



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO.E662 OF 2020**

**ALFRED BAYA MSANZU.....CLAIMANT**

**VERSUS**

**KENYA PORTS AUTHORITY.....RESPONDENT**

**RULING**

1. When the suit herein came up for mention for pre-trial directions on 21<sup>st</sup> September 2021, counsel representing the parties herein told the Court that both parties had complied with earlier orders on filing of documents and had filed their respective documents. Indeed, both counsel asked the Court to fix the suit for hearing. The Court, however, could not allocate a date for hearing of the suit on the said date as the Court's diary for the year 2021 had already been closed. Consequently, the suit was fixed for mention on 8<sup>th</sup> November 2021 for purposes of fixing a hearing date.

2. On 8<sup>th</sup> November 2021, counsel for the Claimant sought, and was granted leave to file a further witness statement by the Claimant. The Respondent did not object to the application, and the Court gave Orders as follows:-

- a) The claimant was granted leave to file and serve a further list of witnesses and witness statement within 7 days.
- b) The Respondent was granted leave to file a further list of witnesses and witness statement within 7 days of service, if need be.
- c) The suit was fixed for hearing on 19/1/2022.

3. It is worth noting that the Respondent did not, on 8<sup>th</sup> November 2021, give any indication that it intended to file any further documents.

4. When the matter came up for hearing on 19<sup>th</sup> January 2022, counsel for the Respondent orally applied for leave to file an additional document. The oral application was opposed by counsel for the Claimant, and the same was declined by the Court. The Respondent was, however, put at liberty to file a formal application which would, of course, be determined on merit. Hearing of the suit was ordered to proceed (on 19<sup>th</sup> January 2022) as scheduled.

5. The claimant, who appeared in court on a wheel chair, testified. He was cross-examined by counsel for the Respondent and was subsequently re-examined by his counsel.

6. The claimant called one witness, who also testified and was cross-examined by counsel for the Respondent. The Claimant's case was thereupon closed. Hearing was adjourned by the Court at 4.14pm (on 19<sup>th</sup> January 2022), and the suit was fixed for defence hearing on 9<sup>th</sup> February 2022.

7. On 24<sup>th</sup> January 2022, the Respondent filed the Notice of Motion dated 21<sup>st</sup> January 2022 seeking Orders, *inter alia*:-

- a) **that the Respondent be granted leave to file a supplementary list of documents after the close of pleadings to introduce a payment slip for two months' salary in lieu of notice paid to the claimant.**
- b) **that the supplementary list of documents annexed to the application be deemed as properly filed upon payment of the requisite court filing fees.**
- c) **that the application be heard on priority basis before the hearing of the case is closed.**

8. The application is based on a supporting affidavit of STEPHEN KYANDIH sworn on 21<sup>st</sup> January 2022 and filed together with the application. No tenable or valid reason has been given in the application as to why the document sought to be introduced after closure of the claimant's case was not filed before pre-trial directions were taken under Rule 15 of the Employment and Labour relations Court (Procedure) Rules 2016, or at least before the date scheduled for hearing of the suit.

9. The said deponent deponed, *inter alia*:-

- a) that the Entire Earning History of the Claimant was filed by the Respondent in the understanding that all payments made to the Claimant by the applicant (Respondent) would be captured therein, but the Earning History shows payment to Claimant only while he was an employee of the applicant; and not after his retirement.
- b) that whereas the claimant retired on 6<sup>th</sup> September 2019, his 2 months' salary in lieu of notice was processed and paid through his Bandari Sacco account on 5<sup>th</sup> February 2020 after his letter of retirement had been received by his wife.
- c) that the Respondent (applicant) has now obtained the document showing this payment from its finance department.
- d) that it was while preparing for the hearing on 19<sup>th</sup> January 2022 that counsel for the Respondent learnt that the Entire Earning History of the Claimant did not entail the payment made to him in lieu of notice.
- e) that the delay in filing the document before closure of proceedings was not intentional and is excusable.
- f) that under Rule 38 of the Employment and Labour Relations Court (Procedure) Rules, the Court has power to regulate its own procedure.
- g) that no party will suffer prejudice if the application is allowed.

