



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1236 OF 2013**

**NASIEKU TARAYIA.....CLAIMANT**

**V**

**AGRICULTURAL FINANCE CORPORATION...RESPONDENT**

**RULING**

1. On 8 October 2019 the Court delivered judgment in favour of the Claimant but declined to award her costs because she had filed submissions long after the agreed timeline, without offering any explanation for the delay.

2. The Claimant was dissatisfied and on 22 October 2019 she filed an application seeking orders

1. ...

2. ...

3. THAT the judgment be reviewed to take into account that:

(a) Pension Fund contributions earn interest according to the Rules of the Scheme which ought to be included in any pay out of the same which has not been factored pursuant to the provisions of the Retirement Benefits Act No. 3 of 1997.

(b) The Pension Surrender Value from the Applicant's old scheme as computed by the Respondent with the aid of its scheme Trustees and Administrators pursuant to the provisions of the Retirement Benefits Authority Act No. 3 of 1997 and the Rules made thereunder the same being an entitlement under the Pension Scheme.

(c) Costs follow the cause and the Claimant having succeeded in her claim is entitled to costs

(d) Interests prayed for in the Memorandum of Claim from the date of filing suit as the Claimant has succeeded in her suit.

3. The Claimant's advocate filed a supplementary affidavit on 30 October 2019.

4. The Respondent filed grounds of opposition and a replying affidavit in opposition to the application on 7 November 2019, and this prompted the Claimant to file a further supplementary affidavit on 14 November 2019.

5. The Claimant and the Respondent filed their list of authorities on 29 November 2019, and the Court took submissions on 3 December 2019.

**Denial of costs**

6. Under section 27 of the Civil Procedure Act, costs are at the discretion of the Court but subject to the principle that costs shall follow the event unless the Court for good reason decrees otherwise.

7. However, under the establishing statute of this Court, the Employment and Labour Relations Court Act, section 12(4), as read with Rule 29 of the Employment and Labour Relations Court (Procedure) Rules, 2016, the Court is enjoined to make just costs order.

8. The Court agreed timelines with the parties on the filing and exchange of submissions.

9. The Claimant was expected to file and serve submissions on or before 9 August 2019 but the same were only filed on 21 August 2019.
10. At the time of filing the submissions, there was no explanation from the Claimant's advocates (the explanation only came in the advocate supplementary affidavit filed on 30 October 2019).
11. In Court, the Claimant's advocate contended that after close of hearing and reserving of judgment, he had no access to the Court to tender any explanation for failing to file/serve the submissions in time.
12. The assertion by the Claimant cannot be correct.
13. The explanation could have been part of the submissions.
14. The Claimant also had the option of formally addressing the Court through the Registrar or Deputy Registrar and copied to the Respondent setting out any difficulties in meeting the agreed timelines.
15. Failure to file/serve submissions within agreed timelines has an obvious impact on a Court's ability to prepare and deliver a Judgment or Ruling on time.
16. In the view of the Court, there was no error apparent on the face of the record in declining to award costs nor has the Claimant provided sufficient reasons to review the order on costs.

#### **Interest on decretal sum from date of filing Cause**

17. The Claimant had sought interest on salary in lieu of notice, severance pay, unpaid salaries from June 2009 to November 2010, golden handshake, relocation allowance and accrued leave not taken from date of filing suit.
18. The Court did not award severance pay, golden handshake and relocation allowance.
19. The Court allowed the heads of claim(s) for salary in lieu of notice, unpaid salaries and accrued leave.
20. The Claimant took the view that in failing to award interest as sought, there was an error apparent on the face of the record.
21. The Respondent on the other hand countered that such failure, if at all could only be challenged through an appeal and not under the review jurisdiction.
22. The Respondent had offered all these dues to the Claimant through the letter informing her of the termination of service.
23. The Claimant, in her own wisdom declined to collect the dues. The question therefore begs whether it would have been fair to award interest of dues which had been offered before litigation.
24. The Court is of the view that it would have been unconscionable to award interest as sought as there was no evidence that the Respondent had demanded that the Claimant waive any right to sue if she collected the dues, which were not in dispute.

#### **Interest on pension funds from date of judgment**

25. Similarly, the Claimant had sought interest on Pension fund contributions, additional voluntary contributions and surrender value from date of judgment.
26. In her submissions before judgment, the Claimant made a general submission that she should be awarded interest without setting out any statutory basis as has now been advanced and more particularly as outlined in the Retirement Benefits Act.
27. And if the Rules of the Pension Scheme provided for payment of interest, the same was not proved.
28. However, because the Respondent conceded that interest is payable under the Trust Rules, the Court is of the view that interest on the pension is payable even without a Court order.
29. For the comfort of the Claimant, the Court would agree that she is entitled to payment of interest on the pension in terms of the applicable statutory framework, and the Rules of the Pension Scheme.
30. Save for what is stated in the preceding paragraph, the Court finds no error apparent on the face of the record, or any other sufficient reasons to review the judgment.
31. The application therefore fails. No order on costs.

**Delivered, dated and signed in Nairobi on this 10<sup>th</sup> day of March 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Obura instructed by Obura Mbeche & Co. Advocates

For Respondent Mr. Nyandieka instructed by Nyandieka & Co. Advocates

Court Assistant Judy Maina