REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. E583 OF 2021

(Before Hon. Justice Dr. Jacob Gakeri)

ALICE WANGUI MWANGI.....CLAIMANT/APPLICANT

VERSUS

LOXEA LIMITED.....RESPONDENT

RULING

1. By a notice of motion application dated 6th January 2022 filed under certificate of urgency, the Claimant/Applicant seeks orders, **THAT**:

(1) This application be certified urgent.

(2) This Honourable Court does direct that this matter do proceed to full hearing.

(3) Upon granting order (2) herein above, this Honourable Court does direct that a hearing date be issued on priority basis.

(4) This Honourable court does direct that this matter be dispensed with by way of written submissions.

(5) This Honorable court be further pleased to make such other interlocutory orders as may appear to the Court to be just and convenient.

(6) Each party to bear their costs.

2. The notice of motion is expressed under Sections 1(A) and 3(A) of the Civil Procedure Act, Rule 17 and 21 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and all other enabling provisions.

3. The application is supported by the annexed affidavit of the Applicant:

(i) That the present Cause No. E583 of 2021 was filed on 22nd July 2021 and service effected and the Respondent entered appearance on 19th August 2021.

(ii) That on 11th October 2021, the Applicant was invited to attend a conference in Vancouver, Canada slated for 26th February, 2022 to give lectures in her area of expertise to delegates from across the world and as a result made an application for residency acknowledged on 15th October, 2021 and subsequently submitted her biometric data.

(iii) That arising out of deliberations with the High Commission of Canada, the prospects of obtaining residency are high and likely to be approved in early 2022.

(iv) That the foregoing evidence meets the threshold for

the grant of this application.

(v) THAT it would be prejudicial, unfair and violation of principles of natural justice to actualize the imminent immigration with the egregious injustice of being unfairly terminated hanging over her head.

(vi) THAT the parties to the suit have filed their documents and the same is ready for hearing.

(vii) That the Respondent will suffer no prejudice of the orders sought as it is in its best interest for the matter to be disposed of expeditiously.

(viii) That the issues raised in the memorandum of claim are not complex for a full hearing and may proceed by way of written submissions.

(ix) The Court has jurisdiction to issue the directions sought.

4. The Respondent's replying affidavit is sworn by PAUL NAMU, who depones that he is the Team Leader – Collections Department of the Respondent and well acquainted with the matters in dispute.

5. He depones that the Applicant is falsifying information and adducing untrue statements in Court and had not supplied sufficient evidence of the alleged immigration to Canada to make a case for a hearing on a priority basis other than the two day conference.

6. That the residency sought is temporal and is yet to be approved by the relevant authorities in Canada and it is unclear when approval will be granted and the Applicant will suffer no prejudice if the matter followed the normal Court process.

7. The Respondent vehemently objects to the suggestion that the matter be disposed of by way of written submissions and avers that the suit proceeds to full hearing.

8. That even if residency is granted, hearing can proceed virtually failing which the Court has jurisdiction to give dates convenient to the parties since the travel to Canada is for a short time.

9. The Respondent prays for dismissal of the application with costs.

10. In response to the Respondent's replying affidavit. the Applicant filed a further affidavit stating *inter alia* that:

a) The deponent of the affidavit had no standing to adduce evidence in court.

b) The invitation to the conference was only revealed to

validate the Applicant's credentials in her area of expertise.

c) The conference had since been rescheduled to April 2022.

d) The delay in approval of the immigration was occasioned by Covid-19, as acknowledged by the Canadian Immigration Services as well as a lockdown in Canadian.

e) The 8 hour time difference, cost implications and inconvenience militates against a hearing as proposed by the Respondent.

f) The Respondent does not demonstrate any prejudice it will suffer if the application is allowed.

g) No costs have been prayed for.

Submissions

11. The Applicant identifies two issues for determination: -

i) Whether the Applicant has established a case necessitating hearing on priority basis;

ii) What prejudice stands to be suffered by either party if the application is allowed.

