



**Waithera v Haltons Pharmacy Limited (Cause 1960 of 2017)
[2023] KEELRC 832 (KLR) (13 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 832 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1960 OF 2017**

JK GAKERI, J

APRIL 13, 2023

BETWEEN

TABITHA WAITHERA CLAIMANT

AND

HALTONS PHARMACY LIMITED RESPONDENT

RULING

1. Before the court for determination is a Notice of Motion by the Claimant/Applicant dated February 12, 2023 seeking orders that:-
 1. This Honourable Court be pleased to strike out all documents filed by the Respondent on September 8, 2022.
 2. The costs of the application be in the cause.
2. The application is expressed under Rule 14(6), 10, Rule 17 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* and all enabling provisions of law and is based on the grounds set out on its face and the Supporting Affidavit of Cheryl Munda dated February 12, 2023.
3. The affiant states that the matter came up for pre-trial directions on April 6, 2022 and the Respondent had not filed its documents and on the date of hearing on May 16, 2022, the Respondent sought an adjournment which the court granted and hearing was slated for September 22, 2022.
4. That an email from the applicant's counsel to the Respondent's counsel requesting for the Respondent's documents was unresponded to as was the Claimant's invitation for settlement.
5. The affiant states that on September 15, 2022, the Respondent sent to the Claimant a list of documents and witnesses and witness statements, 7 days before the hearing and on September 22, 2022, the applicant raised the issue of the documents filed without leave of the court.



6. That at the instance of the applicant, the suit was fixed for hearing on January 17, 2023 and the applicant raised an objection on the documents and court directed the filing of a formal application.
7. The affiant deposes that the documents were filed out of time, without leave of the court and were served on September 15, 2022 and are thus irregularly on record and should be expunged.
8. That the documents were served close to the hearing to scuttle the Claimant's case.
9. That the Respondent failed to utilize the opportunity accorded to it on May 16, 2022.
10. That the application could be raised at any point before the documents are produced by the party seeking to rely on them.
11. The court was invited to look into the Respondent's mischief and strike out the documents.

Respondent's Reply

12. In its Affidavit dated February 27, 2023 sworn by Mr. John Muu Ndungo, the Respondent deposes that the application was frivolous and made in bad faith to mislead the court and the applicant had not explained the prejudice she stood to suffer.
13. That neither the Notice of Motion nor her submissions were filed on time and was extracting a speck from the Respondent's eye ignoring the log in her own.
14. That the parties were negotiating the matter as late as September 2022 and the Claimant's counsel had signalled his intention to withdraw the suit and ceased to act by application dated October 7, 2019 and notice to act in person followed on November 30, 2021 and negotiated with her until April 4, 2022 when the current law firm came on record.
15. That a proposal was received from one Jinaro Kimutai Advocate on July 27, 2022 and a trial bundle was requested and served.
16. That the Claimant led the Respondent to believe that the matter would be resolved amicably hence the delay in the filing of documents.
17. That after it became clear that a settlement was not forthcoming, the Respondent filed its trial bundle.
18. That the applicant is seeing to scuttle the Respondent's response.
19. That without the bundle, the Respondent will have nothing to rely on in its defence having declared the Claimant redundant.

Applicant's submissions

20. The Applicant's counsel identified a singular issue for determination on whether the Respondent's documents filed on September 8 should be expunged from the court record.
21. Counsel relied on Order 2 Rule 13 of the [Civil Procedure Rules, 2010](#) (CPR) to urge that pleadings must close 14 days after service of reply or defence to the counter-claim or 14 days after service of the defence.
22. Counsel submitted that the suit was filed on September 28, 2017 with all documents to enable the Respondent respond and filed a response on November 10, 2017 after which the applicant filed a reply.
23. That the Respondent had no justifiable reason not to comply with pre-trial directions.



