



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NUMBER 138 OF 2016

BETWEEN

PROF. DR. DR. MONI WEKESA.....PETITIONER

VERSUS

MOUNT KENYA UNIVERSITY.....RESPONDENT

RULING

1. This Petition was scheduled for hearing orally, on 14th October 2021. The Petitioner was ready with 1 witness.
2. Respondent's Counsel Mr. Kenyatta asked Mr. Omondi to hold his brief. The Court was informed that Mr. Kenyatta was engaged in a 3-Judge Bench hearing, at the High Court in Nairobi.
3. The Court scheduled the Petition for mention at 2.30 p.m. to enable Mr. Kenyatta finish with the High Court. At 2.30 p.m. the Court was informed by Mr. Omondi that Mr. Kenyatta was still held up at the High Court, but that he had agreed the Petition, is disposed of through written submissions.
4. Parties were directed to file and exchange their submissions within a total of 28 days.
5. The Respondent has however, filed an Application dated 16th November 2021, seeking to have the orders on hearing by way of written submissions set aside, and that the Petition is heard through oral evidence.
6. The Application is supported by the Affidavit of Respondent's Advocate Mr. Kenyatta, sworn on 16th November 2021. He explains that he was involved in another hearing at the High Court, on 14th October 2021. He states that he was informed by Mr. Omondi at the end of the day, that the Court had directed the Petition proceeds by way of written submissions.
7. In the course of preparing his written submissions, Mr. Kenyatta realized that the Petition cannot be dealt with through that mode, because documents filed by the Petitioner, have not been attached to an Affidavit, but to the Petition. The documents need to be produced and subjected to cross-examination through an oral hearing. The Petition is supported by witness statement which has not been adopted as evidence. Specific claims must specifically be proved. There are complex issues which can only be properly determined on oral hearing. Complexity is underscored by the value of the subject matter- Kshs. 58.1 million. The Petitioner should prove his case in an Open Court, as required under the E&LRC [Procedure] Rules, 2016.
8. The Application is opposed through the Replying Affidavit of the Petitioner, sworn on 23rd November 2021. It has not been shown that Mr. Kenyatta was engaged in another Court, on 14th October 2021. It was agreed by the Parties, at 2.30 p.m. on 14th October 2021, that the Petition proceeds by way of written submissions. Mr. Omondi must have received instructions from Mr. Kenyatta, when he agreed to filing of written submissions. The prayer for the amount of Kshs. 58,130,895 has been explained in the Petition. The Verifying Affidavit and Further Affidavit filed by the Petitioner, adequately support the documents presented by the Petitioner. The Respondent has not specified any contested documents. The Petitioner urges the Court to dismiss the Application.

The Court Finds: -

9. On 14th October 2021, the Petitioner was ready for oral hearing. The Respondent, represented by Mr. Omondi, informed the Court that Mr. Kenyatta was held up at the High Court, in a 3 Judge Bench Hearing.

10. The Court adjourned the Petition to 2.30 p.m. Mr. Omondi informed the Court that Mr. Kenyatta was still tied up at the High Court, and that he had agreed to have the Petition prosecuted through written submissions.

11. The Court issued orders for filing and exchange of written submissions against this background.

12. Rule 7[1] of the E&LRC [Procedure] Rules, 2016, states that, a party who wishes to institute a Petition, shall do so in accordance with the Constitution of Kenya [Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution] Practice and Procedure Rules, 2012.

13. This Petition is regulated by the Rules above.

14. Rule 20[1] states that, the hearing of the Petition, shall, unless the Court otherwise directs, be by way of Affidavits, Written Submissions, or Oral Evidence.

15. The Court may upon application of the Parties, or on its own motion direct that the Petition or part thereof be heard by oral evidence.

16. Parties had agreed to proceed orally, and indeed the Petitioner was ready for such hearing on 14th October 2021, when the Respondent Counsel's absence, scuttled the oral hearing.

17. To expedite hearing thereafter, and considering that this is a Petition which was filed in 2016, the Court directed, with the concurrence of the Parties that hearing proceeds by way of written submissions.

18. Mr. Kenyatta has had a change of heart, which he says, happened when he was preparing his written submissions. He wishes to revert to oral hearing, the mode that was in place, on 14th October 2021.

19. He even offered to pay costs of Kshs. 20,000 to the Petitioner if the Application is granted. This offer was made on 9th December 2021, when the matter was last mentioned before the Court. It was made, pursuant to the Petitioner's own offer to concede to the Application, upon receipt of Kshs. 20,000.

20. The Court normally goes by the mode of hearing preferred by the Parties, whether under the E&LRC [Procedure] Rules, 2016 or the Constitution of Kenya Practice and Procedure Rules, 2012. It hardly imposes the mode of hearing on the Parties, the underpinning judicial policy being the attainment of a fair hearing for all the Parties.

21. The Respondent's Advocate may have agreed to proceeding by way or written submissions, but cannot be faulted for change of heart. Frequently, fresh details or perspectives emerge, in the course of writing submissions, which leave the author persuaded, that there is need to interrogate these details through cross-examination. In a Claim for unlawful and unfair termination, which is what this Petition is, it is always useful to let the Employer discharge its obligation on justification of termination, under Section 47[5] of the Employment Act. The Petitioner claims through his Petition that he was wrongfully retrenched; and his right to fair labour practices was violated. He seeks orders of reinstatement, compensation, damages and terminal benefits. It is in the view of the Court, in the interest of justice, to have the Respondent justify termination, through the mode of hearing the Respondent feels justification can be achieved.

22. The Court notes that the Petition was filed in 2016; delay has been occasioned in part by vacillation on the part of the Respondent on the mode of hearing; and the Respondent has offered to pay Kshs. 20,000 to the Petitioner, as cost of the Application.

IT IS ORDERED: -

a. The Application seeking review and setting aside of the orders made on 14th October 2021 is allowed.

b. Costs of Kshs. 20,000 to the Petitioner.

c. Parties to obtain a hearing date from the Registry on a priority basis.

Dated, signed and released to the Parties electronically, at Nairobi, under the Ministry of Health and Judiciary Covid-19 Guidelines, this 18th day of February, 2022.

James Rika

Judge