REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1955 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

PATRICK WARUNGE GASHEMA.....CLAIMANT

VERSUS

MEDTRONIC COVIDEIN KENYA AG.....RESPONDENT

RULING

The claim herein was instituted vide a memorandum of claim dated 29th September 2017 and amended on 22nd November 2017. In the amended memorandum filed on 23rd November 2017 the claimant seeks orders *inter alia* a declaration that Notice of Intended Redundancy sent to the Claimant was a subtle summary dismissal. Filed together with the suit was the Claimant's Application filed under Certificate of Urgency seeking orders to suspend the Notice of Intended Redundancy issued to the Claimant.

The Court did not issue any orders when .the Claimant's Application came up for *ex parte* hearing. The Claimant was directed to serve the Respondent with the Application.

On 13 December 2017, the Respondent filed its Replying Affidavit sworn by Ms Thandiwe Masuku in opposition to the Claimant's Application in which he deposes that the Notice of Intended Redundancy was issued to the Claimant in accordance with the Employment Act 2007 and the Claimant's Contract of Employment. Further that the application was filed prematurely as no decision had been made to terminate the Claimant since consultation was still ongoing.

On 14th December 2017, the Respondent informed the Claimant that it would not proceed with the Redundancy after parties had held consultations. Subsequently, the Claimant was formally informed of the consultation outcome on 22nd January 2018 vide the letter dated 19th December 2017.

Following the filing of the claim, the Respondent, through its advocates, made proposals to the Claimant for settlement of the matter with each party bearing their own costs.

On 22nd February 2018 when the Claimant's Application was scheduled for hearing, the Claimant's advocates informed the Court that the matter is settled save for costs. The Court gave directions for parties to file their respective submissions on the issue of costs.

The only issue outstanding is therefore who should bear the costs.

It is the claimant's contention that the redundancy targeted him alone as no other employee was issued with a redundancy notice, that the proposed redundancy was not justified, was premised on discrimination, arbitrariness, malice and cavalier attitude of the respondent toward the claimant. It is submitted that the respondent had hired a replacement of the claimant, a South African and the redundancy was therefore invoked in bad faith, that the respondent terminated the redundancy process while the case was pending in court having been inconvenienced and incurred costs.

It is submitted that the claimant had a genuine reason to file the suit and the consent amounted to an event as envisaged under Section 27 of the Civil Procedure Act. It is submitted that the overture of the respondent in terminating the redundancy notice was intended to forestall the consequences of the suit, that the application had merit and the claimant has incurred expenses in filing the suit and application.

The claimant relied on the case of **MORGAN AIR CARGO LIMITED -V- ERNEST ENTERPRISES LIMITED [2014] eKLR** and **REPUBLIC -V- KHHA & 2 OTHER Ex Parte Kanyinyi Wahome [2015] eKLR.**

For the respondent it is submitted that the suit was unnecessary and premature as consultations were ongoing at the time of filing the same, that no order had been issued by the court by the time the suit and application were compromised and that the suit was overtaken by events.

The Respondent submits that ‘’*Costs follow the event*” and quotes in *ex tenso* the literally work by Justice Kuloba’s (as he then was) what the word “*event*” entails in **Judicial Hints on Civil Procedure 2nd edition at page 99** as follows;

> “*The words “the event” mean the result of all the proceedings to the litigation. The event is the result of entire litigation. It is clear however, that the word ‘event” is to be regarded as a collective noun and is to be read distinctively so that in fact it may mean the “events” of separate issues in an action. Thus the expression “the costs shall follow the event” means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it. An issue in this sense need not go to the whole cause of action, but includes any issue which has a direct and definite event in defeating the claim to judgment in the whole or in part. ”*

The respondent submits that it is entitled to the costs in this suit. The Respondent further relies on the case of **MORGAN AIR CARGO LIMITED V EVREST ENTERPRISES LIMITED [2014] eKLR** where F. Gikonyo Judge quoted the work of **David Foskett, Q.C of Gray’s Inn at page** 77 **of his book In the Law and Practice of Compromise** is relevant that;

> “*An unimpeached compromise represents the end of the dispute or disputes from which it arose. Such issues of fact or law as may have formed the subject matter of the original disputation are buried beneath the surface of the compromise. The tribunal will not permit them to be raised afresh in the context of new action.”*

The Judge qualified the quote above and stated that;