24. Reliance was also made on Order 7 Rule 17 of the [Civil Procedure Rules, 2010](#) that pleadings filed out of time required leave of the court.
25. Order 50 Rule 6 was also relied upon to urge that the Respondent had an opportunity to seek court's leave to enlarge time to file the documents.
26. That the Respondent blatantly disregarded rules of procedure.
27. Reliance was made on the decision in *George Kamau & others V County Government of Trans-Nzoia* (2017) eKLR to underscore the essence of rules or procedure as emphasized by the Supreme Court in *Trusted Society of Human Rights Alliance V Mumo Matemu & 5 others*.
28. Counsel further relied on the provisions of Section 3(1) of [Employment and Labour Relations Court Act, 2011](#) to underscore the overriding objective of the Act.
29. The decision in *Abdirahman Abdi* also known as [Abdirahman Mubumed Abdi V Safi Petroleum Products Ltd & 6 others](#) (2011) eKLR was also cited to underline the essence of avoiding delay in civil litigation.
30. Finally, counsel submitted that the Claimant had suffered hardship, delay and justice owing to the Respondent's complacency.

Respondent's submissions

31. The Respondent's counsel identified one issue for determination, namely; whether the Respondent's trial bundle should or should not be expunged from the record.
32. Counsel relied on Article 50 of the [Constitution](#) of Kenya, 2010 to underscore the right to have disputes resolved in a fair hearing before the court by adducing evidence.
33. Reliance was also made on Article 159(2)(d) of the [Constitution](#) to emphasize that justice should be administered without undue regard to procedural technicalities. The sentiments of Marete J. in *James Mangeli Musoo V Ezeetec Ltd* (2014) eKLR were also cited to underline the essence of procedural technicalities.
34. Similarly, the House of Lords decision in *Henry B Kendall & others V Peter Hamilton* (1878) 4AC 504 was also relied upon to exemplify procedural technicalities.
35. Counsel further relied on Section 67 of the [Evidence Act](#) otherwise known as the "Best evidence rule" in documentary evidence.
36. Counsel submitted that the applicant's prayer would deprive the court the best possible evidence to assist the court in arriving at its decision.
37. Section 3A of the [Civil Procedure Act](#) was also cited on the inherent power of the court to ensure that the ends of justice are met.
38. Reliance was also made on the principle of equality of arms to urge that parties to proceedings should be accorded reasonable opportunity to present their case to the court as explained by Kimaru J. in [Rael Wambui Munyua & another V Justus Ngotho Muriuki & another](#) (2022) eKLR.
39. Finally, counsel submitted that the Claimant had not demonstrated the prejudice she stood to suffer if the Respondent's documents were not expunged from the court record.
40. The court was invited to decline the application.



