



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 50 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

KENYA COUNTY GOVERNMENT WORKERS UNIONCLAIMANTS

-Versus-

KISUMU COUNTY ASSEMBLY SERVICERESPONDENT

AND

DENISH ODHIAMBO & 33 OTHERSINTERESTED PARTIES

R U L I N G

The Claimant Kenya County Government Workers Union filed the instant suit seeking orders of injunction to restrain the Respondent Kisumu County Assembly Public Service Board from terminating the services of the interested parties numbering 34 in number, and recruiting new staff to replace them or perform duties that the interested parties were engaged to perform before staff rationalisation and deployment to determine the availability of vacancies. The Claimant further sought an injunction restraining the Respondent from terminating the employment of the interested parties or dismissing them from service. The Claimant further sought a declaration that the actions of the Respondent contravened the constitution, the County Government Act and the Employment Act and lastly, an order directing the Respondent to first carry out staff rationalisation of staff working in the County Assembly then determine available vacancies to be advertised and filled.

Together with their memorandum of claim, the claimant filed a notice of motion under certificate of urgency seeking the following orders -

- 1) That this application be heard as a matter of urgency and ex parte in the first instance.
- 2) THAT pending the hearing and determination of this matter inter partes there do issue a temporary order of injunction against Respondent, its agents, officers or persons acting under their instruction from carrying on with any interviews scheduled for 11.3.14 to 3.4.14 or other date, recruitment or employment of any staff to the county Assembly before staff rationalization and deployment to determine the vacancies that cannot be filled by the interested parties.
- 3) THAT pending the hearing and determination of this matter there do issue an order of injunction against Respondent, its agents, officers or persons acting under their instruction from carrying on with any interviews scheduled for 11.3.14 to 3.4.2014 or other date, recruitment or employment of any staff to the County Assembly before staff rationalization and deployment to determine the vacancies that cannot be filled by the interested parties.

- 4) An order directing the respondent to first take staff rationalization of the staff working in the Kisumu County Assembly and determine vacancies that exist and thereafter place advertisements for only those positions that cannot be filled by the current staff from the claimants membership.
- 5) An injunction against the respondent from termination and/or dismissal of the claimants from their employment without following the law and their terms and conditions of employment.
- 6) Costs of this suit plus interests at court rates.
- 7) THAT costs of this application be provided.

Upon hearing the application Wasilwa J. granted the following orders -

1. The application is certified urgent.
2. A temporary injunction do issue against the Respondent, its agents, officers or persons acting under their instructions from carrying on with any interviews scheduled for 11.3.2014 to 3.4.2014 or other date, recruitment or employment of any staff to the County Assembly before staff rationalization and deployment to determine the vacancies that cannot be filled by the interested parties pending the hearing and determination of this matter.
3. Service of the Application dated 11th March, 2014 upon the Respondent be dispensed with before close of today.
4. Inter-parties hearing on 14th March, 2014.

The Respondents were unhappy with the orders and sought review of the same but their application for review was dismissed. When the case came before me on 4th June, 2015 for directions I pointed out to the parties that the orders granted on the application appear to have compromised the case as the only orders that remained for determination were also pegged on the orders that had been granted. The case was thereafter mentioned on 29th June, 2015 when the case was fixed for hearing on 9th December 2012. However on the hearing date the parties sought leave to ventilate the case by way of written submissions and directions were taken accordingly and the case was fixed for mention to confirm compliance on 29th February, 2016.

None of the parties filed submissions as directed. After several mentions on 23rd May, 23rd June and 25th October, 2016 the court was informed by counsel for the Claimant that the Respondent issued letters of appointment to all the employees affected by the orders made by the court on 11th March, 2015 and the only issue left for determination was the issue of costs.

Ms. Arony for the Respondents however submitted that it was due to the Claimant's failure to file written submissions that the Respondent was compelled to issue letters of appointment to the affected employees. She submitted that parties had been negotiating an out of court settlement but the negotiations had failed. She submitted that the Respondent proposed that the suit be withdrawn with no orders for costs but the Claimant had rejected the proposal. She submitted that it was now upon the Claimant to decide how it wished to proceed with the case.

The court directed that the parties file written submissions on the issue of costs as the claim had collapsed following the issuance of letters of appointment to the affected employees. Only the claimant filed submissions.

