



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

ELRC CAUSE NO. 835 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 18th December, 2018)

CONSOLATA NEKESA OTIENO

& COLLINS OMONDI ATHE (Suing on their behalf

And as Administrator and Administratrix of the Estate of

HASTINGS OTIENO ATHE (DECEASED).....CLAIMANTS

VERSUS

MANUFACTURERS AND

SUPPLIERS (K) LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimants are the administrators of the Deceased's estate and are seeking determination of the legal and factual issue as to whether the Respondent's action in failing to release the terminal benefits of the Deceased to the Claimants is legal. They sought the following reliefs:-

- a. Payment of KShs. 647,305.00;*
- b. Interest on the above at court rates until payment in full.*
- c. Costs of this suit.*
- d. Any other relief this Honourable Court shall deem fit to grant.*

2. The Respondent denies that it unlawfully failed to and/or refused to release the Deceased's terminal dues to the Claimants and instead sought the following prayers:

- a. A declaration that the Claimant's claim is premature having been filed without due notification to the Respondent.*
- b. A declaration that the Claimants are not entitled to costs of the claim.*
- c. A declaration that the Claimants' advocates be condemned to pay the costs of the Claim.*
- d. Any other relief that this Honourable Court shall deem fit to grant.*

Claimants' case

3. The Claimants aver that the Deceased had been working for the Respondent for over 20 years until 28th June 2013. The Claimants wrote several letters to the Respondents requesting for the Deceased's terminal dues but it was all in vain. The Claimants aver that the Respondent's actions are unprocedural, unlawful and amount to oppression and discrimination to the Deceased's family.

The Respondent's case

4. The Respondent avers that upon the death of the Deceased, his widow: Consolata Nekesa Otieno and his co-operative society laid claim to the Deceased's terminal benefits. In its letter dated 30th October 2013, the Respondent indicated to the Deceased's widow that it had no intention of holding onto the Deceased's benefits and advised the widow to follow due process in order to access the Deceased's benefits.

5. The Respondent further avers that the Claimants did not revert back to it from 2013 until the filing of this claim. The benefits of the Deceased could not be processed without the Claimants producing Letters of Administration, which the Claimants never produced until the filing of this claim.

6. The Respondent denies receiving the letters dated 8th November 2016 and 16th November 2017, from the Claimants' Advocates. The Respondent avers that had it received those letters, it would have requested for a copy of the Letters of Administration from the Advocates and upon receipt of the same, it would have released the Deceased's dues to the Advocates.

7. The Respondent avers that the Claimants' claim is an abuse of court process and the Court should condemn the Claimants' Advocates to pay costs of the claim.

8. On 7th August 2018, the Claimants filed a Notice of Motion Application dated 6th August 2018 seeking the following orders:

a. THAT this Honourable Court be pleased to strike out the Respondent's Memorandum filed herein and judgment be entered in favour of the Claimant against the Respondent as prayed in the Statement of Claim.

b. THAT costs of the application and of the suit be awarded to the Claimant.

9. The Application was based on the grounds that the Respondent's response was scandalous and frivolous raising no triable issues. Further, the Response filed herein consists of admission that the debt is owed and is an abuse of the court process.

10. On 27th August 2018, the Respondent opposed the Claimants' Application vide its Grounds of Opposition dated 22nd August 2018 on the following grounds:

a. The application is bad in law in that although the sum claimed is admitted, the Respondent disputes the issue of costs and interest.

b. The Respondent avers that had it been served with the letters of administration prior to the institution of this claim, it would have settled the same, but there was no such service.

c. The Respondent denies having received any notice prior to the institution of this suit.

11. On 2nd October 2018, the matter was before this Honourable Court where the Claimants' Application dated 6th August 2018 was brought to the attention of the Court. However, the Respondent argued that it had admitted the principal sum claimed but was against the payment of costs. The Respondent argued that the Letters of Administration were issued on 29th August 2017 but was not brought to the attention of the employer and had it received the Letters of Administration, it would have acted accordingly.

12. The Court ordered that it would enter judgment on the admitted amount of KShs. 647,305.00 and further ordered that the issue of cost be pursued through submission by both parties within 30 days, hence this judgment.

The Claimants' Submissions

13. The Claimants in their written submissions dated 11th October 2018 and filed in court on 16th October 2018, submitted that demand letters demanding payment were delivered to the Respondent. The Claimants further submitted that the letters were a clear indication that there was demand for payment long before the claim herein was filed in Court.

14. The Claimants submitted that the Respondent opted to ignore the demands prompting the Claimants to file the claim herein. It is the Claimants' submissions that since there was demand which was not responded to, the Claimants had no option but to proceed to file the claim. The Claimants further submitted that it is established in law that costs follow the events and the Claimants having moved the Court, are entitled to costs.

The Respondent's Submissions

15. The Respondent in its written submissions dated 5th October 2018 and filed in court on 8th October 2018, submitted that it is trite in law that costs are awarded at the discretion of the Court. The Respondent relied on ***Section 27 of the Civil Procedure Act, Cap 21 Laws of Kenya*** which provides as follows:-

[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 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 exceeding fourteen per cent per annum, such interest shall be added to the costs and shall be recoverable as such”

16. The Respondent further relied on **order 3 rule 2 of the Civil Procedure Rules** which outlines the essential documents to be filed with the Plaintiff as follows:-

“All suits filed under rule 10 including suits against the government, except small claims, shall be accompanied by:

(a) ...

(b) ...

(c) ...

(d) Copies of documents to be relied on at the trial including a demand letter before action”.

17. The Respondent submitted that it is necessary for a party who seeks costs to have served a demand letter before action in order for the Court or Judge to exercise discretion in its favour. It relied on the case of **Tread Setters Tyres Limited vs. Country Motors Limited [2009] eKLR** where the Court held that:

“The sixth issue regards costs. Who should pay the costs of the suit? Costs follow the event. Section 27 (1) of the Civil Procedure Act gives the court discretion to award costs of and incidental to the suit, to the party it deems fit. In this case the Plaintiff should be paid the costs of the suit, having given a demand and notice of intention to sue to the Defendant before filing this suit, and subsequently for having succeeded in proving its case on a balance of probabilities”.

18. The Respondent also submitted that it should not be condemned to pay costs of the claim since it did not refuse to release the Deceased’s benefits but only asked for due process to be followed. Further, had it been served with the Letters of Administration prior to the institution of this claim, it would have settled the same, but there was no such service. As such, the Honourable Court should be pleased to uphold the Respondent’s Grounds of Opposition and order that each party bears its own costs.

19. I have considered the averments of both parties. I note that letters of administration in this case were issued on 29/8/2017 and this claim was filed on 31/5/2018. The Claimants had sought payment of the deceased’s benefits from the Respondents but the Respondent advised them to produce letters of administration. They never contacted the Respondents after receipt of the letters of administration but proceeded to file this claim.

20. There is an indication that the Respondent were always ready and willing to release the deceased benefits but for lack of letters of administration. The Respondents cannot be blamed for the failure to pay out the terminal benefits of the deceased.

21. In the circumstances, I will not find the Respondents liable to pay costs of this claim. I order each party to pay its own costs.

Dated and delivered in open Court this **18th day of December, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Gaita holding brief for Ochanda Onguru for Claimant

Onyonyi holding brief for Onsando for Respondent – Present