



**Owuor v Longitude International Ltd (Cause 111 of 2017)  
[2022] KEELRC 1342 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1342 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 111 OF 2017**

**AK NZEI, J  
JUNE 30, 2022**

**BETWEEN**

**BRIAN J. OWUOR ..... CLAIMANT**

**AND**

**LONGITUDE INTERNATIONAL LTD ..... RESPONDENT**

**RULING**

1. The suit herein was filed by the Claimant on 10<sup>th</sup> February 2017 vide a Memorandum of Claim dated 8<sup>th</sup> February 2017. On 15<sup>th</sup> March 2017, the Respondent filed a Replying Memorandum and Counter-claim dated 14<sup>th</sup> March 2017. The Respondent also filed a list of documents on the said date.
2. The Claimant filed a Response to the Replying Memorandum and Counter-Claim on 15<sup>th</sup> April 2017, dated 13<sup>th</sup> April 2017.
3. The Respondent did not file a witness statement and/or witness statements. The suit was severally mentioned in Court and was finally fixed for hearing on 16<sup>th</sup> December 2021.
4. When the suit came up for hearing before me on 16<sup>th</sup> December 2021, the Claimant testified and was cross-examined by Counsel for the Respondent and was thereupon re-examined. The Claimant's case was then closed.
5. Upon closure of the Claimant's case, Counsel for the Respondent informed the Court that he had realized that the Respondent did not have a witness statement on record. Counsel prayed for leave to file the Respondent's witness statement. The application was opposed by the Claimant's Counsel, who contended that the Claimant had already testified and stood to be prejudiced if the Respondent was allowed to file a witness statement at that stage. Upon hearing both counsel on the issue, I declined to grant the leave sought. I however put the Respondent at liberty to file a formal application for leave to file the Respondent's witness statement so that the Claimant could see the nature of the statement sought to be filed, and respond to the application appropriately.



6. On 9<sup>th</sup> February 2022, the Respondent filed a Notice of Motion dated 3<sup>rd</sup> February 2022, seeking orders: -
  - a. that leave be granted to the Respondent/Applicant to file and serve a list of witnesses and a witness statement of Michael Monari, which were annexed to the application.
  - b. that the list of witnesses and witness statement annexed to the application be deemed as duly filed upon payment of the Court's assessed fees.
7. This is the application before me for determination and is based on the supporting affidavit of Michael Monari filed therewith. It is deponed in the said supporting affidavit, inter-alia:-
  - a. that the Respondent/Applicant failed to file a list of witnesses and witness statement in time due to an administrative mix-up in its office and that the failure was neither deliberate nor intentional.
  - b. that the Respondent/Applicant was in communication with the Claimant and there was an indication and/or inference that he would withdraw the suit before this Court.
  - c. that the aforementioned fact caused confusion and the Respondent/Applicant was not aware of the apparent omission of the list of witnesses and statement that were to be filed in this Court.
  - d. that the Respondent ought not to be shut out of the corridors of justice since it has come to Court upon discovering the existence of the omission.
  - e. that the Applicant's witness statement raises no new claims or facts and is not prejudicial to the Claimant.
  - f. that the Claimant will have a chance to cross-examine the witness and may as well be granted corresponding leave to recall his witness for further examination in chief.
8. The application is opposed by the Claimant/Respondent, who on 3<sup>rd</sup> March 2022 filed a Replying Affidavit sworn by himself on the same date. It is deponed, in the said Replying Affidavit:-
  - a. that the application is an abuse of the Court's process and is made out of malice.
  - b. that the alleged letter referred to in the Respondent's application was done way back on 21<sup>st</sup> January 2019, which is 3 years ago.
  - c. that the suit had subsequently been mentioned in Court, a clear indication that the Claimant was keen on prosecuting the claim.
  - d. that the matter has been adjourned severally at the instance of the Respondent/Applicant, and that the Applicant ought to have taken advantage of the adjournments and time to file its witness statement.
  - e. that the Respondent/Applicant seeks leave to file a witness statement five (5) years after the claim was filed, and that this shows indolence that cannot be excused.
  - f. that the Claimant has testified and given evidence in Court, and filing a witness statement after his testimony will not only be prejudicial to the Claimant, but will amount to stealing a match.
  - g. that the application was filed after undue delay and that the same lacks merit.



9. It is to be noted at the onset that when the suit herein came up for hearing on 16<sup>th</sup> December 2021, both parties were represented by Counsel. No indication was made by Counsel for the Respondent/Applicant that the Respondent had no witness statement on record and that it intended to file one. The Claimant testified and was cross-examined by the Respondent/Applicant's Counsel (Mr. Ileri) and was thereupon re-examined by his Counsel. The Claimant's case was then closed.
10. Under the principle of right to a fair hearing as enshrined under Article 50(1) of *the Constitution* of Kenya 2010, a party has a right to adduce and to challenge evidence. A plaintiff or Claimant in a suit can only challenge the defence case while adducing his evidence in prosecution of the claim and under cross-examination by the defence, hence the need to disclose the defendant's evidence to the Claimant long before he takes the witness stand. The necessity of filing and serving/exchanging witness statements before trial commences is founded on this principle of fair hearing/trial.
11. Allowing the Respondent/Applicant to build its testimony in Court by way of filing a witness statement after hearing the Claimant's testimony in Court and cross-examining him will amount to travesty of justice, and will greatly prejudice the Claimant. Parties to Court proceedings are duty bound to be vigilant and to exercise due diligence regarding filing of their pleadings and presentation of evidence in support and prove of their respective cases.
12. Failure by one party to a suit to exercise vigilance and due diligence should never be allowed, in any way, to be a source of injustice to the other party. It is to be noted that the Respondent/Applicant has a counter-claim on record, and that allowing the Respondent to introduce and to present evidence that the Claimant never saw and never challenged when he testified on his case will amount to condemning the Claimant unheard, both on the counter-claim and on the suit regarding any issue that the Respondent/Applicant may raise on the suit in his witness statement/testimony, if allowed to introduce it this late in the day. As the Court of Appeal put it in the case of *Kiai Mbaki & 2 Others - vs- Gichuhi Macharia & another* [2005] eKLR,  

“...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.”
13. Re-opening of the Claimant's examination in chief, as suggested by the Respondent/Applicant, will not atone for the prejudice and mischief likely to be visited on the Claimant if the application is allowed. A party who chooses not to act, or neglects to act on their case, should always bear the consequences of such inaction or negligence. The wheels of justice must move on, such inaction or negligence notwithstanding. To a great extent, such incidents of inaction or negligence by parties to Court proceedings contribute to the endemic problem of case backlog in Courts of law.
14. In summary, I find no merit in the Notice of Motion dated 3<sup>rd</sup> February 2022.  
The same is hereby dismissed with costs to the Claimant/Respondent.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 30TH DAY OF JUNE 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:

..... for Claimant

..... for Respondent

