



**Esilaba v Termitterion TCS Limited (Cause 2157 of 2017)  
[2023] KEELRC 2109 (KLR) (20 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2109 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2157 OF 2017  
JK GAKERI, J  
SEPTEMBER 20, 2023**

**BETWEEN**

**RONARD KISARA ESILABA ..... CLAIMANT**

**AND**

**TERMITERION TCS LIMITED ..... RESPONDENT**

**RULING**

1. Before the court for determination is the Respondent's Notice of Motion dated 2<sup>nd</sup> June, 2023 seeking ORDERS THAT;
  1. Spent.
  2. Leave be granted to the Applicant to file additional documents out of time.
  3. The costs of this Application be provided for.
2. The Notice of Motion is expressed under Order 50 Rule 6 of the *Civil Procedure Rules, 2010* and is based on the grounds set out on its face and Supporting Affidavit sworn by Mr. Kairima Magambo on 5<sup>th</sup> June, 2023 who deposes that during the oral hearing on 3<sup>rd</sup> May, 2023, the Claimant perjured himself by denying having received payments from the employer between 2015 and 2017 and a Notice to Produce was issued on 5<sup>th</sup> May, 2023 to produce NHIF, NSSF and KRA PAYE Statements for 2015 to 2017 and receipt of notice was acknowledged but remains unresponded to and the Respondent is apprehensive the documents will not be produced.
3. That in the circumstances, the court admits secondary evidence of payment namely copies of NSSF receipts 2015 to 2017, copies of KRA payment slips 2015 – 2017.
4. That no prejudice will be occasioned to the Claimant/Respondent if the documents are admitted as it was in the interest of justice.



## Response

5. In his Replying Affidavit, the Claimant through his counsel deposes that the Notice to Produce was received by the Claimant.
6. The affiant deposes that the Respondent had the opportunity to produce the documents he intends to produce but failed to do so during pre-trial and was trying to sneak in evidence after close of the Claimant's case when the Claimant has no right to reply.
7. That the application was served on 14<sup>th</sup> July, 2023 yet the hearing was slated for 17<sup>th</sup> July, 2023.
8. Counsel deposes that the court's power to enlarge time was not absolute and cannot be done after certain processes have been taken and the Claimant had no intention to consent to re-open the case being a 2017 matter.
9. That at the hearing, the court asked counsel for the Respondent whether he would call any witness, but he responded that he would rely on the Claimant's documents whose essence is to prevent trial by ambush.
10. The affiant urges the court to dismiss the Respondent's Notice of Motion.
11. Parties agreed that the Notice of Motion be canvassed by oral submissions.

## Applicant's Submissions

12. Mr. Eredi for the Respondent submitted that the documents he intended to avail were intended to counter the Claimant's testimony as he had not been truthful which exposed the Respondent to unjustified payments.
13. Counsel acknowledged that the Notice of Motion was late and blames the advocate who handled the matter before him and urged the court to sustain justice as the prejudice caused to the Claimant was capable of compensation by nominal costs as opposed to locking out documents.

## Respondent's Submissions

14. Counsel submitted that the Claimant filed the suit in 2017 and pre-trial was conducted in 2021 and parties confirmed readiness to proceed and before the Claimant's case was heard, counsel confirmed that he had no witness and would rely on the Claimant's documents.
15. Counsel submitted that the Applicant's counsel was taking the parties back to the pre-2010 era where trial by ambush was possible. The Supreme Court decision in *Kenya Revenue Authority v Mt. Kenya Bottlers & 4 others* (2021) eKLR was relied upon to buttress the submission.
16. Counsel further submitted that Article 159 of the *Constitution* of Kenya, 2010 does not sanction abandonment of rules as it ensures justice for both parties.
17. That the applicant had taken 6 years to file the instant Notice of Motion, which was cruel and unconscionable.
18. That enlargement of time was an equitable principle to be given only in deserving cases and the applicant had not demonstrated that he deserved it.
19. Reliance was also made on the holding in *Nick Salat v Independent Electoral and Boundaries Commission* (2014) eKLR.



