



REPUBLIC OF KENYA



Kisirkoi v Maasai Mara University (Employment and Labour Relations Cause 143 of 2018) [2022] KEELRC 757 (KLR) (21 February 2022) (Ruling)

Samson Ole Kisirkoi v Maasai Mara University [2022] eKLR

Neutral citation: [2022] KEELRC 757 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE 143 OF 2018
DN NDERITU, J
FEBRUARY 21, 2022**

BETWEEN

SAMSON OLE KISIRKOI CLAIMANT

AND

MAASAI MARA UNIVERSITY RESPONDENT

RULING

Introduction

1. In an amended Memorandum of claim dated 5th July, 2018 the Claimant prays for the following against the Respondent:-
 - a) A declaration that the Notice of retirement dated 22nd May, 2017 and all similar notices varying the Contract of Employment are unlawful and unfair.
 - b) And Order that the Claimant be retained in his current employment position with all the benefits and terms as per the contract of employment. In the alternative compensation for the prospective future earnings for the remainder of the Contract period based on the last gross salary.
 - c) An Order for maximum compensation for wrongful/illegal termination of employment contract as per Section 49 (c) of the [Employment Act](#).
 - d) A Certificate of Service as per Section 51 of the [Employment Act](#).
 - e) Costs and interest.
 - f) Any other relief this Honourable court may deem fit to grant.



2. In a response to the memorandum of claim dated 12th June, 2018 the Respondent objected to the claim and prayed that the cause be dismissed with costs citing the cause as an abuse of the process of court for reasons that another cause being ELRC Petition No. 8 of 2018 (Kericho) had dealt with the same or similar issues in contention in this cause and that the Kericho matter was subject of an appeal at the Court of Appeal being Civil Appeal No. 255 of 2018.
3. Several interlocutory applications were filed and argued culminating in the Ruling of 15th July, 2021 (Wasilwa J) in which it was ordered that the Claimant was at liberty to prosecute this cause as the issues raised herein were materially and substantially different from those canvassed in the Kericho Petition and the pending Appeal No. 255 of 2018 at the Court of Appeal.
4. This cause came up in court for hearing on 10th November, 2021 but none of the parties appeared for the trial. The matter came up again for hearing on 17th November, 2021 and this time round Mr. Anyoka appeared for the Claimant and Mr. Labullellah for the Respondent.
5. On 17th November, 2021 Mr. Anyoka, Learned Counsel for the Claimant, informed the court that the court of Appeal had made a decision in Civil Appeal No. 255 of 2018 which decision had effectively rendered this cause moot and hence applied for leave of the Court to withdraw this cause.
6. Mr. Lubullellah, Learned Counsel for the Respondent, while not opposed to the withdrawal prayed for costs of the cause to be granted to the Respondent but Mr. Anyoka prayed that each party bears own costs.
7. The Court granted the application for withdrawal of the cause and requested Counsel to agree on the issue of costs failure to which both Counsel were to file and serve written submissions on that single issue of costs for the matter to be determined by this court.
8. Both Counsel filed their written submissions, the Claimant's on 21st December, 2021 and the Respondent's on 15th December, 2021. This ruling is thus in respect of that single issue on who should meet the costs of this, now withdrawn, cause.
9. As stated above, both parties took almost diametrically opposed positions, with the Claimant praying that each party should meet own costs while the Respondent prays that it be awarded the costs of this cause.

II. Claimant's View

10. This court has carefully and dutifully gone through the submissions filed by Counsel for both parties.
11. Counsel for Claimant has argued that the reason for withdrawal of this cause was informed by the Judgment of the Court of Appeal in Civil Appeal No. 255 of 2018. He argues that the Judgment in that appeal fully settled the issues that were in contest in this cause.
12. In paragraph 5 of his submissions Counsel for the Claimant has rendered himself as follows;-

“This suit is directly affected by the Court of Appeal decision. This is because the prayers being sort (sic) have been directly provided by the Court of Appeal. In its Judgment, the Court of Appeal directed the Respondent to reinstate the Claimant. It further stated that the retirement notice issued by the Respondent to be illegal and in breach of the contract of employment between the Claimant and Respondent herein.”
13. Curiously, Counsel for the Claimant has not attached the said Judgment of the Court of Appeal. However, Counsel for the Respondent attached a copy of the said Judgment of the Court of Appeal



to his submissions. This court has gone through the said Judgment again and again and this court is unable to identify the findings alluded to by Counsel for the Claimant. At page 27 of the Judgment of the Court of Appeal made the following final orders:-

- i. The award of six months' salary as compensation for unlawful termination computed on the basis of a monthly salary of Kshs.201,319.50 is hereby set aside. We substitute the same with an award of six months' salary as compensation computed on the basis of a monthly salary of Kshs. 87,750/= (87,750 x 6 = 526,500).
 - ii. The order of reinstatement of the Respondent is hereby set aside.
 - iii. We uphold the order for payment of unpaid salaries and allowances to the Respondent.”
14. On the issue of costs of the appeal, each party was ordered to meet own costs.
 15. The Court of Appeal did not order or direct the withdrawal of this instant cause. In fact, the said Judgment does not mention this cause.

