



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mola v National Government Constituencies Development Fund Board (Cause E042 of 2022) [2023] KEELRC 2111 (KLR) (20 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2111 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**  
**CAUSE E042 OF 2022**  
**S RADIDO, J**  
**SEPTEMBER 20, 2023**

**BETWEEN**

**EDWARD OMONDI MOLA ..... CLAIMANT**

**AND**

**NATIONAL GOVERNMENT CONSTITUENCIES DEVELOPMENT FUND BOARD ..... RESPONDENT**

**RULING**

1. On 15 February 2023, the court upheld a preliminary objection by the respondent and struck out the Cause for lack of jurisdiction.
2. The court also ordered each party to bear own costs for the reason that the respondent had not filed a Response to the Memorandum of Claim.
3. The respondent was not satisfied with the order on costs and on 2 June 2023, it filed a Motion seeking the review of the costs order.
4. The primary ground advanced by the Respondent in seeking the review of the costs order was that there was an error apparent on the face of the record, particulars being that it had filed a Memorandum of Appearance, Response and notice of preliminary objection which had been paid for on 28 October 2022.
5. The Claimant opposed the application through a replying affidavit filed on 14 June 2023.
6. In the affidavit, the claimant asserted mainly that the application lacked merit because he had filed a Notice of Appeal against the Ruling, the application had been brought after 3 months, the grounds in support of the application were grounds of appeal, the Statement of Response had been served through the wrong email, the Court was being dragged into the arena of litigation and that the application was an afterthought.



7. The respondent filed its submissions on 28 July 2023 and the claimant on 29 August 2023.
8. The Court has considered the application, affidavits and submissions.
9. The claimant filed a Notice of Appeal against the Ruling striking out the Cause for lack of jurisdiction on 1 March 2023.
10. By dint of section 80 of the *Civil Procedure Act*, the invocation of the review jurisdiction is not available where an appeal has been lodged. This Court, consequently does not have the wherewithal to entertain the review application.
11. Nevertheless, the court record show that the respondent sent to the court copies of Memorandum of Appearance, Response and Notice of Preliminary Objection on 27 October 2022, and the same were paid for on 28 October 2022.
12. The said documents were served upon the claimant through email (first attempt was through an invalid email address) and it was on the basis of that service that the claimant responded to the notice of preliminary objection.
13. It is, therefore, probable that the registry staff had failed to place the documents in the file by the time of preparation of the Ruling, or that the Court did not notice the same if in the file.
14. In the circumstances, the factor the court considered in denying the respondent costs was a mistaken view that a Response had not been filed whilst the Response and Notice of preliminary objection had been filed and served upon the claimant.
15. Unlike under the *Civil Procedure Act* where costs follow the event, section 12(4) of the *Employment and Labour Relations Court Act*, the Court is mandated to make a costs order it considers just.
16. In consideration the justness of a costs order, the court should put in mind among other factors, the general rule that costs follow the event, nature of the proceedings and the parties and relationship or previous relationship between the parties.
17. The claimant and respondent were in an employment relationship which ended prematurely. The respondent is a public body funded by taxpayers.
18. The court did not have the opportunity to hear the merits of the parties' cases as the proceedings were terminated at an interlocutory stage even before pre-trial. If the court had jurisdiction, it would have maintained the costs order it made.
19. Before concluding, the court notes that the claimant's advocate now on record did not secure leave to come formally on record.

### **Conclusion and Orders**

20. Having considered the above, the court declines the Motion dated 2 June 2023 for lack of jurisdiction.
21. Each party to bear own costs.

**DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

