



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1134 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

**KENYA UNION OF COMMERCIAL, FOOD
AND ALLIED WORKERS.....CLAIMANT**

-Versus-

TUSKER MATTRESSES LIMITED.....RESPONDENT

RULING

By memorandum of claim dated 29th June 2015, the claimant, a trade union registered under the Labour Relations Act sought the following remedies against the respondent –

1. A declaration that the indefinite suspension of ninety one (91) employees of the respondent's Beba Beba Branch is unfair, unlawful, null and void and immediate reinstatement and recall to work be ordered.
2. A permanent injunction be hereby issued restraining the respondent by itself, employees, agents, servants and officers from terminating, dismissing and or declaring redundant the ninety one (91) employees of the respondent's Beba Beba Branch.
3. The court do issue such orders and give such directions as it may deem fit and just to grant to meet the ends of justice.
4. The respondent be condemned to pay costs of the suit.

The claim was filed together with an application by way of notice of motion dated 29th June 2015 under certificate of urgency seeking the following orders –

1. That the application be certified as urgent and same be heard *ex parte* in the first instance.
2. That pending the hearing and determination of this application, the respondent be restrained by itself, agents, servants and employees by a temporary injunction from terminating, dismissing or disciplining 91 of its employees from the respondent's Beba Beba Branch.
3. That the decision of the respondent suspending ninety one (91) employees of its Beba Beba Branch be lifted forthwith and the said employees do resume duty forthwith.
4. That the court do issue such orders and give such directions as it may deem fit and just to grant.
5. That the costs of this application be paid by the respondent.

Upon hearing counsel for the claimant *ex parte* on 2nd July 2015, the court made the following orders –

1. That the application be and is hereby certified as urgent and direct that the same be served on the respondent for mention on 15th July 2015 before any Judge for directions on *interpartes* hearing.

2. That pending the hearing *inter partes* on 15th July 2015, the respondent be and is hereby restrained by itself, agents, servants and employees by a temporary injunction from terminating, dismissing or disciplining 91 of its employees from the respondent's Beba Beba Branch.

The respondent filed a replying affidavit in response to the application and a statement of response in reply to the memorandum of claim on 10th August 2015.

The application was argued on 29th September 2015 and a ruling delivered on 6th November 2015. In the ruling the court lifted the suspension of the ninety one (91) employees of Beba Beba Branch of the respondent pending hearing and determination of the main suit.

On 15th November 2017, during the mention of the case for directions, parties agreed to dispose off the suit by way of written submissions. However, after consultations, parties agreed that the substratum of the case had been compromised by the ruling in respect of the interlocutory application and the only issue for determination was costs. As they were unable to agree, I directed the parties to file written submissions in respect of the issue of costs.

Claimant's Submissions

The claimant submits that the issue of costs ought to be determined by reference to Section 27 of the Civil Procedure Act 2010, which provides as follows –

27. Costs

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

It is submitted that the general rule is that Section 27 is to be applied unless there is good reason to be recorded. It is submitted that in determining the issue of costs, courts are to be guided by the following principles –

- (i) The conduct of the parties
- (ii) The subject of litigation.
- (iii) The circumstances, which led to the institution of the proceedings.
- (iv) The events which eventually led to their termination.
- (v) The stage at which the proceedings were terminated.
- (vi) The manner in which they were terminated.

It is submitted that the respondent has not expressed willingness to have the suit finalised based on the interim orders and neither has it filed an application for review or an appeal against the orders. The claimant submits that costs follow the event as the ruling of 6th November 2015 resolved the case.

The claimant referred the court to the decision in the case of **ORIX OIL (KENYA) LIMITED -VS- PAUL KABEU & 2 OTHERS [2014] eKLR** where it was held –

“...the court should have been guided by the law that costs follow the event and the plaintiff being the successfully party should ordinarily be awarded costs unless its conduct is such that it would be denied costs or the successful issue was not attracting costs. None of the deviant factors are present in this case and the court would still have awarded costs to the plaintiff, which I do.”

The claimant prays that the respondent be ordered to pay its costs of this suit.

