



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT OF KENYA AT NAIROBI
CAUSE NO. 926 OF 2013
GRACE WANJIKU NDUNG’U CLAIMANT
VERSUS
HIGHLANDS MINERAL WATER CO. LTD..... RESPONDENT

Snr Counsel Nzamba Gitonga for claimant / applicant

Miss Ajiambo for the respondent

RULING

1. The claimant/applicant brought a notice of motion application on 10th September 2015 seeking that;
 1. orders made herein on 29th July 2015 be reviewed, varied, vacated and/or be set aside;
 2. the claimant’s suit be reinstated unconditionally.
2. The application is based on the grounds set out on the face of the application and the supporting affidavits of the claimant/applicant to wit;
 - a) that the said orders directed that the applicant pay costs of Kshs.50,000, which sum the claimant/applicant cannot raise.
 - b) The said orders were made by Nzioki J., while unaware that the claimant/applicant is a dismissed former junior employee without any means of livelihood whatsoever.
 - c) That the said orders were therefore unintentionally harsh and oppressive and its effect was to chase away the claimant/applicant from the temple of justice, unheard purely because of monetary considerations, which is unconstitutional.
 - d) In any case the figure of costs being Kshs.50,000 is unjustifiable because it is not based on the Advocates Remuneration Order or any legal provision.
3. The claimant/applicant filed written submissions on 13th May 2016 in which it restated the aforesaid grounds and the sequence of events that led to the learned trial Judge on 28th October 2014 at 9.00 a.m. to

dismiss the suit at 11.00 a.m. when the matter was called out for hearing, while the claimant was seated in court but her advocates had stepped out and she did not appreciate that she should have stood up and the Judge dismissed the suit for want of appearance.

4. The advocate came in a few minutes late after the matter had been dismissed.

5. On 4th March 2015, the suit was reinstated upon application by the advocate for the claimant but on condition that the claimant/applicant pays thrown away costs of Kshs.30,000 within fourteen (14) days failing which the claim would stand dismissed. The applicant discovered this condition when the fourteen (14) days had lapsed. She could not at any rate raise the Kshs.30,000.

6. The claimant/applicant filed another application for reinstatement and once again on 29th July 2015 the suit was reinstated to hearing on condition that the applicant pays thrown away costs of Kshs.20,000 in addition.

7. The claimant/applicant submits that Kshs.50,000 represents half the unpaid salaries claimed in the suit in the sum of Kshs.99,000. The applicant submits that the court did not know that the claimant is indigent, she is poor and unemployed. She earned Kshs.33,000 per month while in employment but was now jobless for over two and half (2^{1/2}) years then and now over three (3) years.

8. That had the court reflected on this, it would have realized that the applicant is a destitute person who cannot afford her basic needs let alone the payment of costs.

9. That the firm of M/S Nzamba Kitonga & Co. Advocates is providing the claimant legal services *pro-bono*.

10. The applicant prays that the suit be reinstated unconditionally with no order as to costs.

11. The trial Judge recused himself from the matter upon delivering his ruling on 29th July 2015 in which the trial Judge made a conditional reinstatement provided the applicant paid Kshs.50,000 within fourteen (14) days of the ruling failing which the suit stood dismissed with costs to the respondent.

Response

12. The respondent filed a replying affidavit deposed to by Awa Mulindi an advocate in conduct of the suit on behalf of the respondent on 8th July 2015.

13. The respondent restates the sequence of events leading to the dismissal of the suit.

14. The respondent emphasizes that the applicant failed to meet the condition precedent to the reinstatement of the suit on two occasions without any lawful justification.

15. The respondent submits that the claimant/applicant was in default of appearance when the suit was dismissed on 29th October 2014 and when default judgement on the counter claim was entered on 15th June 2015.

16. The respondent accuses the claimant/applicant of indolence in failing to ascertain the conditions attendant to reinstatement of the suit.

17. That the delay in ascertaining the conditions precedent to the reinstatement of the suit was inordinate and inexcusable. The claimant is guilty of laches and indolence, is therefore not entitled to the exercise of the court's discretion in her favour.

