



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 46 OF 2015

BANKING, INSURANCE & FINANCE UNION (KENYA)...CLAIMANT

-VERSUS-

CAPITAL SACCO SOCIETY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 5th May, 2017)

RULING

The court delivered the judgment in the suit on 25.09.2015 and ordered thus, **“In conclusion, judgment is entered for the respondent against the claimant and the suit is dismissed with costs.”**

The claimant filed an application on 21.02.2017 under section 22 of the Employment and Labour Relations Court Act, Cap. 234B, section 5, 29, and 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and all enabling provisions of the law. The application was based on the supporting affidavit of Joseph Ole Tipape, the claimant’s 1st National Deputy General Secretary, attached on the application. The claimant prayed for orders as follows:

- a) That the court does clarify its judgment dated 25.09.2015 wherein it made an order that, **“In conclusion, judgment is entered for the respondent against the claimant and the suit is dismissed with costs,”** as to the whether the costs of the claim will be borne by the representative or the grievant.
- b) That the court does clarify that the party to bear the costs of the suit is the grievant and not the claimant.
- c) The bill of costs dated 08.12.2016 be charged on the grievant.
- d) That the cost of the application be provided for.

The grounds in support of the application are as follows:

- 1) The claimant trade union is a representative of the grievant as provided for in section 22 of the Employment and Labour Relations Court Act.
- 2) The court needs to clarify the person who bears the costs as between the grievant and the union in view of the provisions of rule 33 (1) (c) and (d) of the Employment and Labour Relations Court (Procedure) Rules.

3) That the tradition of the court is to award costs payable by the grievant if the union lost suit instituted like in the instant case.

4) The grievant was the intended beneficiary of the claim and should therefore bear the costs in the instant case.

The respondent opposed the application by filing the grounds of opposition on 08.03.2017 through Mwenda Mwarania, Akwalu & Company Advocates.

The respondent urged grounds of opposition as follows:

1) Under the provisions of section 12(1)(b) of the Employment and Labour Relations Act, 2011 the claimant is a competent independent party to a suit by or against an employer of its member or members.

2) Though the claimant may represent a party to proceedings before the court if the party is the union's member as per section 22 of the said Act, such proceedings have to be instituted in the name of the member.

3) In the instant case the union was the substantive party to the suit and should comply with the order on costs as set out in the judgment.

4) The claimant, the union, had an option to institute the suit in its member's name per section 12(1) (a) of the Act and to represent her per section 22 of the Act but instead opted to institute the case in its own name under section 12(1) (b) and is liable accordingly.

The court has considered the parties respective positions. The court finds that the points as urged for the respondent are valid and justified. The claimant trade union was the substantive party to the suit and is liable to meet the costs of the suit. The member who was desired to benefit from the judgment was not a party and could therefore not be held liable to pay the costs. The court considers that a trade union must exercise prudence in filing a suit in its name to further its member's claims so that the union would be precluded from filing suits that are vexatious, frivolous or abusive of the court process or with unlikely chances of success. The court will exercise the discretion to sparingly award costs in suits where trade unions are parties and as against employers or employers' associations with subsisting recognition and collective agreements with the union; the clear court's intention being to foster future good industrial relations between the parties and the understanding that in such circumstances, the litigation is part of the continuing bargain process between the parties. Nevertheless, the court may order costs in appropriate circumstances and the party named in the proceedings would be liable to pay the costs as per the court order.

Needless to state, if an employee is named as a claimant or respondent in the individual capacity and the union represents the employee under the said section 22 of the Act, then the employee and not the union would be liable to pay the costs; and special arrangements between the union and the employee for the union to pay costs in such cases would be administrative or as per agreement in such special arrangements to be enforced or complied as agreed and as may be necessary between the union and the employee being its member. While taking that view, it is the view of the court that the trade unions should habitually make arrangements to meet legal costs of their members who may move the court in litigious matters because without such arrangements, the spirit and purpose of trade unionism being solidarity of workers would thereby diminish as workers would be exposed to paying costs despite their having pooled funds by way of union dues and agency fees as prescribed in the law. Thus, in the opinion of the court, a relevant legislative intervention in that regard would be that the union pays costs whether the suit is in the name of the union or the member of the union and such union representing the member as envisaged in the cited section 22 of the Act.

In this case, it is clear that the union was the claimant in its own name and the union is therefore liable in that regard towards satisfying the order on costs. The court having made that clarification, the application

dated 17.02.2017 and filed for the respondent on 21.02.2017 is thereby determined. Mr. Mwenda Mwarania Advocate for the respondent and Mr. Kubai, the respondent's National Secretary General were in agreement that the application was necessary towards growing jurisprudence and law and the court returns that each party shall bear own costs. In conclusion, the application is hereby determined with a clarity that the claimant will satisfy the decree by paying the costs as ordered in the judgment and each party to bear own costs of the application.

Signed, dated and delivered in court at Nyeri this Friday, 5th May, 2017.

BYRAM ONGAYA

JUDGE