



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT BUNGOMA

MISCELLANEOUS APPLICATION NO. 02 OF 2020

KELLUM ALUHA CHANDAI.....APPLICANT

VERSUS

THE CLERK TO COUNTY ASSEMBLY OF BUNGOMA.....1ST RESPONDENT

THE CHAIRMAN COUNTY ASSEMBLY SERVICE BOARD BUNGOMA...2ND RESPONDENT

THE COUNTY ASSEMBLY SERVICE BOARD-BUNGOMA.....3RD RESPONDENT

AND

COUNTY ASSEMBLY OF BUNGOMA.....1ST INTERESTED PARTY

THE HON. ATTORNEY GENERAL.....2ND INTERESTED PARTY

RULING

1. The ruling is on the application filed by the Applicant under certificate of urgency by way of Notice of Motion dated 13th October, 2021 seeking the following orders:-

- (a) That service of his application be dispensed with in the first instance.
- (b) That there be a temporary stay of execution of costs herein pending hearing and determination of the Application inter- partes,
- (c) That an order be made that the Respondent's costs were fully settled.

2. The Application is grounded on among other reasons that on the 23rd September, 2021 the Exparte Applicant was served with a proclamation by Eshikhoni Auctioneer demanding costs of Kshs. 291,435/- adjudged by court on 15th July, 2021 against the Applicant without stay of execution. That the Request for temporary stay of execution was denied by the taxing master. The Applicant further states that they had a meeting with the Respondents and agreed that the Respondents' costs were settled hence no other demands for the same.

3. The Application is supported by the affidavit of the Applicant sworn on 13th October 2021. In brief, the Applicant states that he had talked with the Respondent and interested party and had agreed that he be reinstated and any other issues of court including costs should be waived and be considered as settled by the outcome of the negotiation. The Applicant annexed a copy of the reinstatement letter by Clerk of the County Assembly, 1st Respondent herein dated 29th April, 2021 and a letter inviting the Applicant to appear before the Board dated 8th April, 2021 and the Auctioneer Proclamation Notice dated 23rd September 2021.

4. The application was placed before me under certificate of urgency on the 14th October, 2021 and upon consideration of the certificate and application certified the application urgent and granted exparte interim order (b) in the Notice of Motion. I further directed service upon the Respondents and interested parties and for them to file response for inter-partes hearing on the 3rd November 2021. on 3rd November 2021 when parties appeared before court I directed that the application be canvassed by way of written submissions. The 1st Respondent filed a replying affidavit sworn on the 18th October, 2021 by himself as the 1st Respondent and Secretary of the 1st Interested party.

5. The 1st Respondent denied that assertion by the Applicant that the 1st interested party and Respondents agreed to wave costs that were

assessed by the Honourable Court and stated that the Applicant should settle the costs or execution to proceed as per warrants of attachment and sale issued by court. The 1st Respondent averred that there was no agreement over the costs between the Applicant and employer and that the annexed documents to the application have no nexus to the assessed costs.

6. The Applicant filed a supplementary affidavit sworn on 28th October, 2021 and averred that the response by 1st Respondent was made of falsehood and that as the Clerk of the County Assembly he had not annexed copies of minutes which reinstated the Applicant to employment which contained all the particular facts that they waved any costs or fees against him in that regard so that the court can believe his response. That the Clerk and Interested Parties are the ones in custody of the minutes hence it was upon them to produce the record in court.

7. The Applicant's written submissions are dated 28th October, 2021 filed by his Advocates A.W Kituyi Advocates. The submissions are only on facts. The Applicant reiterates its claim in the submissions save to add that the Respondents and interested parties are acting in bad faith in view of the reconciliation process leading to the Applicant's reinstatement to employment.

