



**Mutema v Kenya Methodist University (Cause 1887 of 2016)
[2023] KEELRC 2962 (KLR) (17 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2962 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1887 OF 2016
SC RUTTO, J
NOVEMBER 17, 2023**

BETWEEN

ALFRED MWONGERA MUTEMA CLAIMANT

AND

KENYA METHODIST UNIVERSITY RESPONDENT

RULING

1. What is before this Court for determination is a Notice of Motion Application expressed to be brought under sections 1A, 3A, 3B, 99 and 100 of the [Civil Procedure Act](#) and all other enabling provisions of the law. The Applicant seeks the following orders;
 1. Spent.
 2. That the Court be pleased to amend and rectify the decree herein issued by this court by this court on March 13, 2018 in terms of the Draft Amended Decree hereto.
 3. That the costs in the Application be provided.
2. The Application is grounded on the annexed Affidavit of Ms. Bridget Inyanje, the Applicant's Advocate on record. Ms. Inyanje avers that parties agreed to compromise prayer 1 of the suit Claim and the court through a Ruling dated February 23, 2018 ordered that interest on the amount compromised as to prayer 1 be at 12%. That resultantly, the parties recorded a consent dated 17th July 2018 to the settlement of the amount compromised as to prayer 1.
3. She further states that the amounts in the consent judgment dated 17th July 2018 plus the 12% interest as per the judgment dated 23rd February 2018 have since been duly paid.
4. That the remainder of Claim went for full hearing and the Court through its judgment delivered on 30th June 2023 dismissed the suit with an order that each party to bear its own costs. That strangely, the Claimant on 3rd July 2023, filed a bill of costs relying on a partial decree dated 13th March 2018.



5. According to Ms. Inyanje, it was only upon the Claimant filing the submissions on the bill of costs that the Applicant became aware of the existence of the partial decree dated 13th March 2018. She avers that the partial decree dated 13th March 2018 was obtained based on the consent judgment dated 17th July 2018 and the ruling delivered on 23rd February 2018.
6. Counsel further asserts that the partial decree erroneously provided for an order as to costs of the suit which order was neither granted vide the consent judgment dated 17th July 2018 nor the ruling delivered on 23rd February 2018.
7. Ms. Inyanje further states that it is trite law that a party has no rights to costs unless and until the court awards them to a party and that the Claimant cannot assume that the costs of the suit erroneously mentioned on the partial decree dated 13th March 2018 is in reference to the consent judgment dated 17th July 2018 and in particular prayer 1 of the Claim.
8. The Application is opposed vide a Replying Affidavit sworn on 27th October 2023, by the Claimant's Advocate, Mr. Gacheru Ngang'a. Briefly, Mr. Gacheru avers that on 24th February 2017, the Claimant applied for summary Judgment and when the said Application came up for hearing on 6th March 2017, counsel for the Applicant did not appear. Consequently, the Court allowed the Application in terms of prayers 3 and 4. Prayer 4 was on costs.
9. That on 9th March 2017, the Applicant made an application seeking inter alia to set aside the orders made by the Court on 6th March 2017 in their entirety, including the order on costs. When the Application came up for hearing on 25th April 2017, the Judge directed that he would only entertain the Applicant's Application for setting aside the orders of 6th March 2017, only to the extent of interest payable, rate thereof and commencement date.
10. Mr. Gacheru further states that the implication of the court directions/order of 25th April 2017, is that the Applicant's assault on costs awarded on 6th March 2017 was dismissed.
11. He further deposes that the issue of interest was decided vide the said Ruling of 23rd February 2018, where the Judge reviewed the orders of 6th March 2017 only to the extent of the applicant rate interest and the commencement date. Consequently, the preliminary decree was issued on 13th March 2018.
12. According to Mr. Gacheru, the preliminary decree was issued in accordance with the court orders of 6th March 2017 and 23rd February 2018. Therefore, contrary to Applicant's averments, there is no error on the face of the record to warrant review amending the preliminary decree of 13th March 2018.
13. Mr. Gacheru further contends that the Applicant has never appealed against the said orders.
14. He further deposes that there are no consent judgments of 23rd February 2018 and 17th July 2018 respectively on record. That the consent of 17th July 2018, was on payment of the judgment sum gratuity by installment and did not deal with costs which had not been ascertained by then.
15. That it is true that vide the judgment of 30th June 2023, the court, which was then dealing with the second part of the claim did not award costs but it did not also set aside the order of costs of 6th March 2017 on the first part of the claim on gratuity and the subject matter of the preliminary decree.
16. The Application was canvassed by way of oral submissions on 31st October 2023. Submitting on behalf of the Applicant, Ms. Inyanje argued that no costs were awarded by the Court as per the court's Judgment on 23rd February 2018 and the Claimant cannot purport to have been awarded costs. She further termed the award of costs in the partial decree as an error as the entire suit had not been canvassed. She further submitted that the Court did not award costs in its Judgment delivered on 30th



June 2023. In Ms. Inyanje's view, it was premature for the court to award costs at the preliminary stage. To this end, she urged the court to amend the partial decree issued on 13th March 2018.