10. The application is opposed by the Claimant/Respondent, ALFRED BAYA MSANZU, who swore a Replying Affidavit on 28<sup>th</sup> January 2022 and deponed, *inter alia*, as follows:-

- a) that the application is based on untruths, is an attempt to derail the course of justice and is an afterthought cover-up on loopholes evident after the claimant testified and closed his case on 19/01/2022.
- b) that the suit was mentioned in court on 15/03/2021 and 01/04/2021 where the Respondent was granted 21 days to fully comply with pre-trial directions.
- c) that the Respondent/Applicant, through the Advocates on record, appeared later on several mentions being on 21/4/2021, 07/07/2021 and 21/09/2021, and on those occasions the Respondent/Applicant never mentioned the existence of the alleged payslip document, and neither did the Respondent/Applicant utter any intention of having such a document in her possession.
- d) that on 08/11/2021, the matter was mentioned for purposes of taking a hearing date and leave was granted to parties to file witness statements and/or documents, which leave the Respondent/Applicant failed to utilize by filing any further statements and/or additional documents as alleged to be in her possession.
- e) that the Respondent/Applicant has had over one (1) year and deliberately waited to introduce a disputed document which is detrimental to the Claimant's case after the claimant has given his evidence.
- f) that the Claimant never received any payment from the Respondent/Applicant after it retired him, contrary to the allegations made in the Respondent/Applicant's affidavit.
- g) that the Claimant stands to be greatly prejudiced should the orders sought be granted.

11. Parties herein have filed written submissions on the Respondent/Applicant's application pursuant to the court's directions in that regard, which I have considered.

12. I must point out that parties to any litigation are the masters of their respective cases. It is their duty to draw and file proper pleadings and to prepare and to present in court such evidence as they believe would prove their respective claims and aid the court in arriving at a fair and just determination of the case. Filing of pleadings and presentation of evidence is, however, not an endless journey. The process is regulated by the Court and rules of procedure. Rule 38 of the Employment and Labour Relations Court (Procedure) Rules 2016 provides:-

***“subject to these rules, the Court may regulate its procedure.”***

13. In exercise of its mandate to regulate its procedure, this court severally, and particularly on 21<sup>st</sup> April 2021, 25<sup>th</sup> May 2021 and 7<sup>th</sup> July 2021 respectively, patiently gave the Respondent time to comply with pre-trial directions by filing all its documents.

14. When the matter came up for pre-trial directions before me on 21<sup>st</sup> September 2021, counsel for the Respondent told the court that the

Respondent had filed its documents, and had served the same on the claimant. He prayed for a hearing date as did counsel for the claimant. There being no available dates on the court's diary for the year 2021, the Court fixed the suit for mention on 8<sup>th</sup> November 2021 for purposes of fixing a hearing date.

15. On 8<sup>th</sup> November 2021, as the Court fixed the suit for hearing, counsel for the Claimant sought leave to file a further witness statement on behalf of the claimant. Counsel for the Respondent sought corresponding leave to file a further witness statement if need be. The court granted leave to both parties to file further witness statements; the claimant within seven days of the Order and the Respondent within seven days of service, if need be. The suit was fixed for hearing on 19<sup>th</sup> January 2021.

16. The Respondent/Applicant failed to exercise due diligence in the filing of its documents. It is clear from the affidavit sworn in support of the Respondent/Applicant's application that the document sought to be introduced has always been in the Respondent/Applicant's possession and custody. The document is highly disputed by the Claimant, who has since testified, been cross-examined by the Respondent/Applicant's counsel and re-examined. The claimant's witness has also testified and was cross-examined by counsel for the Respondent/Applicant.

17. If the document in issue is allowed to be introduced at this stage of the trial, the claimant will not have an opportunity to question its contents and validity, and will therefore not be heard on the same. The claimant will stand prejudiced and condemned unheard as far as the document in issue is concerned should the court make a finding against the claimant based on the said document.

18. In his written submissions, counsel for the Respondent referred the Court to the Court of Appeal decision in the case of KIAI MBAKI & 2 OTHERS –VS- GICHUHI MACHARIA & ANOTHER [2005] eKLR where the Court stated:-

*“ the right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”*

19. In the KIAI MBAKI case (supra), the Court of Appeal referred to its earlier decision in the case of MATIBA-VS- ATTORNEY GENERAL [1995-1998] EA192 where the Court had stated:-

*“...There was thus an order on record in the presence of Counsel for the appellant but without affording him an opportunity to address the judge. This was a fundamental breach of the rule that no man shall be condemned unless he has been given a fair opportunity to be heard, which is a cardinal principle of natural justice. Any order that flowed from such a fundamental breach cannot be sustained.”*

20. The foregoing edicts of the Court of Appeal favour the Claimant in the present application than they do the Respondent/Applicant. This is because whereas the Claimant's case stands heard and closed, the Respondent/Applicant's case is yet to be opened. The Respondent/Applicant has its full opportunity to be heard. Indeed, the Respondent/Applicant's defence case is fixed for hearing on 9<sup>th</sup> February 2022. The Respondent will have its day in Court.

21. In view of all the foregoing, the Respondent's Notice of Motion dated 21<sup>st</sup> January 2022 is devoid of merit; and is hereby dismissed with costs to the claimant. Defence hearing shall proceed as scheduled.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9<sup>TH</sup> DAY OF FEBRUARY 2022**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Ganzala for Claimant

Mr. Cheruiyot for Respondent