

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 728 OF 2017

STEPHEN MACHARIA.....CLAIMANT

VERSUS

SECURITY GROUP KENYA LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 22nd November, 2019)

RULING

The parties entered a mediation agreement in the suit which was filed on 31.07.2019 and recorded in Court as a partial judgment on 23.10.2019. On costs, the mediation agreement stated, “**8. Parties have not settled on the issue of the costs; this has been referred back to Court for determination.**” The parties agreed to file submissions on the only pending issue being costs of the suit.

The parties are in agreement that under section 27 of the Civil Procedure Act, costs follow the event. For the respondent, Michuki & Michuki Advocates have submitted that in **Munyaka Kuna Company Limited –Versus- Herman Kimani & 6 Others [2018]eKLR**, Mboghli J held that where parties have met and a consent order is arrived at, there are no losers or winners in the circumstances. Further in **Rufus Njuguna Miringu & Another –Versus- Martha Murithi & 2Others [2012]eKLR**, Nyamweya J held thus, “**....consent cannot be interpreted to mean that one or the other party has succeeded in a suit. Even if in the present case such settlement has worked out in the Defendants’ favour, the successful determination of the dispute is still attributable to both the Plaintiffs and the 1st and 2nd Defendants.**” Thus, it was submitted for the respondent that each party should bear own costs of the suit.

For the claimant, Kimani & Muriithi Advocates submitted that a consent or settlement did not necessarily mean that there was no successful party but it is only one of the factors the Court should consider in awarding costs. The claimant relies on **Morgan Air Cargo –Versus- Everest Enterprises Limited [2014]eKLR**, where Gikonyo J held, “**....It should also be understood well; that a successful party does not refer to a person who has been taken through rigorous and convoluted motions of litigation by the other party. Similarly, a party does not cease to be a successful party merely because he met little or no contest in his claim against the Defendant. He is a successful party because he is declared so by the Court after looking at the result of the entire litigation, which includes; negotiations or steps which culminates to, and the recording of a consent thereto, conduct of the Plaintiff etc. On that basis I believe settlement of a case by consent of the parties should be one of the factors the court should consider in deciding whether or not costs should be awarded to the successful party.**”

It is submitted for the claimant that the respondent was sued for compensation for unfair termination and after the mediation processes, the parties agreed that the respondent pays the claimant a sum of Kshs. 1, 427, 370.39. The agreed amount had already been paid to the claimant and a certificate of service already delivered to the claimant. The agreement was within the claimant’s claims and prayers in the suit and it is submitted that the claimant succeeded in his suit. The claimant had requested or demanded a settlement prior to filing the suit but the respondent had failed to settle. Thus the respondent should pay costs of the suit in line with section 12(4) of the Employment and Labour Relations Court Act, 2011 thus, “**12. (4) In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just.**” Rule 29 of the Employment and Labour Relations Court (Procedure) Rules 2016 states as follows:

- 1) The Court shall be guided by section 12(4) of the Employment and Labour Relations Court Act and the Advocates (Remuneration) Order in awarding costs.
- 2) The Court may order reasonable reimbursements of money spent by litigants in the course of litigation.
- 3) Where a suit involves a liquidated amount that is claimed and specified at the time of filing a statement of claim and the Court orders that the amount claimed or part of the amount be paid to the claimant, it may, in addition to that order, direct that interest be paid on the liquidated amount awarded at Court rates.

The Court has considered the rival submissions. It is clear that at the end of the mediation process, the result was that the respondent paid the claimant Kshs.1, 427, 370.39. The Court finds that the claimant was a successful litigant within the cited holding by Gikonyo J because the final result was that his cause of action was resolved in his favour. The Court has considered the mediation process and that the respondent had already paid the agreed amount. The mediation process and the prompt payment of the agreed money, in the Court’s opinion, amounted to serious mitigating factors to be considered in awarding costs. Considering the parties’ respective positions and the justice in the circumstances of the case, the claimant is awarded partial costs of the proceedings now fixed at **Kshs. 70,000.00** only as partial reasonable reimbursements incurred by the claimant in prosecuting the proceedings.

While making that finding and considering the authorities cited for the parties, the Court considers that whether costs will be awarded or not pursuant to a consent order will depend upon the justice of the individual cases. In determining the justice of the individual case, the Court must consider the intention of the parties as expressed or necessarily inferred from the wording of the consent or agreement resolving the dispute. In some instances like the present one, it may be clear that the parties were conscious about the issue of costs and referred it to the Court for determination. In other instances the agreement or consent may be silent about costs suggesting that the parties may have opted not

to pursue the issue of costs. Other consents may be express in their wording on the issue of costs such as no orders on costs or each party to bear own costs of the suit or a given party to pay costs to be agreed upon failing to be assessed by the taxing master.

In the present case the parties were clear that the Court would determine the issue. In determining the issue, the Court returns that the traditional parameters set out in the applicable law and as extensively explained by Gikonyo J in the cited case will apply.

In conclusion, the respondent will pay partial costs of the suit fixed at **Kshs.70, 000.00** by 20.12.2019 failing interest to be payable thereon at Court rates from the date of this ruling till full payment.

Signed, dated and delivered in court at **Nairobi** this **Friday, 22nd November, 2019**.

BYRAM ONGAYA

JUDGE