

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 51 OF 2015

GRACE WAITHERA HUNGLI.....CLAIMANT

-VERSUS-

RILEY SERVICES LIMITED.....RESPONDENT

(Before Hon.Justice Byram Ongaya on Tuesday 20th December, 2016)

RULING

The court delivered the judgment in the case on 04.11.2016. Judgment was entered for the claimant against the respondent for:

- a) The respondent to pay the claimant Kshs.31,685.00 by 15.12.2016 failing interest to be payable at court rates from the date of this judgment till the date of full payment.
- b) The counterclaim is dismissed.
- c) The respondent to pay costs of the counterclaim and the claimant's suit.

The respondent filed a notice of motion on 01.12.2016 brought under section 16 of the Employment and Labour Relations Court Act, 2011 and rule 33 of the Employment and Labour Relations Court (Procedure) Rules and other enabling provisions of law. The application was based on the supporting affidavit of Jonathan Musomba attached on the application. The firm of Obura Mbeche & Company Advocates acted for the respondent, the applicant. The substantive prayer was that the court be pleased to review and or vary the judgment of 04.11.2016 by ordering that each party bears its own costs; and alternatively, the court to order that the respondent shall only bear a fraction to be specified of the claimant's costs.

The applicant's case was that there was an error on the face of the record because the claimant having failed to prove the bulk of her claim it was unjust to condemn the respondent to pay the full costs of case. It was submitted that the claimant had prayed for Kshs.201, 206.00 and she was awarded Kshs.31,685.00. It was submitted that costs follow the outcome in the suit and it was not fair that the respondent pays 100% of the costs.

The claimant opposed the application by filing her replying affidavit on 07.12.2016 through Gori, Ombongi & Company Advocates. It was submitted that the finding by the court that the costs were payable was not an error and the costs should proceed for taxation in the usual manner. The bill of costs for a sum of Kshs.217,395.00 had been filed for the claimant on 18.11.2016.

It is settled that the costs of the suit follow the event. In this case the claimant prayed for and was awarded as submitted for the applicant. On the other hand, the respondent counterclaimed for Kshs. 8, 629.92 but the same was declined as per the judgment. Thus, the claimant's margin of success was Kshs. 31, 685.00 out of a net of Kshs.192, 576.08. That gives a success margin of 16.5%.

Accordingly, the judgment would be reviewed so that the respondent pays 16.5% of the costs of the

proceedings. While making the finding the court has considered that it would be manifest injustice for the respondent to pay 100% of the costs as had been ordered and such manifest injustice, as submitted for the applicant, is such an error on record that justifies a review. Thus, the court returns that the application for review will succeed. The court has taken all the circumstances into consideration and fixes the costs at Kshs. 35, 000.00. While fixing the costs, the court has further considered that it will be in the parties' best interest that this matter comes to a close without incurring further costs through further court attendance. In conclusion, the application dated 22.11.2016 and filed 01.12.2016 will succeed with orders:

a) The judgment delivered on 04.11.2016 is hereby reviewed by deleting order (c) and substituting thus, **“The respondent to pay the claimant’s costs of the suit fixed at Kshs.35,000.00 payable by 15.01.2017 failing interest to be payable at court rates from the date of the judgment till full payment.”**

b) Each party to bear own costs of the application.

Signed, dated and delivered in court at **Nyeri** this **Tuesday, 20th December, 2016.**

BYRAM ONGAYA

JUDGE