In the submissions the claimant states that section 27 of the Civil Procedure Act provides for costs to the party in whose favour the suit is determined. Mr. Omondi submitted that even though the Respondent did not explicitly admit the claim its conduct in issuing letters of appointment demonstrates that the Respondents admitted the claim. Mr. Omondi submitted that after being awarded costs for the applications dated 11th March, 2014 and 23rd June 2014 it is illogical not to award the Claimants

instructions fees for filing the claim for reason that the applications cannot stand independent of the claim.

It is further submitted that it took enormous effort to file the claim and to defend the application by the Respondent and it is only fair to award costs to the Claimant. The Claimant referred the court to the case of SAFE RENTALS LTD v LEISURE LODGE LIMITED T/A LEISURE LODGE HOTEL CLUB CASINO in Civil Appeal No.80 of 2009 (unreported) in which the court stated as follows:-

Under section 27(1) of the Civil Procedure Act, the award of costs is within the discretion of the trial Judge. However that discretion must be exercised judiciously so that, where the trial Judge decides not to award costs to a successful litigant, there must be good reasons to support the exercise of such discretion. In this case, there was absolutely no reason given by the judge for denying the appellant costs of the suit.

Determination

I have considered the submissions of the Claimant. I have also considered the pleadings and the record. The only issue for determination is whether in the circumstances of this case, the claimant is entitled to costs against the Respondent.

This suit is filed by a trade union and therefore falls under the Labour Relations Act. The Act provides the manner in which trade unions are to approach the court. Section 62 provides that all disputes are to be reported to the Minister in charge of Labour Matters for conciliation and it is only where conciliation fails that the case is referred to this court. The Act and Rules of this Court further provide the nature of claims that may be filed directly to court under certificate of urgency in section 74 and 75 of the Act.

The foregoing notwithstanding, section 12(4) of the Act ELRC Act provides that the court may, subject to the rules, make such orders as to costs as the court considers just. Rule 29(1) provides that in awarding costs the court will be guided by section 12(4) of the Act and the Advocates (Remuneration) order. There is no reference to the Civil Procedure Act or Rules.

In the submissions by counsel for the Claimants' he has referred the court to section 27(1) of the Civil Procedure Act. That Act is not applicable to proceedings in this court in instances where the Employment and Labour Relations Court Act or the Rules made there under specifically provide for such matter.

Rule 53 of the Advocates remuneration order provides that no fees are payable to an advocate if the plaintiff has not given notice of his intention to sue and the defendant pays the amount claimed or found due at or before the first hearing, except on special order of the Judge or Magistrate.

In the present case there was no hearing of the suit (claim). What was heard was a notice of motion filed together with the memorandum of claim, and an application to review the orders granted pursuant to the notice of motion. The case was fixed for hearing severally but was adjourned at each instance by one or other of the parties. At one time the case was adjourned on the request of the parties to attempt an out of court settlement which did not result into an agreement. The parties eventually agreed to proceed by way of written submissions but the claimant failed to file submissions even after the time for filing was extended twice.

On 22nd October, 2016, the parties agreed that the ruling made in the interlocutory application resolved all the issues in dispute as set out in the memorandum of claim. This was after the parties reported to the court that that the Respondent has indeed issued letters of appointment to the Claimant's members thus resolving the issues in dispute herein. The only issue outstanding is costs.

As provided in the Act and Rules of this court, costs are in the discretion of the court. I am inclined to exercise my discretion against granting costs to the claimant on several grounds. The first is that the suit is irregularly before this court as it did not comply with the mandatory requirements of the Labour Relations Act. Secondly, the suit did not proceed to hearing and even if I was to apply the principle in

section 27(1) of the Civil Procedure Act, that cost follow the event, (which as I have already pointed out is not applicable to proceedings in this court) I would still not award costs to the Claimant as there was no event. This case was concluded without a hearing, which is the "event" referred to in section 27(1) of the Civil Procedure Act.

The Claimant was awarded costs in both its notice of motion as well as in the application for review. No event took place in court beyond the two applications both of which terminated in favour of the Claimant with orders of costs to boot. Even if the case had proceeded to hearing, there is no guarantee that the claimant would have been awarded costs if judgment was in its favour.

For the foregoing reasons, I order that each party shall bear its costs, with exception of the costs already awarded to the claimant in respect of the applications which will be paid by the Respondent.

Ruling Dated, signed and delivered this 2nd day of February, 2017

MAUREEN ONYANGO

JUDGE