12. On the first issue, the Applicant contends that he has put forward a case that not only meets but exceeds the threshold as exemplified by the supporting affidavit dated 13th December 2021 as well as the further affidavit of the impending immigration of the Applicant to Canada. That the Applicant would be residing in Canada but for the COVID-19 pandemic. That a hearing will delay her justice contrary to Article 159(2)(b) of the Constitution of Kenya 2010.

13. It is further submitted that a virtual hearing as suggested by the Respondent would be impracticable due to the 8-hour time difference and cost implications. Reliance is made on the overriding objective under Section 1A of the Civil Procedure Rules.

14. On the second issue, it is submitted that it would be impractical to conduct a hearing and the Respondent stands to suffer no prejudice if the matter proceeds by way of written submission as proposed by the Applicant.

15. Reliance is made on the decision in **M'kubania Ndwara v Caterina M'ibui & 4 others [2016] eKLR** where an application was allowed

as it was not prejudicial to any of the parties. The decisions in **Teachers Service Commission v Muchiri Kiraithe [2021] eKLR** and **Jim Rodgers Gitonga Njeru v Al-Husnain Motors Limited & 2 others [2018] eKLR** were also relied upon.

16. The Respondent on the other hand identities two issues for determination, namely whether:

(i) The suit is ready to proceed to full hearing;

(ii) The Applicant has established a case necessitating expedited hearing of the suit.

17. On the first issue, the Respondent relies on Order 11, Rule 3 of the Civil Procedure Rules, 2010 to urge that the case management contemplated by the order is yet to be complied with, that the Respondent has not filed its list of issues and the case management check list. The decision in **Josephine Ndenyi v Vishak Builders Ltd [2015] eKLR** is relied upon to buttress the submission and urge that the suit is not ready for hearing.

18. As regards the second issue, it is submitted that no urgency has been demonstrated. That the impending immigration has been pending since last year and there is no indication of when it is likely to be granted thus the application is premature.

19. It is further submitted that virtual hearings have been conducted successfully and no prejudice will be suffered if the hearing is virtual. That there has been no delay in the dispensation of justice since the Applicant is yet to comply with the provisions of the Civil Procedure Rules, 2010 and the suit is not ready for hearing.

20. Reliance is made on Article 50 of the Constitution of Kenya, 2010 to underscore the right to a fair hearing which must be balanced against the need for expediency and efficiency as explained by Aburili J. in **Josephine Ndenyi v Vishak Builders Ltd (supra)** to oppose the proposal to dispose of the matter by way of written submissions.

21. The Respondent prays for dismissal of the application with costs.

Analysis and Determination

22. I have considered the application, supporting and replying affidavits as well as submissions by Counsel. The singular issue for determination is whether the Applicant has demonstrated the necessity of having the case heard on priority basis.

23. This is an employment claim where the Claimant/Applicant prays for various reliefs for breach of contract, unfair and unprocedural termination, unfair labour practices, violations of rights and fundamental freedoms and unfair administrative action.

24. The Claimant alleges that she was employed by the Respondent on 5th December 2011 and on or about 25th March 2021, she received a letter informing her that she had been declared redundant with 31st March 2021 as the last working day and employment would cease on 30th April 2021.

25. That on 16th April 2021, the Claimant received a notice to show cause and was invited for a disciplinary hearing which took place on 22nd April 2021 and was dismissed by letter dated 3rd May 2021.

26. The Respondent entered appearance on 19th August 2021 and filed a memorandum of reply on the same day.

27. It admitted change of name from Tsusho Capital Kenya Limited to Lorea Limited.

28. The Respondent admits that it had initially declared the Claimant redundant but subsequently opted to dismiss her on account of gross misconduct in that she had unlawfully discharged three (3) motor vehicle log books without prior authorisation from the Respondent since the customers had not cleared their loan balances.

29. The Claimant filed her witness statement dated 22nd July 2021, list of issue, pre-trial questionnaire, copies of letters on payment of terminal dues, minutes of the disciplinary hearing appeal against dismissal and other documents.