20. Counsel submitted that the Notice of Motion herein was made under Order 50 Rule 6 of the *Civil Procedure Rules, 2010* yet the Claimant had not agreed.
21. Counsel prayed for the Notice of Motion to be dismissed and the case heard to conclusion.
22. In reply, counsel for the applicant submitted that his application was not too late as Order 18 Rule 10 empowered the court to recall witnesses who had testified and put questions to him as it thinks fit and Order 11 was not cast in stone as the court had discretion to vary the timelines for compliance and in this case the Claimant perjured himself.

### **Determination**

23. The singular issue for determination is whether the Respondent's Notice of Motion dated 2<sup>nd</sup> June, 2023 is merited.
24. The Respondent/Applicant is seeking leave to file "additional documents" out of time.
25. The applicant alleges that the Claimant perjured himself when he testified on 3<sup>rd</sup> May, 2023 and the "additional documents" are intended to correct the position or put the record straight.
26. It is not in dispute that the instant suit was filed on 31<sup>st</sup> October, 2017 and the Respondent filed an Amended Response to the Memorandum of Claim on 25<sup>th</sup> February, 2019 attaching a witness statement of the Respondent, Mr. Kairima Magambo.
27. On his list of documents dated 12<sup>th</sup> February, 2019, counsel for the Respondent stated that;  

"The Respondent will rely on the Claimant's documents."
28. The applicant relies on Order 50 Rule 6 of the *Civil Procedure Rules, 2010* which the Respondent's counsel faults arguing that the Order and Rule relates to enlargement of time by consent of the parties and her client. The Claimant had not consented to the enlargement of time.
29. Order 50 Rule 6 of the *Civil Procedure Rules, 2010* provides that;  

"The time for delivering, amending or filing any pleading, answer or other document of any kind whatsoever, may be enlarged by consent in writing of the parties or their advocates without application to the court."
30. Since the provision requires written consent of the parties or their advocates without the court's intervention, it is evident that the Respondent/Applicant's Notice of Motion cannot be expressed under Order 50 Rule 6 of the *Civil Procedure Rules, 2010*.
31. The foundation of the Notice of Motion must be elsewhere, Order 50 Rule 5 which provides that;  

"Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require; and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application unless the court orders otherwise."



32. Similarly, Section 95 of the *Civil Procedure Act* confer upon the court discretion to enlarge time even though the period originally fixed or granted for the doing of an act under the Act has expired.
33. Equally in *Nicholas Kiptoo Arap Koriri Salat v Independent Electoral and Boundaries Commission & 7 others* (2014) eKLR, cited by the Claimant’s counsel, the Supreme Court articulated the factors a court should consider in exercising its discretion to extend time as follows;
  - a. “Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
  - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
  - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
  - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
  - e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
  - f. Whether the application has been brought without undue delay; and
  - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
34. The explanation given by counsel for seeking extension of time to file over 100 pages of documents styled as “additional documents” is to disprove the Claimant’s testimony that he was not paying taxes or making NSSF and NHIF contributions.
35. The suit herein was certified ready for hearing as early as 4<sup>th</sup> February, 2019 when the court directed the Respondent to file a witness statement and parties were to thereafter fix a hearing date at their convenience.
36. The matter was thereafter referred to mediation.
37. A notice to show cause issued by the court *suo moto* was vacated on 25<sup>th</sup> January, 2022 at the instance of the Claimant and a hearing set for 23<sup>rd</sup> June, 2022 when the Claimant’s counsel was not present.
38. Mr. Eredi sought the dismissal of the suit but the court instead pushed the hearing to 7<sup>th</sup> December, 2022 on which date the Claimant’s counsel was initially ready to proceed but sought an adjourned which the court granted.
39. The court was not sitting on 27<sup>th</sup> February, 2023 and hearing was slated for 3<sup>rd</sup> May, 2023 by consent.
40. On that day, a Mr. Mbae appeared for the Respondent at 9.28 am when the file was placed aside in preparation for the hearing and hearing proceeded from 10.28 am in the presence of both counsels.
41. At the close of the Claimant’s case, the Respondent was not ready to proceed as his witness was absent and hearing was adjourned to 18<sup>th</sup> July, 2023 which hearing the Respondent’s counsel torpedoed by the instant application.
42. A review of the history of the case reveals that none of the parties has been extremely eager to conclude the case.
43. The non-availability of either party at different times explains the delay in having the matter concluded.