Determination

41. The singular issue for determination is whether the Notice of Motion dated February 12th February, 2023 is merited.
42. It is not in dispute that the Respondent filed and served its List and Bundle of documents and List and witness statement after the close of pleadings and without leave of the court as ordained by law as clearly and succinctly submitted and illustrated by counsel for the parties.
43. The provisions of the Civil Procedure Rules, 2010 and the Employment and Labour Relations Court (Procedure) Rules are clear on close of pleadings and the ways available to a party that has not filed any document it wishes to rely on at the trial.
44. These rules and procedures are part of the law and cannot be wished away. *The Constitution* of Kenya, 2010 did not oust them. It only decreed they should not be given undue attention so as to override the ends of justice. Procedures play an indispensable role in the administration of justice.
45. It requires no emphasis that procedure is the hand maiden of substantive law.
46. The essence of compliance with procedures has been underscored in legions of decisions including by the Supreme Court in the *Trusted Society of Human Rights & Alliance V Mumo Matemu & others (Supra)*.
47. Procedures are essential and should be insisted upon at all times to the extent that they facilitate administration of justice to both parties and do not occasion prejudice to either of the parties. Courts of law on the other hand are enjoined to focus on substantive justice.
48. In this case, the Respondent filed its trial bundle a few days before the hearing date without leave of the court. Contrary to the Respondent's counsel's submissions that negotiations continued upto September 2022, that was not the case.
49. During a mention on February 1, 2022, counsel for the Respondent informed the court that the Claimant had been very unco-operative and proposed a pre-trial date in case there was no agreement for the matter to proceed to trial and a pre-trial date was given as February 14, 2022 when the Claimant confirmed her wish to have the matter settled and a further mention was scheduled for April 6, 2022. The Respondent's counsel was absent.
50. The matter had been certified ready for hearing and a hearing was slated for May 16, 2022 on which date the Respondent's counsel was not ready. Hearing was adjourned to September 22, 2022. Both counsels confirmed readiness to proceed and hearing was to commence at 12.15 pm but commenced at 11.52 am.
51. After hearing the Claimant's case, counsel for the Respondent indicated that he was not ready to proceed as his witnesses had other engagements in the afternoon.
52. The request for adjournment was opposed by the applicant's counsel but the court allowed the adjournment nevertheless.
53. The contention of the Respondent's documents arose on first January 17, 2023 the scheduled hearing date.
54. All this time, the Respondent had not informed the court that it had filed documents out of time or sought to regularize the same.
55. The issue would have been addressed early enough and perhaps obviated the instant application.



56. The Respondent counsel's non-disclosure of the fact of having filed and served documents out of time was discreditable.
57. However, the more fundamental question is whether the Respondent should be punished for the oversight of its counsel.
58. Whereas, the Respondent's counsel does not deny having filed documents out of time and without leave of the court, reliance was made on the prolonged negotiation process which argument the court has discounted elsewhere in this ruling. Counsel relied on the right to fair hearing and Article 159(2) (d) of the Constitution of Kenya, 2010 as well as the inherent power of the court to urge that the non-observance of the rules on filing was not as grave as denying his client the right to fair hearing by striking out its trial bundle.
59. In determining this issue, the court is guided by the sentiments of the Court of Appeal in Abdirahman Abdi also known as Abdirahman Mubumed Abdi V Safi Petroleum Products & others (2011) eKLR as follows;
- “ Article 159(2)(d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion.”
60. Similarly, in the words of E Obaga J in George Kamau Kimani & 5 others V County Government of Trans-Nzoia (Supra),
- “ Article 159 of the Constitution does not offer a blanket cover for all manner of non-compliances of the relevant rules. . .”
61. The court is in agreement with these sentiments.
62. In the instant suit, it is not in controversy that the Claimant's previous counsel filed an application to cease acting and the Claimant acted in person from November 2021 before the counsel on record received instructions. This occasioned delay in the progress of the matter as expressed by the Respondent's counsel on February 1, 2022.
63. Weighing the competing prejudices on the part of the parties, while granting of the application would deny the Respondent its say in court and thus impede its right to fair trial as it would deny it the evidence it seeks to rely on, disallowing the application would occasion the applicant unparticularised hardship, expense and delay.
64. Closely related to foregoing, and as stated elsewhere, courts are enjoined to endeavour to administer substantive justice in all instances unless otherwise impracticable.
65. For the foregoing reasons, the court is satisfied that striking out the Respondent's trial bundle would seriously compromise the Respondent's case and concomitantly deny the court essential evidence in its endeavour to arrive at a just decision in this matter.
66. Consequently, the Notice of Motion dated February 12, 2023 is disallowed and the Respondent's trial bundle shall be deemed to be properly on record.



67. However, in order to balance the scale of justice, the Claimant's counsel shall have leave to recall its witness, if need be, and is awarded thrown away costs of Kshs 30,000/= payable before the next hearing date.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 13TH DAY OF APRIL 2023

DR. JACOB GAKERI

JUDGE

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 Civil 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.

DR. JACOB GAKERI

JUDGE

RULING Nairobi ELRC Cause No. 1960 of 2017 Page 8 of 8