18. That the respondent stands to be prejudiced should the orders sought by the claimant be allowed.

19. The respondent submits the complaint by the claimant cannot be subject of review under Rule 32 of the Employment and Labour Relations Court (procedure) Rules, 2010 but the claimant ought to file an appeal if aggrieved by the rulings and judgment of the court.

Determination

20. The only issue for determination is whether the application for review and reinstatement of the suit is merited.

21. Section 12(4) of the Employment and Labour Relations Court Act, 2011 (as amended by Miscellaneous Amendment Act No. 18, 2014) provides;

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

In this regard, Rule 28 (2) of the Employment and Labour Relations Court (procedure) Rules 2010, provides;

“the court shall not award exemplary or punitive costs.”

(Emphasis mine). This rule is couched in mandatory terms.

22. Furthermore, courts do not normally quantify costs. The amounts are left to parties and to the taxing master because there is a legal process and a schedule for determining the actual amount in terms of the Advocates Remuneration Order.

23. It is important to reflect the importance of Article 50 (1) of the Constitution of Kenya, 2010 which provides;

“every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

24. It is not lost on this court that when the trial Judge first dismissed the claimant’s suit on 28th October 2014 the claimant advocate was present in court initially at 9.30 a.m. but had stepped out after the matter was allocated time for the hearing of the claim to be 11 a.m. The advocate came back a few minutes late only to find the claimant’s suit had been dismissed and hearing of counter claim was going on.

25. The absence of the advocate was wrongly visited on the claimant/applicant who was present in court and ready for the trial when the same was allocated hearing time to be 11 a.m.

26. Given these circumstances, the punitive reinstatement of the suit by the trial Judge on 4th March 2015 subject to payment of Kshs.30,000 and later Kshs.50,000 is amenable to review in terms of Rule 32 (1) (c) and (e) of the Employment and Labour Relations (procedure) Rules 2010 which reads;

“32 (1) A person who is aggrieved by a decree or an order of the court may apply for a review of the award, judgment or ruling -

a)

b)

c) on account of the award, judgment or ruling being in breach of any written law; or

d)

e) for any other sufficient reason.”

27. It is the court's considered view that the ruling of the court on 4th March 2015 and subsequent ruling on 29th July 2015 which required the claimant to pay thrown away costs in the sum of Kshs.30,000 and subsequently Kshs.50,000 within fourteen (14) days as a condition precedent to reinstate the suit was in violation of firstly, the Advocates' Remuneration Order under which the court is not authorized to quantify costs but to let the same be determined by the taxing master and secondly, the ruling violated section 12 (4) of the Employment and Labour Relations Act, 2011 as read with Employment and Labour Relations Court (procedure) Rules 2010, Rule 28 (2) which prohibits the court in mandatory terms not to award punitive costs.

28. It cannot be disputed that the award of Kshs.50,000 was arrived at without assessment and its final effect was to shut out the claimant, a poor citizen, from the temple of justice. Not only was the claimant's suit in which she claims payment of three months salary in the sum of Kshs.99,000 dismissed without being given a hearing, but a counter claim by her previous employer was granted in favour of the respondent to her further loss and detriment without a hearing, for the reason that she was late or unable to pay Kshs.50,000 thrown away costs.

29. The aforesaid reasons are in my view sufficient for the court to review and set aside the ruling by the trial Judge delivered on 29th July 2015 and any other proceedings conducted in the absence of the claimant/applicant especially because the Hon. Judge recused himself from the matter upon delivery of his ruling.

30. In conclusion I recall the provisions of Article 159 (2) (e) of the constitution which binds all courts to protect and promote the principles of the constitution and in this regard with respect to the inalienable right to a fair hearing and equality before the law.

31. Accordingly, the court makes an order to set aside all the previous proceedings and decisions in this matter and for the hearing of the suit to start *denovo* and each party to bear their own costs.

32. The suit to be granted a hearing date on priority basis.

Dated and delivered at Nairobi this 23rd day of September, 2016

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE