



**Oduori v Twenty Cube Logistics Ltd & another (Cause 19 of 2019)  
[2023] KEELRC 2288 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2288 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 19 OF 2019  
AK NZEI, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**CHARLES MDADI ODUORI ..... CLAIMANT**

**AND**

**EXCELLENT SERVICE FREIGHTERS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**TWENTY CUBE LOGISTICS LTD ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The suit herein came up for hearing on 14/3/2022 when the Claimant and his counsel attended Court. On being satisfied that the Respondent had been duly served with a hearing notice and an affidavit of service filed, I ordered hearing to proceed. The Claimant testified and closed his case. I ordered the Respondent's case closed, and directed the Claimant to file and to serve written submissions within set timelines, upon which the Respondent would also file its written submissions. The Claimant filed and served his written submissions.
2. On 13/4/2022, the Respondent filed an application dated 11/4/2022 seeking the setting aside of the proceedings taken on 14/3/2022, which I considered and dismissed vide this Court's Ruling delivered on 3/11/2022. Thereupon, the Respondent filed written submissions on the main suit, on 22/11/2022, and I delivered the Court's judgment on 2/3/2023.
3. Subsequently, the Respondent filed a Notice of Motion dated 31/5/2023, seeking the following orders:-
  - a. stay of execution pending hearing and determination of the application.
  - b. that the Court be pleased to review and/or vary the judgment delivered on 2<sup>nd</sup> March 2023.
  - c. that costs of the application be provided for.



4. The Notice of Motion, which is the application before me for consideration, is premised on the supporting affidavit of Jude Charles Okeche Advocate sworn on 31/5/2023. It is deponed in the said affidavit:-
  - a. that the Respondent filed Response to each of the prayers (made) by the Claimant, and specifically on the issue of leave pay which was responded to conclusively with attendant documents.
  - b. that the Court did not take into account the response filed by the Respondent on the claim for leave as the same formed part of the Court record on the response to claim.
  - c. that the Court (ought) to consider pleadings by parties despite the fact that a party did not testify in Court.
5. The application was opposed by the Claimant vide (a statement of) grounds of opposition dated 10/7/2023. The Claimant/Respondent stated that the application is seriously misconceived, vexatious, frivolous, bad in law and was nothing but an abuse of the Court's process. The Claimant further stated that the application is brought in bad faith and does not raise any issue or ground on the basis of which the orders sought can be granted.
6. The Claimant/Applicant further stated in his grounds of opposition that the application in its entirety offends Section 45(1) of the Civil Procedure Act as it does not disclose the discovery of a new and important matter; a mistake or error that is apparent on the face of the record.
7. I directed parties to file written submissions on the application. Counsel for the Claimant told the Court that the Claimant's grounds of opposition would serve as submissions. The Respondent filed written submissions which I have considered.
8. Section 16 of the Employment and Labour Relations Court Act provides as follows:-

“The Court shall have power to review its judgments, awards, orders or decrees in accordance with the Rules.”
9. Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules 2016 provides as follows:-

“33.

  - (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time apply for a review of the judgment or ruling—
    - (a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
    - (b) on account of some mistake or error apparent on the face of the record;
    - (c) if the judgment or ruling requires clarification; or



(d) for any other sufficient reason.”

10. In the present case, the Respondent has not satisfied or even attempted to satisfy, any of the foregoing requirements. All that the Respondent/Applicant is telling the Court is that although the Respondent did not attend Court to testify at the trial, this Court ought to have considered the Respondent’s pleadings and documents filed therewith in determining the case. To say the least, this kind of argument is absurd. Where a party fails to call evidence in support of his or her case, that party’s pleadings, witness statements or any other documents filed alongside the pleadings, or filed subsequent to the pleadings, remain mere unsubstantiated statements of fact.
11. It was stated as follows in *Trust Bank Limited -vs Paramount Uiversal Bank Limited & 2 Others* (NAIROBI [Milimani] HCCC No. 1243 of 2011), and I agree:-

“it is trite where a party fails to call evidence in support of his case, that party’s pleadings remain mere statements of facts. In so doing, the party fails to substantiate its pleadings. In the same vein, the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is unconverted and therefore unchallenged.”
12. I find no merit in the Respondent’s Notice of Motion dated 31/5/2023, and the same is hereby dismissed with costs. The interim order of stay of execution granted by this Court on 19/6/2023 is hereby vacated.
13. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28<sup>TH</sup> SEPTEMBER 2023**

**AGNES KITIKU NZEI**

**JUDGE**