> “*But, it does not necessarily mean that, where parties have entered into consent to settle a proceeding, no costs should be awarded, or there is no successful party in the matter. The incidence of settlement by consent of the parties, to my mind, is just but a vital factor the court should consider, within the circumstances of each case, in deciding whether costs are payable or not.*
>
> *A consent recorded in settlement of a proceeding is not an automatic disentitlement of costs and I, would, therefore, hesitate profoundly to make any generalized propositions on the law that consent is an automatic disentitlement of costs without reference to the context of the particular case. There are obvious reasons I say so; the nature of settlement in the consent may determine the course of the event and, thus, the place of costs in the suit; parties may as well in the consent indicate that costs shall be borne by a particular party and I do not think that can be defeated on the argument that a settlement by consent of the parties means no party pays costs unless it is expressly stated or by implication inferred in the case. These are real legal as well as practical issues which abound in this subject.”*

Further the Respondent relies on the case of **RUFUS NIUGUNA MIRINGU & ANOR V MARTHA MURIITHI & 2 OTHERS (2012) eKLR** as quoted in the case of **MORGAN AIR CARGO LIMITED** *(supra)* where the court held thus;

> “*...in the circumstances... of the case. The Court should, therefore, look at the event within the circumstances of the case. And that exercise will inform the exercise of discretion by the Court. 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. ”*

The Respondent submits that it is entitled to the costs of this case because it is the successful party and relies on the case of **REPUBLIC -V- KENYA NATIONAL HIGHWAY AUTHORITY & 2 OTHERS EX PARTE KANYINGI WAHOME [2015] eKLR** where Justice Odunga GV held that;

> “*In determining the issue of costs, the Court is entitled to look at inter alia the conduct of the parties, the subject of litigation, the circumstances which led to the institution of the legal proceedings, the events which eventually led to their termination, the stage at which the proceedings were terminated, the manner in which they were terminated, the relationship between the parties and the need to promote reconciliation amongst the disputing parties pursuant to Article 159(2)(c) of the Constitution. In other words the court may not only consider the conduct of the party in the actual litigation, but the matters which led up to litigation, the eventual termination thereof and the likely consequences of the order for costs.”*

The Respondent submits that the filing of this suit and Application would have been avoided had the Claimant waited the outcome of the consultations and saved the parties the consequences of orders on costs. The Respondent submits that it is entitled to the costs of this suit.

The Respondent submits that its wishes for the Claimant to await the outcome of the consultations have been fulfilled by the consent of the parties that the matter is overtaken by events and therefore settled. Therefore *“the event”* for the purposes of the costs is the determination which in this case was the success of the Respondent’s contention that the suit was premature.

Determination

I have considered the rival submissions of the parties, each of them seeking costs. I have also considered the authorities cited and the circumstances leading to the settlement of the case. I have further taken into account the submissions of the counsel when they appeared before me on 22nd February 2018. The claimant had insisted on costs while the respondent had proposed a withdrawal of the suit with no orders for costs.

There is no doubt from the pleadings that the claimant had justifiable fears of his redundancy. This stems from the fact that he had received three notices of redundancy over the period between May and November 2017. He has also supplied documentation that the respondent intended to retain a national of South Africa whose work permit had been issued on the basis that the claimant was his understudy and would eventually take over from him.

I further take into account the email correspondence from Masuku Thandiwe to the claimant of 14th December 2017 in which he advised the claimant that Medtronic had decided not to proceed with the redundancy based on the claimant's responses and insight provided during the call. This discloses that it is the respondent who issued the redundancy notice prematurely before considering all relevant factors and not the claimant who filed the suit prematurely.

I am pointing out these facts not in a bid to review the evidence but to justify the claimant's justification in filing suit. I am alive to the fact that all the evidence on record was subject to proof and/or rebuttal at the hearing.

The court has further considered the provisions of Section 12(4) of the Employment and Labour Relations Court Act which provides that–

> **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.**

The court has further considered the provisions of Rule 29 of the Employment and Labour Relations Court (Procedure) Rules, 2016 which provide that –

> **(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.**

For the foregoing reasons, it is my opinion that the claimant was dragged to court by the respondent's actions which could have been avoided had the respondent engaged the claimant before issuing the redundancy notices.

I have further taken into account the fact that the compromise is in effect a win for the claimant as it achieved the very results that the claimant had sought in the claim and application.

For these reasons I find it fair and reasonable that the claimant should be reimbursed at least part of the expenses he incurred in filing the suit.

I therefor order that the respondent pays the claimant's costs for the suit to be based on the lower scale and limited to instruction fees, reimbursements and court attendances.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF JULY 2018

MAUREEN ONYANGO

JUDGE