III. Respondent's View

16. From the inception of this cause, the Respondent held the view that the same was an abuse of the process of court taking the position that the issues raised were the same or similar to those in the Kericho petition and the appeal in the Court of Appeal.
17. However, it was held on 7th February, 2019 (Mbaru J) that this cause was not res judicata and on 15th July, 2021 (Wasilwa J) it was held that the proceedings in this cause could not be stayed pending the decision of the Court of Appeal as the subject matters were different and mutually independent of each other.
18. All along, therefore, the Claimant was opposed to stay of proceedings in this matter pending and determination of the appeal and displayed enthusiasm to prosecuting this cause to its logical conclusion.
19. The Respondent takes the position that it was dragged into this litigation by the Claimant and that all its efforts to halt these proceedings failed and as such it should be awarded costs of this cause.

IV. Issues for Determination

20. As stated elsewhere in this Judgment, and flowing from the foregoing, together with the written submissions by Counsel for both parties, there is only one issue for determination. On 17th November, 2021 the Claimant applied for leave to withdraw this cause and the court granted that request. However, Counsel for both parties failed to agree on who should shoulder the costs of this cause or the appropriate order on costs. And therefore the single issue for determination by this court is on who should meet the costs of this cause.

V. The Applicable Law

21. Section 27 of the *Civil Procedure Act* (Cap 21) grants unfettered discretion to this court in awarding costs but based on the general established rule that costs follow event. The proviso to Section 27(1) provides as follows:-

“Provided that 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.”



22. Order 25 (2) of the Civil Procedure Rules provides as follows;-

“Where a suit has been set down for hearing the court may grant the plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just”.

23. The above provisions of the law clearly demonstrate that to a large extent a court of law has wide discretionary powers on the issue of awarding or denying costs. However, such discretion shall be exercised in a just and fair manner based on logically sound reasoning that is neither whimsical nor capricious.
24. The Claimant’s Counsel has relied on Rufus Njuguna Miringu & Another Vs Martha Muriithi & Another (2012) eKLR in arguing that where a cause is withdrawn there is neither a winner nor a loser and that the appropriate order would be for each party to meet own costs. He has relied on Jasbin Singh Rai & 30 others Vs Tarlodian Singh Rai & 4 others (2012) eKLR wherein the Supreme Court in effect alluded to the well settled principle that on issue of costs each case should be considered on its own unique facts and circumstances.
25. The Respondent’s Counsel has relied on the persuasive but not binding decisions from the High Court in Pacis Insurance Company Ltd Vs Francis Njeru Njoka (2018) eKLR and Samson K.A. Tim Vs D. M. Machage (2019) eKLR.
26. Having considered all the materials placed before this court and in particular the written submissions by Counsel for both parties, this court has been called upon to consider whether there are special or unique circumstances in this matter that would render this court to depart from the well- established general rule and principle that costs follow event.
27. In the considered view of this court there are no unique circumstances that may persuade this court to depart from that general and well established path for the following reasons.
28. The Claimant filed this cause with the full knowledge that similar (not necessarily the same) issues, concerning his employment with the Respondent had been litigated upon in the Kericho Petition and that the decision in that petition had been challenged in the Court of Appeal.
29. At the earliest opportunity, the Respondent pleaded that this cause was res judicata and secondly for stay of the proceedings pending the outcome of the appeal, but the Claimant vigorously opposed both applications and, as noted above, the court (Mbaru J and Wasilwa J) declined the applications and the Claimant was allowed to proceed with the prosecution of this cause to its logical conclusion.
30. The Judgment by the Court of Appeal was delivered on 5th November, 2021 but the Claimant did not file a notice of intention to withdraw the cause until 17th November, 2021 when Counsel for the Claimant made the application for withdrawal orally in court. If the Claimant had taken steps to inform the Respondent and the Court that he was intending to withdraw the cause, that would have demonstrated good faith and ameliorated the costs in the cause.
31. This is a private/personal cause as the prayers sought are in personum. This cause does not concern a matter of public interest or importance.
32. The Claimant all along did not seem to have any regard of the impact the outcome of the appeal would have had on this cause and he successfully convinced the court (Mbaru J and Wasilwa J) that he was ready to prosecute this cause to its logical conclusion regardless of the outcome of the appeal. As stated



elsewhere in this Judgment, the Court of Appeal did not prohibit the Claimant from prosecuting this cause. But he has opted to withdraw the same on his own volition.

33. The Respondent is a public institution and costs incurred in this litigation shall eventually be shouldered by the tax- payer. While the Claimant is a tax-payer as well, he should take responsibility and meet the costs in this cause as the same were incurred in pursuance of his perceived personal rights.
34. This court has said enough to demonstrate that in this matter the Claimant should meet costs and hence the Respondent is awarded costs of this cause.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 21ST DAY OF FEBRUARY, 2022.

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DAVID NDERITU

JUDGE

