



**Nayweni & 45 others v African Shipping Limited & 47 others;
International Transport Federation & 4 others (Interested Parties) (Petition
E007 of 2022) [2023] KEELRC 2306 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2306 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
PETITION E007 OF 2022
M MBARŪ, J
SEPTEMBER 21, 2023**

BETWEEN

HILLARY IGWE NAYWENI & 45 OTHERS CLAIMANT

AND

AFRICAN SHIPPING LIMITED & 47 OTHERS RESPONDENT

AND

**INTERNATIONAL TRANSPORT FEDERATION & 4 OTHERS .. INTERESTED
PARTY**

RULING

1. The ruling herein relates to the application by the 42nd respondent, Bamburi Cement Limited dated 25 July 2023 filed under the provisions of Rule 3(1) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms Practice and Procedure Rules, 2013)* and seeking for orders that leave be granted to defend the petition herein and the Reply to Petition attached to the application be deemed as properly filed.
2. The application is supported by the affidavit of Sanjeev Khagram the advocate for the 42nd respondent and on the grounds that following the petition herein would like to file a response which is essentially the same as that of the 1st to 33rd respondents and the petitioner will not suffer any prejudice if this is allowed. There is no specific relief has been sought against any of these respondents and the petition herein is largely speculative as against them. the 42nd respondent's failure to file a response as directed by the court on or before 28 May 2023 was not deliberate but occasioned by a change of personnel in the Head of Legal and Compliance at the company and no prejudice shall be visited upon the petitioners if the orders sought are issued since its response shall be the same as that of the other respondents.
3. The other respondents and interested parties did not oppose the application.



4. The petitioners opposed the application with submissions that pleadings have since closed and the application seeking leave to file a response out of time is supported by the Affidavit of the Advocate for the 42nd respondent who aver to matters of fact contrary to the law. the facts addressed in support of the application cannot be supported by the same advocate representing the 42nd respondent and no reasons is given as to why the advocate opted to do so instead of the subject client. The 42nd respondent has listed he persons who caused the delay in the filing of the response and these are the only persons who can confirm such facts and not their advocate and hence the Supporting Affidavit is defective making the application without any support and should be dismissed with costs.
5. The 42nd respondent submitted that the application filed is supported by the advocate for the client based on facts within his knowledge and not contested and in terms of Order 9 Rule 9 of the Civil Procedure Rules and which allow the advocate to support an application based on his own knowledge in terms of the Advocates Act. the 42nd respondent had change of personnel and hence could not comply with the court directions herein to file a response within time. the respondent relied on the case of Kwacha Communications Limited & another v Pindoria Holdings Limited & another [2022] eKLR and Turea Limited t/a Dr. Mattress v Mohamed, Civil Application E030 of 2022.
6. The gist of the application by the 42nd respondent is to be allowed to file its response to the petition out of time.
7. The petitioners have moved the court by way of a petition seeking various orders and declarations premised under the Constitution, Labour Relations Act, Employment Act, Kenya Maritime Act, National Hospital Insurance Fund Act, National Social Security Fund Act, Kenya Ports Authority Act and the Workman Benefits Act (since repealed). The essence of the petition is that the petitioners are seeking for orders and declarations that;
 - a. an order of declaration be issued directing the 1st to 42nd respondents as contained in the KPA tariff of 2012 are direct payments to individual stevedore or a gang for that matter and are wages which have accrued and become due to the petitioners herein upon collection by the 44th respondent;
 - b. an order and declaration does issue that any petitioner who have been in service of any of the members of the 43rd respondent for a period exceeding 6 months be and is hereby converted to a contract employment;
 - c. an order of declaration does issue that the petitioners are entitled to the basic minimum conditions of employment as provided under Part V of the Employment Act;
 - d. an order of declaration does issue that the 43rd, 44th, 45th, 46th and 47th respondent contravened the provisions of Article 1, 2, 10, 19, 26, 27, 28, 29, 41, 43 and 47 of the Constitution in so far as they failed to carry either their private and public duties in accordance with the law and the Constitution;
 - e. an order and declaration does issue that the 1st to 42nd respondents do within 30 days of the judgment enter negotiations with the representatives of the petitioners to reach an agreement on the wages payable to the petitioners for direct services the petitioners render to the 1st to 42nd respondents;
 - f. an order of injunction does issue, to direct the 44th respondent to all secure charges from any shipping line, importer and or exporter on behalf of the petitioners and chares so secured for the services rendered by the petitioners shall be remitted to the ships contractor which



contracted the petitioners to carry that operations for the said shipping line/vessel, importer and or exporter.

