and Bill of costs so that substantive justice is done
38. It is in my view in the interest of Justice to allow the Claimant to respond to the application dated February 14, 2022 as denying him an opportunity to defend the same would be greatly prejudicial to him, in view of the huge bill of costs filed by the Respondent herein and the circumstances as pleaded in his affidavit in support of the instant application.
39. I accordingly allow the application and order that the Claimant be and is hereby granted leave to file response to the Respondent's application dated February 14, 2022.
40. The consequence of the orders granted is that the orders of this court made on June 7, 2022 allowing the application dated February 14, 2022 are set aside together with all subsequent proceedings.
41. It is so ordered.

DATED, DELIVERED AND SIGNED AT KITALE

THIS 28TH DAY OF SEPTEMBER, 2023.

M. ONYANGO

JUDGE

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