44. In his claim, the Claimant alleged that his monthly salary was ksh 18,000/= per month and was an employee from 2009 to 28<sup>th</sup> April, 2017 when he was declared redundant and had no written contract and claimed various reliefs such as three months notice pay, severance pay, underpayment for 9 years and 12 months salary for the unlawful termination.
45. In its amended response, the Respondent denied having employed the Claimant but admit having declared him redundant lawfully and was accorded prior notice and all terminal dues were paid, ksh 33,078.00.
46. Intriguingly, the Respondent decided not to file any document and was explicit that it would rely on the Claimant's documents, the redundancy notice dated 28<sup>th</sup> April, 2017, a patently unwise decision.
47. Although Mr. Eredi appears to blame the previous counsel, he was present in court on 12<sup>th</sup> November, 2021 when the Notice to Show Cause was scheduled for hearing and thus had sufficient time to evaluate his case and determine whether his defence was solid or wanting but opted to wait assess the Claimant's evidence.
48. Having prayed for severance pay and underpayment, it behoved the Respondent to avail documentation to counter these prayers. Evidence of NSSF contributions was critical. Evidence of the Claimant's gross and net salary was essential as well.
49. The "additional documents" which the Respondent's counsel is seeking leave to file ought to have been filed with the Respondent's Amended Response in 2019.
50. Significantly, the documents in question are not "additional" as no other had been filed previously. In a nutshell, the Respondent is seeking leave to file its "list and bundle of documents" camouflaged as additional documents and if leave is granted, they will be the only documents the Respondent will have on record as it had not filed any other. The contention that the law provides for the recall of witnesses cannot in the court's view avail the Respondent.
51. As regards the timing of the application for leave, it has taken the Respondent inordinately long to do so and no reasonable justification has been provided.
52. The foregoing is consistent with the sentiments of the Supreme Court in *Bwana Mohamed Bwana v Silvano Buko Bonaya* (2015) eKLR as follows;

"Courts of law litigate on factual issues. The courts look at facts. Courts will not engage in mitigating apprehensive causes and speculations."
53. The Respondent/Applicant counsel's argument that the additional documents are necessary since the Claimant perjured during the hearing, is in the court's view unpersuasive for the simple reason that witnesses routinely perjure themselves. If every time a witness perjured himself or herself, the court granted leave for the opposite party to adduce controverting evidence cases would never progress.
54. The court is not persuaded that the Respondent has discharged the burden of laying a basis for extension of time to file documents.
55. Being an equitable remedy and available to deserving applicants only, the court is in agreement with the Claimant counsel's argument that the applicant had to show that it deserved the extension.
56. As regards prejudice to the Respondent/Claimant if extension is granted, it would further delay the conclusion of a suit filed in 2017 as the Claimant would be recalled to testify or be cross-examined.



57. Guided by the foregoing position of the law, the court is persuaded and holds that the applicant has failed to demonstrate that the Notice of Motion dated 2<sup>nd</sup> June, 2023 meets the threshold for grant of leave to file documents out of time.
58. Finally, the court is in agreement with the sentiments of Oguttu Mboya J in *Neptune Credit Management Ltd & another v Dr. Jigisha P. Jani & another* (2021) eKLR as follows;
- “Be that as it may, the exercise of the discretion, for the extension and/or enlargement of time must be geared towards achieving a just and legitimate purpose. For clarity, the discretion must not be exercised in vain and/or futility.
59. In the upshot, the Notice of Motion dated 2<sup>nd</sup> June, 2023 is unmerited and it is accordingly dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20<sup>TH</sup> DAY OF SEPTEMBER 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