17. On his part, Mr. Gacheru termed the Application as an abuse of the court process and submitted that costs were awarded by the court when the Claimant's Application for Summary Judgment was allowed. He further argued that following an application by the Applicant's Advocate, the Court reviewed its orders only on the interest payable. It was Mr. Gacheru's submission that the Applicant is asking the Court to sit on appeal. He urged the Court to dismiss the Application with costs, to be borne by Counsel for the Applicant personally.
18. In a brief rejoinder, Ms. Inyanje contended that costs cannot be awarded before the matter is finalized. That in this case, costs were awarded in error on 13th March 2018.
19. Upon perusing the Application, the response to the same and considering the submission by Counsels for both parties, the singular issue for determination is whether the court should allow the application thereby amending/rectifying the decree issued on 13th March 2018.
20. It is apparent from the record, that the decree in question emanated from the Claimant's Application dated 24th February 2017, through which he sought the following orders:
 1. That this application be certified as urgent.
 2. The Respondent's Response to the Memorandum of Claim herein dated 30th December, 2016 be struck out and judgment be entered for the Claimant as prayed for in the statement of claim herein.
 3. That in the alternative to prayer (1) above, judgment on admission be entered in favor of the Claimant for a sum of Kshs. 27,715,240 together with interest at bank rates from 24th March 2015 till payment in full.
 4. That the Claimant Applicant do have the costs of this application and the suit.
21. The record reveals that on 6th March 2017, the court allowed the Application by the Claimant in terms of prayers 3 and 4. In effect, the Court allowed Judgment in favour of the Claimant in the sum of Kshs 27,715,240/= and awarded costs in terms of the Application and the suit.
22. It is also apparent that being dissatisfied with the orders of the court, the Applicant lodged an Application dated 9th March 2017, through which it sought to stay execution of the orders of 6th March 2017. The Applicant further sought to set aside the said orders and all consequential orders thereof.
23. Addressing the application on 25th April 2017, the court directed that it would only entertain the Application with regards to the interest payable. Therefore, vide its Ruling delivered on 23rd February 2018, the Court only determined the issue of interest.
24. Essentially, the orders initially issued by the Court on 6th March 2017, were not disturbed save for the issue of interest. Subsequently, the partial decree dated 13th March 2018, was issued.
25. It is that decree that the Applicant has sought to amend and rectify through the instant Application. Fundamentally the Applicant is seeking to review the court's orders of 6th March 2017, wherefrom the partial decree emanated.
26. Rule 33 of the Employment and Labour Relations Court Rules is very explicit that the Court can only review its orders if the following grounds exist: -



- a. if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
 - b. on account of some mistake or error apparent on the face of the record;
 - c. if the judgment or ruling requires clarification; or
 - d. for any other sufficient reason.
27. The crux of the Applicant's argument in this case is that the partial decree erroneously provided for an order as to costs of the suit which order was neither granted vide the consent Judgment dated 17th July 2018 nor the Ruling delivered on 23rd February 2018.
28. Contrary to the Applicant's assertions and as can be discerned from the record, the partial decree flowed from the orders issued by the Court on 6th March 2017 as opposed to the consent dated 17th July 2018.
29. To this end, I am not persuaded that there is an error on the partial decree, specifically with regards to the issue of costs.
30. What's more, the Applicant unsuccessfully attempted to set aside the court's orders of 6th March 2017. It thus follows that if the Applicant was dissatisfied with the orders of the court issued on 6th March 2017 and subsequent directions on 25th April 2017 that the court would only address the issue of interest, the logical thing to do was to lodge an Appeal as opposed to moving this Court through the instant Application.
31. Indeed, the Applicant's argument that the costs were awarded in error as the Court could not have awarded costs before the matter was finalized, does not hold. I say so because that argument may constitute a ground of appeal but certainly not a ground for review.
32. In addition, it is evident that in issuing its orders on 6th March 2017, the Court allowed partial Judgment in favour of the Claimant in the sum of Kshs 27,715,520/=. Therefore, the Claimant was entitled to costs to the extent of that partial Judgment. As a matter of fact, it is notable that the Claimant's Bill of Costs is to the extent of the said Kshs 27,715,520/= being the subject matter.
33. In view of the foregoing reasons, the Court finds that the Applicant's Application dated 4th October 2023, is not meritorious and consequently, the same is dismissed with costs to the Claimant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF NOVEMBER, 2023.

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STELLA RUTTO

JUDGE

Appearance:

For the Applicant/Respondent Ms. Inyanje

For the Claimant No Appearance

Court Assistant Abdimalik Hussein

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 15th March 2020 and subsequent directions



of 21st 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 had 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.

STELLA RUTTO

JUDGE

