



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA**

**CAUSE NO. 485 OF 2017**

**ENOS IRERI.....CLAIMANT**

**- VERSUS -**

**DAVID TOURS & CAR HIRE LIMITED..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 5<sup>th</sup> November, 2021)

**RULING**

The Court delivered the judgment in this suit on 16.04.2021 for the claimant against the respondent for:

- 1) The respondent to pay the claimant a sum of **Kshs. 289, 845.00** (less due PAYE) by 01.07.2021 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
- 2) The respondent to deliver the certificate of service in 30 days from the date of this judgment.
- 3) The respondent to pay costs of the suit.

In awarding the costs in favour of the respondent the Court stated thus, “**6) The claimant has substantially succeeded in the claim and is awarded costs of the suit.**”

The respondent filed on 11.06.2021 the application by the notice of motion through Masore Nyangáu & Company Advocates. It was under section 3(1) (2), 12(3) (i), (viii), 12(4), 16, 20(1) of the Employment & Labour Relations Court Act, 2011, and, rule 33(1) (d) of the Employment and Labour Relations Court (Procedure) Rules, 2016. The applicant prayed for:

- 1) .... (Spent).
- 2) .... (Spent)
- 3) The Honourable Court be pleased to review or vary its judgment specifically its order on costs of the suit and substitute therefor with an order directing each party to bear their own costs of the suit.
- 4) In the alternative and without prejudice to prayer (3) above, the Honourable Court be pleased to review or vary its order on costs of the suit and substitute therefore with an order that the respondent to bear a specified fraction of the costs of the suit being 31.03% having regard to the claimant’s margin of success in the suit.
- 5) Costs be in the cause.

The application is based on the annexed affidavit of the applicant’s director David Ngunjiri Wanjuki and upon the following grounds.

The judgment was delivered on 29.04.2021 and being aggrieved the applicant filed the application on 11.06.2021 (and a notice of appeal was filed but withdrawn on 10.06.2021 to pave way for the application). The order on costs should be reviewed upon the following grounds:

- a) The parties have been in a relationship of mutual benefit for 14 years.
- b) Due to Covid 19 situation the respondent is not in a sound financial position as the applicant’s tourism enterprise has gone down.

- c) The applicant should be spared the extra burden of paying costs of the suit.
- d) The claimant has previously been ordered to pay the respondent's costs in the course of proceeding herein.
- e) The claimant prayed for Kshs. 933, 945.00 but was awarded Kshs. 289, 845 being 31.03 success.

The claimant opposed the application by filing on 17.08.2021 his replying affidavit and through Isaac Onyango & Company Advocates. The opposition was upon the following grounds:

- a) The application is based on speculations and unfounded allegations and grounds.
- b) The Court lacks jurisdiction to entertain the application.
- c) The grounds advanced for the applicant lack merit and threshold for an application for review. There is no error apparent on record to warrant a review.
- d) If dissatisfied, the applicant should have appealed as the legitimate cause of action. The case cannot be re-opened for re-litigation afresh.
- e) The decree has not been extracted and exhibited.
- f) The Court found that the claimant had substantially succeeded and awarded costs. It was in line with the Court's finding that the termination was unfair, unlawful, and wrongful and the other awards made accordingly. The application lacks merit and it should be dismissed.

Submissions were filed for the parties. The Court has considered the material on record and the parties' respective positions. The Court makes findings as follows.

**First**, as submitted for the applicant, section 12(4) of the Employment and Labour Relations Court Act provides that in proceedings under the Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just. Rule 29 (1) and (2) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides that the Court shall be guided by section 12(4) of the Act and the Advocates (Remuneration) Order in awarding costs; and the Court may order reasonable reimbursement of money spent by litigants in the course of litigation. The Court finds that per the findings in the judgment the claimant was awarded costs because he substantially succeeded in his claim because as submitted for the claimant, he established the unfair and unlawful termination and the other awards made. The Court notes that the amount awarded in the decree will then be considered within the provisions of the Advocates (Remuneration) Order at the taxation stage. The applicant was therefore misconceived as to margins of success because at taxation, each party will address the taxing master on the fair actual amounts in the bill to be allowed in view of the amount awarded in the judgment and the other remedies accordingly. Indeed, the parties in the ruling cited in the next paragraph in this ruling had relied on the Advocates (Remuneration) Order to urge their respective cases towards fair computation of the costs in a reference to the Judge in that regard – and the costs having already been awarded in the judgment in that case.

**Second**, as submitted for the applicant, in **Geoffrey Makana Asanyo –Versus- Nakuru Water & Sanitation Services Company Limited & 8 Others [2015]eKLR** (Radido J) the Court took the view that in matters before this Court, the Judge has been given a more wider discretion and latitude in awarding costs and in making that determination he may consider factors which the High Court judge may not consider such as the relationship between the litigants and even the financial position of the parties- so that costs do not follow the event, unlike the situation obtaining in the Civil Procedure Act, thus, “**37. The Employment and Labour Relations judge is under an obligation to consider what is just or what the justice of each case demands in making a costs order. A successful party therefore would not be entitled to costs as a matter of course.**”

The Court follows that elaborate opinion as the guiding considerations in award of costs by the Court. It is notable that the decision as cited was made on a reference to the Judge where the decision of the taxing master had been challenged and not an award of costs – but computation of actual amounts for the challenged items. Nevertheless, the Court adds that the parties must then by way of pleadings, evidence at the hearing, and final submissions provide the Court with all necessary background material to enable the Court make such just award of costs. The Court considers that it is not after an award has been made per the material before the Court that a party may seek to re-open the case outside the established principles of pleading and review. In the present case, the applicant urges that its financial position had been ravaged by the Covid 19 situation and that it had other loans it was servicing periodically. Such are matters that with due diligence should have been pleaded, proved by relevant evidence and then the Court persuaded one way or the other in the final submissions. That was not done and such is found not to qualify as fresh evidence to justify a review. But see what was before the Court as at time of drawing the judgment. The applicant pleaded the suit be dismissed with costs and in the opening remarks at the hearing counsel for the applicant submitted as much. In the final submissions no elaborate submissions were made for the applicant on the issue of costs to persuade the Court one way or the other. The Court considers that the wide discretion has been given to the Court in awarding (granting) costs but in absence of any material before the Court, the Court considers that the celebrated Civil Procedure Act's principle that costs follow the event would be the just path to follow as was done in the judgment in the instant case – and the Court holds that in absence of an established bar, the legitimate path is to award (grant) the successful party the costs of the suit as is just to do so in view of the costs incurred in the litigation process. The Court finds that to that extent the application for review was misconceived.

**Third**, the Court finds that as submitted for the claimant, there being no grounds for review established, the appropriate path was for the applicant to appeal rather than to attempt to persuade the trial Court to change its reasoning or finding. The Court is *functus officio* and it cannot rehear the case on that point of costs. While making that finding, the Court finds that this case is distinguishable from the ruling in **Grace Waitera Hungi –Versus- Riley Services Limited [2016] eKLR** where there existed a glaring error on record – because there had

been a suit with a counterclaim but whose outcome had not been taken into account in awarding full costs to the claimant and upon the principle that costs follow the event. In the instant case there was no counterclaim and the claimant did not solely succeed upon a money remedy. In any event, the Court considers that the Advocates (Remuneration) Order when properly applied before the taxing master, the parties should in the present case, arrive at fair costs.

In conclusion the application for review filed on 11.06.2021 is hereby dismissed with costs.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 5TH NOVEMBER, 2021.**

**BYRAM ONGAYA,**

**JUDGE**