



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAKURU**

**ELRC NO. 70 OF 2018**

**BONIFACE MOMANYI NYACHAE.....CLAIMANT**

**-VERSUS-**

**CANNON ASSURANCE LIMITED.....1<sup>ST</sup> RESPONDENT**

**LUCREZIA MIDEGA.....2<sup>ND</sup> RESPONDENT**

**RULING**

Before me for determination is the Respondents/ Applicants' Notice of Motion dated 13<sup>th</sup> July, 2021 brought pursuant to Section 3A of the Civil Procedure Act, Order 2 Rule 5 and Order 11 of the Civil Procedure Rules, section 13(5) of the Employment and Labour Relations Court Procedure Rules, Article 50(1) of the Constitution and all other enabling provisions seeking Order that; -

**This Honourable Court be pleased to allow the Respondent adduce an additional witness, file an additional witness statement and put in additional list of documents in the cause.**

**That the cost of this application be provided for.**

The application is supported by an affidavit deposed upon on the 13th July, 2021 by Martha Mutoro, the 1<sup>st</sup> Respondent's legal officer.

The basis upon which the Respondents seeks for the following orders is that, when the claimant filed an amended claim the Respondent advocates contacted the Respondent and an amended reply was prepared on 22<sup>nd</sup> July, 2019 together with list of documents and send to an agent in Nakuru for filling since the offices of the Respondents advocates are in Nairobi.

The Respondent's affiant avers that the said documents were never forwarded back to their advocates on record and the matter was held in abeyance due to Covid-19 pandemic till 2021 and upon perusal of the Court file it came to the attention of the Respondent's advocates that the affiants witness statement together with other documents were missing in the Court file informing the filling of this Application.

That this Application has not been filed with the intention of delaying this matter but in pursuit of justice and fair hearing.

That the Respondents will suffer immense prejudice if the application is not allowed as the respondent will be condemned unheard.

The Respondents therefore prayed for the application to be allowed for the matter to be heard on merit and that no prejudice will be visited upon the Claimant.

In response to the Application the Respondents filed grounds of opposition as follows; -

That the Employment and Labour Relations Court Procedure Rule 2016 provides that a party needs to file its list of witnesses, written statements of witnesses and documents to be relied upon before the matter is set down for hearing.

That the applicants have not offered any reasonable explanation for the delay to file the documents or witness statements.

That the applicants have not showed how they will be prejudiced if the same is not allowed.

That the court should not help indolent parties.

That the documents sought to be introduced were in custody of the Applicant all along as such it defeats logic to attempt to introduce them now.

That the instant application is aimed to delay hearing and determination of the main suit.

That the claimant will be greatly prejudiced if the said application is allowed.

The Application was canvassed by way of written submissions.

#### **Respondents/Applicants submissions.**

The Applicant submitted that this Court is empowered under the cited provisions of law to ensure justice is served upon all parties and argued that the court need not be curtailed by procedural technicalities in dispensation of justice. The Applicant then in support of their case cited the case of **Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission and Other[2013] eklr.**

It was further submitted that mistake of counsel need not be visited upon their client as was held in **Almond Resort Limited V Mohamed Mahat Kuno[ 2019] eklr.**

#### **Claimant's/Respondent submissions**

The claimant on the other hand submitted that the grounds which guides this Court in determine whether to allow the application for extension of time to file the additional documents and witness statement were laid out in the case of **Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission and 7 Other[2014] eklr.** Which include;

#### **Whether there is reasonable reason for the delay**

#### **Whether there will be any prejudice suffered by the Respondents if the extension is granted and**

#### **Whether the application was brought without undue delay.**

Accordingly it was submitted that the reason given by the applicants for the delay is not sufficient in light of the emergency of new way of filling documents through email and efilling.

On whether there will be any prejudice visited upon the claimant, it was submitted that the application herein will have the effect of delaying this matter further thus delaying the dispensation of justice contrary to the provisions of section 3 of the Employment Act.

On whether the application was filed without undue delay, it was submitted that the advocates for the applicant alleged to have discovered the missing documents during the mention which was held on 18<sup>th</sup> march, 2021 and the applicant choose to file this Application on 23<sup>rd</sup> July, 2021 about five months later which according to the respondent herein is unreasonable delay in the circumstances. In this they cited the case of **Nganya Kavole V Mailu Gedion, Misc Application No. 401 of 2018**

The Claimant concluded that the extension of time is not a right of a party but an equitable remedy that's only available to a deserving party at the discretion of the Court.

The Respondent then prayed that the application herein be dismissed.

I have examined the averments of the parties herein. It is true that the respondents have delayed in filing their documents and statement of witnesses as submitted.

It is however true that this is a court of justice and a court of equity and if the respondent applicants were allowed to file their documents, the claimants would still have an opportunity to counter file if need be and no prejudice will be suffered by the claimants.

In order to avoid miscarriage of justice, I allow this application and allow the respondents to file their intended documents within 7 days.

Costs of this application to the claimants.

**RULING DELIVERED VIRTUALLY THIS 20<sup>TH</sup> DAY OF JANUARY, 2022**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:-**

No appearance for parties