- g. An order of injunction does issue that the members of the 43rd respondent do enter an agreement with the petitioners herein and file before this court the prorate adopted between them and the petitioners for sharing the charges secured in respect of the services rendered by the petitioners before such monies are remitted form the escrow account.
 - h. An order of prohibition does issue, to prohibit and stop the 44th, 45th and 46th respondents from implementing, carrying or doing anything which is prejudicial to the decision of this court.
 - i.
8. Hence, the petition as framed, the 42nd respondent directly implicated in terms of an orders and declarations seeking that there be direct payments to individual stevedore or a gang in wages which have accrued and become due upon collection by the 44th respondent and that upon judgment herein, the 42nd respondent should enter negotiations with the petitioners to reach an agreement on the wages payable to them for direct services rendered.
 9. As a petition, the procedural requirements in terms of responses ought to apply the provisions of *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 and whose overall purpose is to facilitate access to justice for all persons as required under Article 48 of the *Constitution*. a respondent, once served with a petition should be allowed a fair chance to defend the claim made against it without undue regard to technicalities but securing the petitioners’ rights to also access justice in a timeous manner.
 10. With regard to employment and labour relations, pursuant to Article 162(3) of the *Constitution*, Parliament passed the *Employment and Labour Relations Court Act*, 2011 and the *Employment and Labour Relations Court (Procedure) Rules*, 2016 (Court Rules) thereto to ensure access to justice and the attendant procedures. Under Rule 7, a party is allowed to file a Memorandum of Claim seeking the enforcement of constitutional rights and freedoms to allow the respondents attend and respond to the claims made without necessarily invoking the constitutional petition route as held in *Sumayya Athmani Hassan v Paul Masinde Simidi & another* [2019] eKLR where the court held that;

“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or the Act of Parliament, that procedure should be strictly followed”
 11. The instant application by the 42nd respondent brings out such procedural issues into perspective. Rule 7(3) of the *Court Rules* requires that;
 - (3) Notwithstanding anything contained in this Rule, a party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision in a statement of claim or other suit filed before the Court.
 12. More fundamentally, the Court Rules, allow a party to apply and seek leave to file pleadings or file further records and documents out of time for good cause. Rule 13(5) of the *Court Rules* requires that;
 - (5) The Court may, on application by a party to any proceedings, extend or reduce the time within which a responding party may respond to a pleading.
 13. Pleadings herein closed and parties were directed to address the petition by way of written submissions. The 42nd respondent, aver that due to changes in the office of head of legal and compliance, no response was filed in time and have since submitted the intended response with the instant application.



14. Under Rule 13 of the *Court Rules*, the conditions for filing a response out of time is to move the court with an application and without giving the applicant undue advantage over the petitioner, the matter being at the submissions stage and before judgment issued, such a response should not be locked out.
15. The other matter addressed by the petitioners is that the 42nd respondent's application is supported by the advocate instead of the client and hence this is irregular rendering the application defective.
16. On the affidavit filed in support of the application that was sworn by the 42nd respondent's advocate, under Rule 9 of the Advocates Practice Rules, it is not the mere swearing of an affidavit by an advocate that renders it defective, but the swearing of an affidavit on contentious issues of which the advocate has no knowledge of.
17. In the case of *Turea Limited t/a Dr. Mattress v Mobamed* (Civil Application E030 of 2022) [2022] KECA, the court held that Rule 9 of the *Advocates Practice Rules* has a proviso that expressly states that;

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.
18. The challenged Supporting Affidavit sworn by Sanjeev Khagram specifically states that he is personally aware about the failure to file the response in time and the cause of delay, to his knowledge was due to personnel changes in the head of legal department of the 42nd respondent. The Advocate has filed a draft response following instructions in the matter and attached to his affidavit.
19. The Supporting Affidavit is based on matters within the personal knowledge of the advocate for the 42nd respondent and hence properly on record.
20. Accordingly, application dated 25 July 2023 is with merit and the 42nd respondent is hereby allowed seven (7) days to file a response to the petition and serve all the parties herein to allow them a fair chance of 7 days to file any responses if found necessary and upon which, the court will give hearing directions on the main petition. Costs shall abide the outcome of the petition.

DELIVERED IN OPEN COURT AT MOMBASA THIS 21ST DAY OF SEPTEMBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

