

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 31 OF 2017

MARY WAIRIMU GITINDI.....CLAIMANT/RESPONDENT

VERSUS

KENYA NATIONAL UNION OF NURSES.....RESPONDENT/APPLICANT

UPSTATE KENYA AUCTIONEERS.....INTERESTED PARTY

RULING

1. The Respondent/Applicant seeks through the notice of motion application dated 29th March 2019 and amended on 9th April 2019 for orders that upon *inter partes* hearing of the application do issue an order setting aside the certificate of costs dated 10th January 2019 to the extent the Respondent/Applicant should pay 213,133/-. The Respondent/Applicant prayed that the motion be allowed with costs. The notice of motion application was supported by the affidavit of Seth Panyako and upon the grounds appearing on the face of the motion. Chief among the grounds set on the motion was that the Respondent/Applicant was seeking a review of the taxed costs and that if the auctioneer is permitted to levy execution, the Respondent/Applicant's computers will be attached and thus cripple the Respondent's service with a risk of electronic data loss. The Affidavit asserts the Respondent has paid a portion of the decretal sum and that the balance of the decretal sum. The deponent also states that the court should issue an order to the effect that the Respondent/Applicant is to pay a balance of Kshs. 213,133/- to the Claimant as final settlement of the award by the court. The Respondent/Applicant asserts that it cannot pay punitive costs that do not follow the event.

2. The Claimant/Respondent asserts that the Respondent/Applicant's notice of motion application is misguided as it is *res judicata*. The Claimant asserts that the jurisdiction of the court to review is under Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016. The deponent of the Claimant's affidavit in reply is the Claimant herself and she depones that the costs granted are not punitive and that the application before the court was *res judicata* as a similar application had been heard and determined by the court on 4th March 2019. She stated that based on the advise she had received from her advocates the application was thus unmerited. She asserts that the costs were properly taxed and that she is the one prejudiced by the stay application.

3. The parties assented to have the application determined on the basis of the pleadings before the court and submissions of the parties. The Respondent/Applicant submitted that the review sought was in respect of the taxed costs and that this was because the costs had been taxed *ex-parte* before the service of the decree hence denying the Respondent/Applicant a chance to interrogate the costs as filed. The Respondent submitted that the advocate for the Claimant deliberately ignored the Respondent's request for invitation to take a mutually convenient date for the taxation in total contravention of the doctrines of advocates practice and conduct. It was submitted that the *ex parte* taxation of costs was arbitrary and amounted to condemning the Respondent to pay punitive costs without a hearing contrary to the principles of natural justice.

4. The Claimant on her part submitted that the application for review was not merited as the issue was *res judicata* and that the application was an abuse of the court process. The Claimant submitted that Review under Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016 does not apply the motion before court. She submitted that the costs awarded were in accordance with the Advocates Remuneration Order and Rule 29(1) of the Rules of this court. The Claimant submitted that a similar application challenging the taxation was dismissed with costs and that this matter was *res judicata*.

5. The application by the Respondent/Applicant seeks orders that are akin to the orders sought in the previous application seeking to vary the determination on taxation by the Taxing Master of this court when she awarded costs which the Respondent/Applicant disputes. The challenge to the taxation having proceeded *ex parte* was in issue in the application which was dismissed. *Res judicata* means a matter that has been adjudicated by a competent court and therefore the same may not be pursued further by the same parties. Before the court is an application that meets the precise definition of *res judicata*. The issues between the Respondent and the Claimant regarding the costs payable has been adjudicated and cannot be subject of any other action by the parties before me. The motion is devoid of merit, an abuse of the court process and is dismissed with costs to the Claimant.

It is so ordered.

Dated and delivered at Nyeri this 24th day of May 2019

Nzioki wa Makau

JUDGE

I certify that this is a
true copy of the Original

Deputy Registrar