



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

CAUSE NO 279 OF 2018

THOMAS BABU MWANIKI.....CLAIMANT

VS

VISION AFRICA SACCO LIMITED.....RESPONDENT

RULING

Introduction

1. This ruling is on the preliminary objection raised by the Claimant by notice dated 18th September, 2020 which arose as a result of the party to party Bill of costs dated 9th September, 2020. The substance of the objection is as follows:

1. The bill of costs is premature as the suit is still pending.

2. There is no order awarding the respondent costs of the entire suit, which suit is pending for hearing, and the Bill of cost offends the provisions of section 27(1) of the civil procedure Act cap 21 of the laws of Kenya.

3. There is no order for taxation of costs in respect of the claimant's application dated 10TH March, 2020 during the pendency of the suit and the bill of costs offends section 27(1) of the civil procedure Act cap 21 of the laws of Kenya and Order 51 rule11(2) of the civil procedure Rules.

2. The said party and party cost was taxed pursuant to a court order of 7th July, 2020 whereby the learned Justice M. Mbaru while allowing the claimant's application to reinstate the suit herein directed as follows;

a. The claimant shall pay the respondent all costs incurred to date and the same shall be assessed and paid before the court can allocate a hearing date.

b. Where the claimant fails to abide, the respondent shall be at liberty to apply Rule 16 of the Court rules.

c. The claimant shall attend and indicate his interest in the hearing of the suit upon (a) above and;

d. Costs awarded to the respondent.

3. This Court directed parties to dispense with the preliminary objection by way of written submissions.

Claimant's submissions

4. In its submissions dated 18th September 2020 the claimant submits that, this Court has powers under section 12(4) of the Employment and Labour Relations Court Act and Rule 29 (1) and (2) of the Court Rules to make orders as to costs that it considers just. Additionally, section 27(1) of the civil procedure Act provides that such costs are discretionally, however the cost of any action, cause, or any matter or issue shall follow the event unless ordered otherwise.

5. To buttress this argument the applicant relied on the case of **Thomas Gitau Njogu & 4 others –versus- Patrick Waruinge Muhindi & 2**

others [2013] eklr. Which court held that;

“... the only material event under section 27 of the civil procedure Act is the success or otherwise of a suit”

6. Accordingly, the claimant submitted that the event as contemplated in the proviso to subsection (1) of the Act means the result of all the proceedings incidental to the litigation or the entire litigation as seen in Richard Kuloba's Book; Judicial Hints on Civil Procedure 2nd Edition at page 94-95.

7. The claimant submits that, it filed an application dated 10th March, 2020 seeking reinstatement of the suit that was allowed on conditions including payment of costs which suit is yet to be conclude. Therefore, the claimant submitted that there is no 'event' or finality of the case to warrant payment of costs. In this he relied on the case of **Kenya pipeline company limited –versus- Gray soil investment Limited & 3 others [2009] eklr**. Where it was held that;

“To allow instructions fees at an interlocutory stage would mean

(a) prejudging the result of the case and, (b) awarding instructions on a pleading which has not succeeded.

2. A party is entitled to claim instruction fees to defend (or sue) when he succeeds in the action provided he secures the order of costs in his favour. There would therefore be no justification for a party to raise an item of instruction fee on an interlocutory application on the basis that the suit as originally framed was decided in his favour on an interlocutory application. This is so because instructions in a case do not end up with the filing of the pleadings but they continue until the final disposal of the case.”

8. The claimant avers that the orders of costs made the court are not costs of an entire suit but what is normally known as **“thrown away costs”**. and relied on the case of **Gursharam Singh Brar T/A Kinale saw mills –versus- Mathew Oseko[2006] eklr** where Justice Fred Ochieng held that;

“ As regards the contention by the applicant that when the Hon. Azangalala J. set aside the summary judgement, the orders for payment of the auctioneers' costs also fell through, I hold the view that that is not the case. I say so because the learned judge expressly ordered that the thrown away costs were to be paid by the applicant herein. In effect, even though the summary judgement had been set aside, the applicant was ordered to pay any such costs as may have been incurred during the period when the order was still in force. Had matters stopped at that point, there would be no doubt in my mind that the applicant herein was liable for the auctioneer's costs, as the said costs fall within the ambit of “thrown away costs.”

9. The claimant thus submits that the respondent is only entitled to costs or reimbursement of costs incurred for the duration between the time the suit was dismissed on 10th March, 2020 and its reinstatement on 7th July, 2020.

10. The claimant argues that the law under Order 51 Rule 11(2) of the civil procedure Rules does not provide for taxation of interlocutory application save for when special reason have been tabled before the court. He buttressed this by citing the case of **Auto Springs Manufacturers Limited versus Damisha Building Contractors Limited[2017] eklr** where the court of Appeal held that

“... it is trite law that unless the court directs the immediate taxation and payment of costs in an application there should only be one taxation of costs at the tail end of the suit as was held in **Homi Dara Adrinwalla –versus Jeanne Hogan and another [1966] 1EA 290 where the court held that;**

“I cannot find, nor has there been referred to me, any authority for taxation of interlocutory application in Tanzania”

11. The claimant thus urged this Court to uphold his P.O and dismiss the respondent party to party Bill of Cost.

Respondent's submissions.

12. The respondent submits that, the claimant's objection does not raise matters on pure points of law as envisaged in the celebrated case of **Mukisa Biscuits co –versus- west end distributors [1969] EA 696 at pages 700 & 701.**

13. It was submitted that the preliminary objection raised is incompetent and or invalid for it cannot change the course of the matter as per the terms highlighted in the ruling of 7th July, 2020.

14. The respondent therefore argued that, the Court exercised its discretion granted by section 12(4) of the Employment and labour relations Court Act and awarded the Respondent all costs up to where the case has reached and that there was no wrongdoing or error done by the said Court.

15. The Respondent submits that, the claimant/ Applicant is challenging the ruling of this Court on 7th July, 2020 and instead raised a P.O when it would have sought a review or appealed against the said decision. Therefore, it was submitted that the application is incompetent and utterly misconceived and urged this Court to dismiss with costs to the respondent.

16. I have examined the averments of the parties herein. Indeed J. Mbaru ordered payment of costs to respondent while reiterating their

claim.

17. My understanding was the claimant was to pay thrown away costs at time of reinstating the suit. This did not imply a need to have party and party costs of the entire suit reassessed and taxed as the respondents have intended herein.

18. I will allow the preliminary objection and disallow the intended party and party bill of costs.

19. I instead substitute the said bill with thrown away costs of kshs.20,000/= to be paid by the claimant before a hearing date of the suit is taken.

RULING DELIVERED VIRTUALLY THIS 4TH DAY OF MAY, 2021

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Magata for Claimant – present

Kanyi for Respondent – present

Court Assistant - Fred