30. This is the suit the Claimant/Applicant seeks to fast track in light of her impending immigration to Canada. The Applicant relies on the inherent jurisdiction of the Court to ensure that justice is done as anticipated by parties who file matters in Court.

31. Article 159(2) of the Constitution of Kenya, 2010 provides that:

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) …;

(b) justice shall not be delayed;

32. In the words of Aburili J. in **Josephine Ndenyi v Vishak Builders Ltd (supra)**

> *"Thus, the Constitution acknowledges that delayed justice is denied justice. Nonetheless, it must further be appreciated that some cases have some unusual urgency and therefore deserving a priority hearing. But such early hearing must not disregard the procedure set down by the Civil Procedure Rules that must be complied with before a matter is set down for hearing. Those procedures are necessary for effective hearing of matters and are not mere technicalities capable of being ignored."*

33. The essence of expeditious disposal of suits was underlined by the Court of Appeal in its decision in **Japheth Pasi Kilonga & 8 others v Mombasa Autocare Limited [2015] eKLR** as follows –

> *"The single most drawback in the administration of justice in this jurisdiction is the delay in the determination of cases, resulting in the overwhelming case backlog. Adjournment has been identified as the leading contributing factor to this."*

34. The Court cited with approval the words of Lord Denning, in **Fitzpatrick v Batger & Co. Ltd (1967) 2 A11 ER 657** as follows;

> *"Public policy demands that the business of the courts should be conducted with expedition."*

35. Disposal of cases expeditiously is undoubtedly an overriding principle in the administration of justice and as mentioned above, has been legislated variously including by the Constitution of Kenya, 2010. It is the core of the sagacious maxim that delay defeats equity.

36. In **Josephine Ndenyi v Vishak Builders Ltd (supra)**

Aburili J. expressed herself as follows:

> *"It is not disputed that the plaintiff sustained very serious injuries and this court empathizes with her condition. However, due process of law is the landmark and hall mark of our legal system, requiring that the courts ensure both parties have their day in court.*
>
> *In the end, I find that the application by the plaintiff though commendably intended to expedite justice, was premature as there is no compliance with pre-trial requirements to prompt this court to certify the suit herein to be heard on priority basis. The application is rejected on those grounds with no orders as to costs."*

37. The Applicant's case is based on the imminent immigration to Canada as well as neither party will suffer prejudice if the application is granted.

38. As regards the impending immigration to Canada, the Court is in agreement with the Respondent's submission that the evidence on record is insufficient to justify the granting of the orders sought. The evidence on record is exclusively the application for temporal residence. There is no indication on how far the application has gone or the likelihood of a positive outcome and when.

39. Relatedly, the Claimant has not indicated in which province she purposes to reside if granted residency.

40. As regards prejudice, the Claimant contends that denial of the application will be a violation of Article 159(2)(b) of the Constitution of Kenya, 2010 and a virtual hearing is impracticable due to the 8-hour time difference. On the issue of violation of Article 159(2)(b) of the Constitution, the Court is not persuaded the same will be violated in the event the application herein is unsuccessful.

41. Similarly, the Court is neither persuaded nor convinced that a virtual hearing is impractical owing the time difference between Canada and Kenya.

42. It is not in dispute that since the implementation of the Court Practice Directions, 2021 virtual hearings have been norm and many cases have been disposed of more expeditiously even in circumstances in which one party was a resident of a different time zone such as Untied States of America or the Untied Kingdom.

43. It is paradoxical for the Claimant/Applicant to alleged that a virtual hearing will be an inconvenience or expensive for her yet she is the Claimant and is the one relocating to anther jurisdiction.

44. For the foregoing reasons, it is the finding of the Court that the Claimant/Applicant has not made a sustainable case for the suit to heard on a priority basis.

45. **The application is declined with no orders as to costs.**

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 21ST DAY OF APRIL 2022

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 15th March 2020 and subsequent directions of 21st 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