8. The Interested parties and the Respondents filed written submissions through their advocates Omundi Bw'onchiri Advocates dated 18th October, 2021. They submit that the Applicant approached this court with unclean hands having lied that there was an agreement with his employer over taxed costs when there is no such agreement hence does not deserve the equitable remedy sought in his application and cites the maxim "*equity aids those who approach it with clean hands*". To buttress their opposition to the application the interested parties and Respondents rely on the case of *Mohammed Sahlly Sese -vs- Fulson Company Ltd and Another* (2006) eKLR holding which upheld the maxim of *equity aids those who approach it with clean hands*. The Court held "*it is apparent that the applicant has not been candid with this court. The orders the applicants seeks are discretionary in nature and equitable and upheld the decision in John Njue Nyaga - vs Nicholas Njiru Nyagaga & another* (2013) Eklr where the court of Appeal sitting in Nyeri stated that *one who comes to equity must come with cleans hands and equity frowns upon secrecy and under hand dealings*". The Respondents and 1st interested party submit that the Applicant has not done so and is underserving of the orders he seeks.

9. The 1st Interested party and Respondents further submit there is no stay of costs hence the application has to fail and relies on the case of *Francis Kabaa - vs - Nancy Wambui & Another* (1996) Eklr Where court held "*furthermore we do not think that a stay can be granted in respect of costs. The Applicant has not given any cogent reason why he should be granted stay. In all the circumstance, the order that commends itself to us is that the Application be refused and it is hereby ordered*".....

DETERMINATION

10. The court has carefully considered the Application and the written submissions of the Applicant and the affidavit in response of the 1st Respondent Clerk of County Assembly and the Secretary to the 3rd Respondent and their written submissions.

11. The Applicant alleges there was an agreement to waive costs upon reconciliation which led to his reinstatement into the employment of the 1st interested party, County Assembly of Bungoma. The impugned costs were incurred pursuant to Bungoma ELRC Miscellaneous Application No. 02 of 2020 in which the Applicant had sued the interested parties and the Respondents for judicial review orders following his suspension from employment of the 1st interested party, the County Assembly of Bungoma. The court, Justice Nduma presiding, determined the Application to be without merit and dismissed the Application with costs in the judgement dated 11th February, 2021. The Interested parties and Respondents taxed their party to party bill of costs and certificate of taxation was issued for costs taxed at Kshs. 291,435.00 by the taxing master, Deputy Registrar Hon. E. N. MWENDA on the 9th August, 2021.

12. The court notes that as time of issuance of certificate of costs above the Applicant had since pursuant to a meeting with the 3rd Respondent been reprimanded and reinstated to employment. The Applicant annexed the proclamation notice by Auctioneer, letter titled 'reprimand' which reinstated him dated 29th April, 2021 and the invitation to appear before the Board to his application. The court perused the annexures and did not find anything to do with the alleged waiver of costs in the dismissed case.

13. The Applicant in the supplementary affidavit dated 28th October, 2021 states that the Clerk of the County Assembly of Bungoma (1st Respondent herein), in his affidavit of 18th October 2021 in response to the application has not annexed copies of the minutes which reinstated him to employment and which contains all the particular facts that they waved any costs or fees against him for court to believe what he is stating.

14. It is the law of evidence that one who alleges must prove. The burden of proof on balance of probabilities lay on the Applicant. Even if the Respondents and interested parties are the custodian of the minutes, the law has provision for a party to have court compel production of documents. There was no attempt by Applicant to even request for the minutes. The burden to prove that the impugned costs had been waived during the alleged reconciliation process lay on the Applicant. The court finds that the Applicant has failed to prove their case that the impugned costs were waived by the Respondents during the meeting which led to his reinstatement to employment.

15. Consequently, the court finds that the applicant misled the court in its certificate of urgency leading to grant of interim order No. (b) under the Notice of Motion dated 13th October 2021. There is no evidence that the costs had been waived. The court discharges its order dated 14th October, 2021 and issued on the 15th October, 2021.

16. In conclusion, the Application by way of Notice of Motion dated 13th October, 2021 is dismissed with costs.

RULING DATED, SIGNED AND DELIVERED THIS 6TH DAY OF DECEMBER 2021.

J. W KELI

JUDGE.

In the presence of :-

Court Assistant - Brenda

For Applicant -

For Respondent and 1st Interested Party -