

REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 218 OF 2013

KATIWA KANGULICLAIMANT

VERSUS

BAMBURI CEMENTRESPONDENT

RULING

BACKGROUND

The claimant has filed a Notice of Motion dated 28/11/2013 seeking this court's order compelling the respondent to furnish particulars of the claimants gratuity and show how it was calculated. He also seeks an order compelling the respondent to produce in court documents in relation to the gratuity paid to one Mugala karani Tofa W/No. 0310M/22 who retired in October 1995. The application is based on Section 20(4) of the Industrial Court Act and the affidavit of the claimant. The gist of the said motion is to have more evidence or particulars availed to enable the court make a conclusive determination of the dispute before it.

The Motion is opposed by affidavit sworn on 6/12/213 by Betty Kanyagia on behalf of the defence. The reason for opposing the Motion is that the information requested for is private and requires consent of the concerned retired employee and secondly the information is not available considering that its over 20 years since the said Mr. Tofa retired in October 1995.

ANALYSIS AND DETERMINATION

It is to be appreciated that the present Motion was filed after the close of hearing which was done by way of written submissions. The direction to proceed in that manner was reached by consent of the counsel for the two parties after they narrowed down the issues for determination. The Motion has therefore come just before the court retired to write judgment.

The court is of the considered opinion that the request has come too late in the day after the close of the hearing. In the court's view what the claimant is asking is to reopen the hearing through the back door and without securing the consent of the respondent with whose consent, the proceedings were closed by the filing of written submissions.

The court agrees with the defence that this Motion is an afterthought. If the claimant had in mind the need to rely on the evidence concerning Mr. Tofa, he should have not consented to the close hearing before calling him as his witness. He did not even file any witness statement or affidavit from the said Mr. Tofa. Secondly, the court agrees with the defence that compelling an employer to avail employment records of an employee who retired more than 20 years is unfair. The reason for the foregoing view is that the law does not burden employers with the obligation of keeping employment records for such long periods of time after retirement of an employee as in this case. Consequently the court finds and holds that the Motion before it is devoid of merit and must fail.

DISPOSITION

The Motion is accordingly dismissed with no costs.

Signed, dated and delivered this 28th day of February 2014.

O.N. Makau

Judge