Respondent's Submissions

The respondent submits that the suit has not been fully determined, as there is an outstanding issue on whether the suspension of the

employees was unfair, unlawful, null and void. It submitted that costs should ordinarily follow the event and the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied costs or that the successful issue was not attracting costs. The respondent relied on the case of **LITTLE AFRICA KENYA LIMITED -VS- ANDREW MWITI JASON [2014] eKLR** in which the court observed that –

“Costs are awarded to compensate the successful party for the trouble taken in prosecuting or defending the suit... Costs are (awarded at) the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force but they must follow the event unless the court has good reasons to order otherwise.”

The respondent submits that since the case has not been finally determined, no costs are due.

It is further the respondent’s submission that costs are discretionary as provided in Section 27 of Civil Procedure Act and that each party should bear its costs on the basis of the circumstances of the proceedings and the conduct of the parties to date. The respondent relied on the decision in the case of **Little Africa Kenya Limited** where the court stated –

“The court must have regard to all the circumstance, including: -

- (1) The conduct of the parties*
- (2) Whether a party has succeeded on his case, wholly or partly, and*
- (3) Any payment into court or admissible offer to settle, made by a party which is drawn to the court’s attention.*

The conduct of the parties include –

- a) Conduct before and during the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol*
- b) Whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue*
- c) The manner in which a party has pursued or defended his case or a particular allegation or issue and*
- d) Whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.”*

The respondent submits that it was justified in contesting this suit as in its opinion the suspension of the 91 employees was justified. It is submitted that the respondent complied with the orders of the court even though it was to its detriment.

It is further submitted that the respondent attended all court sessions including a mention which the claimant misled it to believe was a hearing.

Determination

I have considered the submissions of parties on the issue of costs, which is the only matter for determination, other issues in the dispute having been compromised. I must state from the outset that I do not agree with the respondent that the issue of whether or not the suspension of the 91 employees was justified is still pending for determination.

At paragraphs 14 and 15 of the ruling delivered on 6th November 2015, the court stated as follows –

“It is the Court’s considered view that the claimant/applicant has shown a prima facie case of unfair and unjust group victimization without any element of individual liability which is a classical case of unfair labour practice.

The claimant/applicant has also demonstrated that it stands to suffer irreparable harm if the employees lose their jobs unlawfully and unfairly for no valid reason and without the respondent following a fair procedure in an environment as is in Kenya today, where it is almost impossible for young persons to obtain a job.”

The findings, in my opinion are conclusive that the suspensions were unfair.

The Law

The law relating to costs in Employment and Labour Relations Court

cases is contained in Section 12 (4) of the Employment and Labour Relations Court Act, which provides that –

“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 provides as follows in relation to costs –

Rule 29

(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.

This therefore means that costs in this court do not always follow the event and that Section 27 of the Civil Procedure Act is not binding on this court in matters relating to costs but only relevant as a guide.

In his ruling of 6th November 2015, the Court ordered that costs be in the cause. Since there was no hearing and a final determination after that ruling resolved all issues, it follows that those orders became redundant.

In determining costs in this case, it is my opinion that I have to look at all factors. To start with, the claimant is a trade union. Under the Labour Relations Act, the claimant is required to commence action by reporting disputes to the Minister for Labour as provided under Section 62 of the Act. In this case, the claimant came to court directly under certificate of urgency.

The Labour Relations Act provides for the circumstances when the union may approach the court under certificate of urgency under Section 74 as follows –

74. A trade union may refer a dispute to the Industrial Court as a matter of urgency if the dispute concerns?

(a) the recognition of a trade union in accordance with section 62; or

(b) a redundancy where -

(i) the trade union has already referred the dispute for conciliation under section 62(4); or

(ii) the employer has retrenched employees without giving notice; or

(c) employers and employees engaged in an essential service.

It is the opinion of the court that perhaps the matter would have been resolved by way of conciliation had the claimant followed the procedure provided in the Act and there would have been no necessity for court action and attendant costs.

This matter having come to court under certificate of urgency irregularly and the matter having been finalised by way of the interlocutory application filed irregularly, it is my opinion that it is a matter that each party should bear its costs and I order accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF APRIL 2018

MAUREEN ONYANGO

JUDGE