



Ngugi & another v Board of Management Kenya Hospital Association t/a Nairobi Hospital (Employment and Labour Relations Cause E248 of 2021 & Cause E251 of 2021 (Consolidated)) [2024] KEELRC 279 (KLR) (16 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 279 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE
E248 OF 2021 & CAUSE E251 OF 2021 (CONSOLIDATED)**

K OCHARO, J

FEBRUARY 16, 2024

BETWEEN

CAROLINE NJERI NGUGI CLAIMANT

AND

**THE BOARD OF MANAGEMENT KENYA HOSPITAL ASSOCIATION T/A
NAIROBI HOSPITAL RESPONDENT**

AS CONSOLIDATED WITH

CAUSE E251 OF 2021

BETWEEN

IRENE JEPKOSGEI KIBET CLAIMANT

AND

**BOARD OF MANAGEMENT KENYA HOSPITAL ASSOCIATION T/A
NAIROBI HOSPITAL RESPONDENT**

RULING

Introduction

1. When this matter came up for hearing on the 20th September 2022, the Claimant in Cause No. 248 of 2021, testified as CW1, partially, due to time constraints on the part of the court. She was stood down for cross-examination for the 9th November 2022. However, on this appointed date, the cross-



- examination could not proceed as an application that needed to be canvassed first, set in. An application on the part of the then Counsel on record for the Respondent, to cease acting.
2. The application was allowed. The law firm of Kamotho Njomo and Co. Advocates was allowed to quit the record as appearing for the Respondent. Consequently, the Respondent was given leave of 14 days to appoint another Advocate in their place. The matter was then slated for hearing for the 22nd February 2023. On the 22nd February 2023, the Respondent sought for more time to instruct another Advocate. The court reluctantly granted an adjournment and allowed them 5 days to so do.
 3. When the matter last came up for further hearing of the Claimant's case, Counsel Kamotho for the Respondent indicated to court that he had on behalf of the Respondent filed a bundle of documents on the 13th July 2023, substituted witness statement by Brian Chege and two further witness statements by one Titus Kioko (dated 10th July 2023) and of Christine Mbukuli dated 12th July 2023). Further, that he had sought the consensus of Counsel for the Claimant that the documents and statements be deemed duly filed and served.
 4. Counsel Kiluva for the Claimant denied that there was any consensus to have the documents and the witness statements deemed as duly filed. He went a head to oppose the deeming, submitting that the instant suit is a test suit, that the prime witness had already testified. Further, the leave that had been granted by the court in favour of the Respondent was limited to filing of a substituted witness statement.
 5. Mr. Kiluva further submitted that looking at the new documents filed (page 279 – 287 of the Respondent's trial bundle), it is not difficult to conclude that the Respondent has been collecting evidence as the matter progresses. The documents are not even mentioned in the Respondent's pleadings.
 6. Considering the stage at which the documents are sought to be brought on board, allowing the documents and witness statements to be deemed duly on record shall prejudice the Claimants.
 7. In reaction Mr. Kamotho reiterated that on the 24th October 2023, he called his colleague, Counsel for the Claimant, and there was consensus for the deeming of the documents and witness statements as duly filed and served. Further, the witness who has already testified can be recalled for commenting on the documents.

Determination

8. No doubt, there are documents herein that were filed after the 1st Claimants' witness had testified. The documents and statements were filed almost a year after the witness's testimony. In the Respondent's submissions, I see no reason advanced as to why the documents and the further witness statements were not filed before this matter was certified as ripe for hearing, or before the hearing kicked off, and why no formal application was filed before the documents were placed on record. It was so presumptuous of the Respondent to think that the deeming of the documents and witnesses' statements as duly filed and served could be a matter of course. If courts were readily to allow moves by parties like the one being pulled by the Respondent, the importance of pre-trial steps/conference shall be withered to nothingness. Their requirement shall be as if they are for ornamental purposes.
9. Considering the point at which the documents and the witness statements are being brought on board, allowing them to be so brought shall be prejudicial to the Claimant in this suit, and the others. Therefore, I am persuaded by the Claimant's submissions.



10. The court has not lost sight of the fact that, considering the circumstances of this matter, way back the 9th November 2021, the court directed that the matter be heard on a priority basis. To direct the recalling of the Claimant who has already testified in-chief, to come and start testifying on documents, that ought to have been filed before she testified, but not filed for inexplicable reasons, shall be an act not in alignment with the intention of the court when it directed that the matter be heard on a priority basis.
11. As a result, I hereby expunge the documents in the Respondent's trial bundle at pages 279 – 287, and the two further witness statements referred to hereinabove. The only witness statement saved is the substituted witness statement.
12. The matter to proceed from where left on a priority basis.
13. Orders accordingly.

READ, DELIVERED AND SIGNED THIS 16TH DAY OF FEBRUARY, 2024.

OCHARO, KEBIRA

JUDGE

In the presence of:

Mr. Kivuva for Claimant

Mr. Kairo for Kamotho for the Respondent

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

