



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

JUDICIAL REVIEW NO. 7 OF 2017

(Formerly HCC No. 628 of 2008)

SCHENKER (E.A.) LIMITED.....CLAIMANT

VERSUS

KENYA SHIPPING, CLEARING AND WAREHOUSING

WORKER' UNION.....1ST RESPONDENT/APPLICANT

THE INDUSTRIAL COURT.....2ND RESPONDENT

Mr. Nyabena with Onenga for 1st respondent

M/rs Ndirangu for 2nd respondent

Mr. Akello for applicant

RULING

1. The judicial review application was filed on 13th October 2008. Grounds of opposition were filed on 16th July 2009 by the 2nd respondent and replying affidavit filed on 10th July 2009 by the 1st respondent. The applicant filed skeletal submissions on 19th August 2009.

2. A notice of motion application dated 3rd April 2014 was filed by the 1st respondent/applicant seeking in the main, the suit be dismissed for want of prosecution. Justice Aburili heard the application and delivered a ruling on 10th November 2016 in which she dismissed the application even though she found there had been inordinate delay in prosecuting the suit. The court specifically found that the delay in prosecuting the matter was occasioned by the applicant hence necessitating the hearing and determination of the application.

3. The court awarded the 1st respondent costs in the sum of Kshs.50,000/= as against the applicant to be paid within 21 days.

4. The Judge observed that the matter had already been certified to be heard by a three Judge bench and directed the file be transmitted to the Hon. The Chief Justice to constitute the Bench.

5. The suit was subsequently transferred to this court from the High Court for hearing and determination. However on 28th September 2017, Mr. Akello for the applicant submitted that the originating summons had been overtaken by events since the issue in dispute was whether the erstwhile Industrial Court was a court subordinate to the High Court and whether the Labour Institutions Act, 2007 has a lacuna in respect of appeals to the Court of Appeal and or has provisions which contravene the Constitution by denying the applicant right of appeal to the Court of Appeal.

4. The 1st respondent conceded to the withdrawal on condition that the applicant pays the costs of the suit. The applicant submitted on the other hand that the costs incurred by the 1st respondent in prosecuting this matter were satisfied by the award of costs by Justice Aburili to the 1st respondent in the sum of Kshs.50,000/=.

7. We have perused the ruling of Justice Aburili and found that those costs were specific to the application by the 1st respondent dated 3rd April 2014 on the basis that delay to prosecute the suit necessitated the application by the 1st respondent even though the court went ahead and dismissed the application to dismiss the suit for want of prosecution.

8. Section 12 of the Employment and Labour Relations Court Act, CAP 234 B of 2014, provides:

“(4) In proceedings under this Act, the court may subject to the rules, make such orders as to costs as the court considers just.”

9. In this regard, the Employment and Labour Relations Court Procedure Rules, 2016 provides:

“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.

10. Section 27 of the Civil Procedure Act, CAP 21 of the laws of Kenya provides:

“(c) subject to such conditions and limitation as may be presented 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 court or Judge and the court or Judge shall have full power to determine by when 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 reasons otherwise order. (emphasis by the court)

11. This provision has been interpreted by courts as follows: -

*In the case of **Party of Independent Candidate of Kenya –vs– Mutula Kilonzo & 2 others (2013) eKIR**; Mutende J relying on the authority of **Nedbank Swaziland Ltd –vs– Sandile Dlamini No. (144/2010) [2013] SZHC30 (2013) Maphalala J.** referred to the holding of **Murray C J in the case of Levben Products –vs– Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR)** at 227, who stated as follows:*

*“It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs is a matter in which the trial Judge is given discretion..... But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, is a rule which should not be departed from without the **exercise of good grounds for doing so.**”*

In Cecilia Karuru Ngayu –vs– Barclays Bank of Kenya & another [2016] eKLR: where the Court in determining the issue on costs had this to say:

*“Does the filing of the suit and the various steps taken by the parties and the intended resolution of this suit by recording the intended consent as aforesaid amount to an event as envisaged under **Section 27 Civil Procedure Act** cited above. Justice (Retired) Richard Kuloba in his book *Judicial Hints on Civil Procedure*, 2nd Edition, page states as follows:-*

“The words “the event” mean the result of all the proceedings to the litigation. The event is the result of the 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”

At page **101** of the same book, Kuloba authoritatively states as follows:-

“The law of costs as it is understood by courts in Kenya, is this, that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part-no omission or neglect, and no vexatious or oppressive conduct is attributed to him, which would induce the court to deprive him of his costs-the court has no discretion and cannot take away the plaintiff's right to costs. If the defendant, however innocently, has infringed a legal right of the plaintiff, the plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course”

12. In the present case, the suit has been withdrawn by the applicant on the ground that the suit has been overtaken by events by virtue of establishment of the Employment and Labour Relations Court under Article 162 (2) of the Constitution of Kenya 2010 as read with Section 14 of the Employment and Labour Relations Court Act, CAP 234 B of the laws of Kenya.

13. That in terms of Section 17 of the Employment and Labour Relations Court Act;

“Appeals from the court shall lie to the Court of Appeal against any judgment, award, order or decree issued by the court in accordance with Article 164 (3) of the Constitution.”

14. This is the remedy the applicant sought in this suit and finds no useful purpose to pursue the matter any further.

15. At the time the suit was filed in the year 2008, there was a good cause to institute the suit. The same was not frivolous or vexatious. The applicant was made to pay costs in respect of delay occasioned by the applicant to prosecute the matter.

16. It is our considered view that since there was no determination in the suit, it is fair and just to let each party bear their own costs in the matter and the court so orders.

Dated, Signed and Delivered on this 10th Day of November 2017

MATHEWS NDERI NDUMA

JUDGE

HELLEN WASILWA

JUDGE

ABUODHA JORUM NELSON

JUDGE