



REPUBLIC OF KENYA



**Mito v Nyanjom & 4 others (Petition 69 of 2018)
[2022] KEELRC 13297 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13297 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION 69 OF 2018
CN BAARI, J
NOVEMBER 24, 2022**

BETWEEN

GEORGE OLILO MITO PETITIONER

AND

JOYCE ODUOR NYANJOM 1ST RESPONDENT

KISUMU NATIONAL POLYTECHNIC 2ND RESPONDENT

COUNCIL KISUMU POLYTECHNIC 3RD RESPONDENT

MINISTRY OF EDUCATION 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT

RULING

1. Before court is the petitioner's motion dated November 8, 2021, brought pursuant to sections 1A, 1B and 3A of the *Civil Procedure Act*, order 45 rules 1, 2 and 3(2) and order 51 of the *Civil Procedure Rules*, seeking orders that:
 - i. Spent
 - ii. Spent
 - iii. This honourable court be pleased to review/set aside the judgment by Hon Mathews N Nduma awarding costs to the respondents herein.
 - iv. The court do order/declare petition No 69 of 2018 a public interest litigation in which costs ought not to be awarded and each party should bear their own costs.
 - v. Costs of this application be in the cause.



2. The application is supported by grounds on the face of it and the affidavit of George Olilo Mito, the petitioner/applicant. The crux of the motion being that the petition herein is a public interest litigation and for which costs ought not be awarded.
3. The respondents did not oppose the motion.
4. The petitioner filed submissions in support of the motion.
5. The respondents did not file submissions in the matter.

The Applicant's Submissions

6. It is submitted for the petitioner/applicant that no useful purpose would be served if taxation proceeds as the substance of the motion is who bears the costs in a public interest litigation.
7. The petitioner further submits that the judge erred in law and fact by awarding costs to the respondents yet the petition was brought as a matter of public interest to champion the interest of a public institution.

Determination

8. I have considered the application, the grounds and affidavit in support and the submissions by the applicant/petitioner. The applicant seeks that this court sets aside and/or reviews the orders of Justice M Nduma in relation to the costs of the suit.
9. Mativo J in *Bethwel Omondi Okal v Managing Director KPLC and Co [2017] eKLR*, upholding the finding in *National Bank of Kenya Ltd v Ndungu Njau (1996)KLR 469(CAK)* at page 381 held thus:-

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”
10. The finding of the judge in this regard, read as follows: -

“The court finds that this petition ought not have been filed in the first place and was an abuse of the court process and the petitioner should pay the costs of the petition.”
11. Section 27 of the *Civil Procedure Act* states: -

“The costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full powers to determine by whom and out of what property and to what extent such costs are to be paid.”
12. In the case of *Scherer v Counting Instruments Ltd[1986] IWLR 615* the English Court of Appeal set out the principles for the award of costs as follows:-

“a) The normal rule is that cost follows the even. The party who turns out to have unjustifiably either brought another party before the court, or given another



party cause to have recourse to the court to obtain his rights is required to compensate that other party in costs; but

- b) The judge has an unlimited discretion to make what orders as to costs he considers that the justice of the case requires.
- c) Consequently, a successful party has a reasonable expectation of obtaining an order for his costs to be paid by the opposing party, but has no right to such an order, for it depends upon the exercise of the court's discretion.....”

- 13. In my view, an award of costs is purely at the discretion of the court and the court that awarded the costs herein, did so within its discretionary power. Further, the applicant/petitioner has not demonstrated there being an error or omission on the part of the court in relation to the said costs that this court is called upon to correct.
- 14. The petitioner's application seeks order that can only be granted in an appeal, and not in an application for review. A party cannot successful appeal against orders of a court to another court of concurrent jurisdiction. The prayers herein, are only tenable before an appellate court.
- 15. In the upshot, the petitioner's application is found to lack merit and is hereby dismissed.
- 16. In the interest of bring this matter to a close, I make no orders as to costs.
- 17. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 24TH DAY OF NOVEMBER, 2022.

CHRISTINE N BAARI

JUDGE

Appearance:

Ms Ogollah h/b for Mr Mwamu for the applicant/petitioner

N/A for respondents

Ms Christine Omollo -C/A

