



**Tonio v Kenya Power & Lighting Co Ltd (Cause 1359 of 2018)  
[2023] KEELRC 1802 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1802 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1359 OF 2018  
L NDOLO, J  
JULY 27, 2023**

**BETWEEN**

**ROBERT NGUGI TONIO ..... CLAIMANT**

**AND**

**KENYA POWER & LIGHTING CO LTD ..... RESPONDENT**

**RULING**

1. By my ruling dated February 9, 2023, I dismissed the respondent’s application dated January 19, 2023, seeking orders to arrest/stay delivery of judgment and to set aside the ex parte proceedings in this case.
2. Subsequent to this, the respondent filed another application dated February 28, 2023, seeking “leave to amend the statement of claim dated June 10, 2019 and to re-open the hearing of the suit.”
3. In the body of the application, the respondent sets out the following prayers:
  - a. Stay of proceedings in the underlying claim;
  - b. Leave to amend the statement of defence dated June 10, 2019 as set out in the draft amended memorandum of response to be deemed as duly filed upon payment of the requisite fees;
  - c. Upon the aforesaid amendment, review of the orders of the court made on February 9, 2023;
  - d. That the claimant be recalled for cross examination;
  - e. That the respondent be allowed to present its own witness in rebuttal of the case against it.
4. The application is supported by an affidavit sworn by the respondent’s Counsel, Kithinji Marete and is based on the following grounds:
  - a. The respondent’s defence as it presently stands does not sufficiently controvert the matters raised in the statement of claim or address the issues in controversy between the parties;



- b. The intended amendment shall therefore ensure that the litigation between the parties is conducted on the basis of true facts which the parties really and finally intend to rely on;
  - c. The absence of these facts in the statement of defence before this court is prejudicial to the Respondent;
  - d. The intended amendment shall aid the court in determining the substantive merits of the case without restricting it to the form of the action or proceedings thereby determining the issues in controversy conclusively;
  - e. The intended amendments better and more particularly plead the respondent's defence to the serious allegations made against it in the memorandum of claim;
  - f. Should the matter before the court proceed without the intended amendments, the court shall determine the suit in the absence of pertinent facts as to the process of the termination of the claimant's employment;
  - g. The Respondent did not avail itself of the opportunity to cross-examine the claimant and his evidence remains untested yet the same is wholly answered and rebutted by the matters pleaded in the amended pleadings;
  - h. The court did by its ruling of February 9, 2023, decline to re-open the hearing of the claim;
  - i. The proposed re-opening shall not embarrass or prejudice the opposite party;
  - j. The respondent is a public entity and hence the implications of proceeding without the intended amendments would be prejudicial to public interest;
  - k. No prejudice shall be suffered by the claimant which cannot be ameliorated by costs;
  - l. The respondent is ready and willing to pay to the claimant reasonable costs in the circumstances of the matter.
5. The claimant opposes the application by his replying affidavit sworn on April 28, 2023. He states that the application amounts to gross abuse of the court process.
  6. In his affidavit, the claimant rehashes the litigation journey of this case, culminating with the ruling dated February 9, 2023 by which the respondent's application seeking to set aside the ex parte proceedings was dismissed.
  7. The claimant depones that he has been dragged through this litigation for five (5) years and accuses the respondent of scuttling its conclusion contrary to article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act.
  8. The claimant asserts that the respondent has not satisfied the conditions for stay of proceedings.
  9. Further, the claimant accuses the respondent of undue delay in seeking to amend its statement of defence.
  10. By this application, the respondent seeks a mixed menu of orders ranging from stay of proceedings, leave to amend the statement of defence, review of the ruling dated February 9, 2023 to re-opening of the case.
  11. By my ruling of February 9, 2023, I declined the respondent's plea for re-opening of the case and directed the parties to file final submissions on the main claim. Instead of complying with these directions, the respondent crafted the present application, which in essence seeks the same prayers



sought in the earlier application dated January 19, 2023, the only addition being a prayer for amendment of the statement of defence.

12. As held in *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR an application for amendment of pleadings must be brought in good faith. To ask a court that has declined a plea to re-open a case for trial, to allow amendment of pleadings is to push one's luck to the wire.
13. The only thing I will say is that I have already fully rendered myself on the issues in this application and I have no reservations in reaching the conclusion that the present application is brought in bad faith and is a complete abuse of the court process.
14. The application dated February 28, 2023 is therefore struck out with costs to the claimant.
15. The Respondent has seven (7) days from the date of this ruling to file its final submissions on the main claim upon which the matter will proceed for judgment.

**DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF JULY 2023**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

**Mr. Kibera for the Claimant**

**Mr. Waweru for the Respondent**

