



REPUBLIC OF KENYA



KENYA LAW
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**Mativo v Kenya Commercial Bank [K] Limited (Cause E001 of 2021)
[2023] KEELRC 326 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 326 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E001 OF 2021
AK NZEI, J
FEBRUARY 9, 2023**

BETWEEN

BENEDICT KITHUKU MATIVO CLAIMANT

AND

KENYA COMMERCIAL BANK [K] LIMITED RESPONDENT

RULING

1. The application before me is the Claimant's Notice of Motion dated September 20, 2022. The following orders are sought:-
 - a. that the Court be pleased to strike out and/or expunge from the Court's record the Respondent's Further List and Bundle of Documents dated September 15, 2022.
 - b. that costs of the application be provided for.
2. The application is supported by the Claimant's affidavit sworn on September 20, 2022. It is deponed in the said affidavit:-
 - a. that on May 9, 2022, the Respondent sought, and was granted by the Court fourteen days to file a further list of documents.
 - b. that the Respondent filed their further list of documents on September 15, 2022, which was outside the time directed by the Court.
 - c. that the Respondent did not in any way seek leave of the Court to file their further list of documents out of time as required by procedure of the law.
 - d. that the further list of documents filed out of time by the Respondent contains alleged statements recorded by persons not in the list of witnesses filed by the Respondents and a copy



of a statement recorded by the Applicant dated September 27, 2018, which is a violation of the Claimant's right against self-incriminatory evidence.

- e. that the Respondent's actions are a breach and abuse of the Court's process, and adoption of the further list of documents will be a breach and infringement of the procedure and process of the law.
 - f. that the Applicant would suffer prejudice from the Respondent's clear manoeuvres and attempts to fish out evidence while the trial of the matter has greatly advanced.
 - g. that it is clear that the Respondent had all the documents that they purport to want to file now from way back in 2018, well before commencement of the suit herein.
 - h. that the sole aim of filing the documents is to repair the Respondent's case after discovering that their case is baseless.
 - i. that it is in the interest of justice and expeditious disposal of the suit herein that the Respondent's further list of documents dated September 15, 2022 be struck out and/or expunged from the record.
3. The application is opposed by the Respondent, which on October 3, 2022 filed a replying affidavit sworn by one Joseph K Yegon on September 30, 2022. It is deponed in the said replying affidavit:-
- a. that on May 9, 2022, Counsel for the Claimant indicated that he would oppose the admission of certain documents which were contained in the Respondent's list and bundle of documents dated September 15, 2021.
 - b. that vide a letter dated January 28, 2022, counsel for the Claimant had itemised the documents he would oppose.
 - c. that to address potential objection to admissibility, the Respondent sought and obtained leave to file certified copies of the documents, and leave was granted by consent.
 - d. that the Respondent is not introducing additional documents but only causing to be certified, the uncertified copies which had already been filed and served on the Claimant in September 2021.
 - e. that with the grant of leave, the Respondent was tasked with getting the documents certified by DCIO-Wundanyi, in whose custody the originals are. That although the Respondent immediately engaged the DCIO-Wundanyi, there was a delay in getting the documents certified.
 - f. that admittedly, the documents were filed outside the time set by the Court, but the delay was caused by the custodian of the documents, over whom the Respondent has no control.
 - g. that the Respondent did not deliberately fail or neglect to comply with the timelines, but was constantly let down by the custodian of the documents.
 - h. that the Claimant has known the documents since September 2021 and is therefore not taken by surprise, nor is he being prejudiced in any way by the delay in filing.
 - i. that the issue of admissibility of the documents will be resolved by the Court when the Respondent seeks to produce the documents.
4. Both parties filed written submissions on the application pursuant to this Court's directions in that regard, which I have considered. The twin issues for determination are whether the Respondent



complied with this Court's orders dated May 9, 2022 by adhering to the timelines set out therein, and if not, whether it has sought the Court's indulgence by application for extension of time.

5. This Court made the following orders on May 9, 2022:-

- “(1) the application for adjournment is allowed; and is marked as the last adjournment on the part of the Respondent.
- (2) the Respondent is granted leave to file and serve a further list of documents placing on record certified copies of its documents nos. 4,5,6 and 8 within 14 days of today.
- (3) Defence hearing on 26/9/2022.”

6. The Respondent did not file a further list of documents within the fourteen days' timeline set by the Court, and did not seek extension of the timelines set by the Court, if, for any reason, it was unable to file the further list of documents in time. A further list and bundle of documents dated September 15, 2022 is shown to have been filed in Court on September 16, 2022, outside the fourteen days' time ordered by the Court, and without leave of the Court. This is what provoked the filing of the present application.

7. In my view, obedience of, and compliance with Court orders is one of the central pillars of the Rule of Law. For effective judicial process and administration of justice to be realised or achieved, parties and/or litigants cannot be allowed a lee way to choose when and how to comply with Court orders and timelines set by Courts. A party failing to adhere to such timelines must, without exception, explain their delay to the Court and seek the Court's indulgence, extension of time to do what he was supposed to do within the set timelines out of time. Any document filed outside set timelines and without the Court's leave cannot lawfully be part of the Court's record, cannot be said to validly form part of the Court's record, cannot be referred to in the Court's proceedings and cannot be admitted in evidence unless and until its filing is validated by the Court. Court orders are never made in vain, they are meant to be obeyed, and a Court of law should never allow its orders to fall to the ground. Court orders must serve the purpose for which they are given.

8. The Claimant/Applicant referred to the case of *Teachers Service Commission -vs- Kenya National Union Of Teachers & 2 Others* [2015] eKLR where the Court stated:-

“A Court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open a door for chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the Court, the avenues for challenging it are also set out in the law. Defiance is not an option.”

9. The Claimant/Applicant further referred the Court to the Supreme Court of Kenya's decision in *Nicholas Kiptoo Arap Korir Salat -vs- Independent Electrol And Boundaries Commission & 7 Others* [2014] eKLR where the Court said:

“what we hear the Applicant telling the Court is that he is acknowledging having filed a “document” he calls “an appeal” out of time without leave of the Court Pursuant to Rule 33(1) of the Court's rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under Rule 53 of the Court's Rules, this Court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within



which something ought to be done, if that time lapses, one needs to first seek extension of that time before he can proceed to do that which the law requires. By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such “an appeal” is tantamount to moving the Court to remedy an illegality. This, the Court cannot do. To file an appeal out of time and seek the Court to extend time is presumptive and inappropriate. No appeal can be filed out of time without leave. Such a filing renders the “document” so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court.”

10. In my view, the foregoing position obtains in a situation where a person files a document in Court outside timelines set by an order of the Court and without the Court’s leave.
11. In the present case the Respondent does not deny having filed the impugned Further List and Bundle of Documents (dated September 15, 2022) out of time and without the Court’s leave. Indeed, the Respondent has attempted to explain the delay on its part in its response to the Claimant’s application seeking to have the impugned document, filed in Court out of time and without the Court’s leave, struck off and expunged from the Court’s record.
12. The Respondent’s Further List and Bundle of Documents dated September 15, 2022 and filed in this Court on September 16, 2022, out of time and without the Court’s leave, is not legally on record. It is invalid and an illegality.
13. Consequently, the Claimant’s Notice of Motion dated September 20, 2022 is merited and is allowed. The Respondent’s Further List and Bundle of Documents dated September 15, 2022 is hereby struck out, and is expunged from the Court’s record.
14. Each party will bear its own costs of the application.
15. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9TH FEBRUARY 2023

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....for Claimant

..... for Respondent

