



REPUBLIC OF KENYA



KENYA LAW
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**Chairman B.O.M Bishop Abiero Moyo Sec. School v Osiyo (Appeal
E020 of 2021) [2022] KEELRC 12752 (KLR) (6 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12752 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E020 OF 2021
CN BAARI, J
OCTOBER 6, 2022

BETWEEN
CHAIRMAN B.O.M BISHOP ABIERO MOYO SEC. SCHOOL APPLICANT
AND
MESHACK WESONGA OSIYO RESPONDENT

RULING

1. The ruling herein is on the applicant's motion dated April 6, 2022, brought pursuant to sections 3, 3A, 27, 38, 44, 45, 47, 48, 63(e), and 64 of the [Civil Procedure Act](#), and order 45 rule 1 of the [Civil Procedure Rules](#). The applicant's prayers to this court are that:
 - i. spent
 - ii. spent
 - iii. spent
 - iv. After the hearing and final determination of this suit, an order do issue vacating and setting aside the order awarding costs of the appeal to the respondent with an order of no costs to any party.
 - v. The costs of this application be in the cause
2. The application is supported by grounds on the face of the motion and an affidavit sworn by one Dinnah Akinyi Oboro on April 6, 2022.
3. The application is premised on a decision of this court rendered on March 24, 2022, wherein, the court dismissed the appellant's, now applicant appeal, and awarded costs of the appeal to the respondent herein.



4. In that judgment, the court had directed that the applicant in the instant application be removed from the suit for having been wrongfully sued, and be substituted therewith the board of management of Bishop Abiero Secondary School.
5. The applicant argues that to reward the respondent with costs of the appeal when the court had determined that he (the applicant) was wrongfully sued, would amount to rewarding an illegality for reason that the respondent should have moved the court to amend his petition, but did not.
6. It is the applicant's further assertion that the order of costs issued by this court is incapable of enforcement without violation of the *Basic Education Act* and section 43(1) of the *Public Finance Management Act* as the applicant is the chairperson of a public school board, and this court should not issue an order in vain.
7. The respondent opposed the application vide grounds of opposition dated April 19, 2022, wherein, he states that the applicant's application is bad in law, lacks merit and is fatally and incurably defective.
8. The application was canvassed by way of written submissions and submissions were filed for both parties, and which submissions have been duly considered.

Determination

9. I have considered the application, the grounds and affidavit in support, the grounds of opposition, and the submissions by both parties. The issue for determination, is whether this court should review her orders of March 24, 2022, awarding costs of the appeal to the respondent herein.
10. Rule 33 of the *Employment and Labour Relations Court (Procedure) Rules*, proves as follows in respect of review: -
 - “A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—
 - (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.
 - (2) An application for review of a decree or order of the court under subparagraphs (b), (c) or (d), shall be made to the judge who passed the decree or made the order sought to be reviewed or to any other judge if that judge is not attached to the court station.”
11. An often-cited proviso to section 27 of the *Civil Procedure Act*, is to the effect that costs follow the event, unless the court or judge shall for good reason otherwise order. This court in the impugned judgment, in addition to striking out the applicant's preliminary objection, ordered that the applicant herein be struck out of the suit for having been wrongfully sued.



12. It is not disputed that the appeal subject of the award of costs succeeded in as far as the preliminary objection seeking the striking out of the entire suit for misjoinder is concerned. Although the court returned that the fact that applicant herein was wrongfully sued, was not reason enough to strike out the suit-and which remains the case, there is no doubt that the respondent improperly joined the applicant to the suit, and did not deserve the award of costs of the appeal.
13. In *Farah Awad Gullet v CMC Motors Group Limited* [2018] eKLR, cited by the applicant, the Court of Appeal held: -

“Notwithstanding, that the appellant had not wholly succeeded on his claim both at the trial and now on appeal... The trial judge’s failure to take into consideration the factors that triggered the litigation and the fact that it is the respondent which substantially contributed towards the causation of those factors, in our view resulted in a misjustice to the appellant with regard to the issue of cost. We therefore find sufficient justification for us to interfere with the trial courts order on costs.”
14. Confirmation that the applicant was wrongfully sued absorbs him from any wrong doing as to be condemned to pay costs. For this reason, the court finds the order to strike out the applicant from the suit before the lower court sufficient reason to review her orders on costs.
15. In *Pancras T Swai v Kenya Breweries Limited* [2014] eKLR the Court of Appeal stated:-

“Order 44 rule 1 (now order 45 rule 1 in the 2010 Civil Procedure Rules) gave the trial court discretionary power to allow review on the three limbs therein stated or “for any sufficient reason.”... As repeatedly pointed out in various decisions of this court, the words, “for any sufficient reason” must be viewed in the context firstly of section 80 of the *Civil Procedure Act*, cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order.”
16. In the final analysis, the application is found to have merit, and an order is hereby issued for review of the order awarding costs of the appeal to the respondent, and which order is substituted with an order that each party shall bear their own costs of the appeal.
17. Parties are further ordered to bear their own costs of this application.
18. It is so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 6TH DAY OF OCTOBER, 2022.

CHRISTINE N. BAARI

JUDGE.

Appearance:

Mr. Mwamba present for the Applicant

N/A for the Respondent

Ms. Christine Omollo-C/A

