



**Mutabari v Vipingo Ridge Limited (Cause E018 of 2021)
[2022] KEELRC 1338 (KLR) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1338 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E018 OF 2021**

**AK NZEI, J
JUNE 23, 2022**

**BETWEEN
GLORIA JAHENDA CHAHONYO MUTABARI CLAIMANT
AND
VIPINGO RIDGE LIMITED RESPONDENT**

RULING

1. The suit herein was filed on 18th February 2021 vide a Memorandum of Claim dated 28th January 2021. The Respondent entered appearance on 16th March 2021 and subsequently filed a statement of defence on 29th March 2021. The statement of defence is dated 22nd March 2021.
2. The Court's record shows that on 3rd May 2021, the Claimant's Advocates wrote to the Court's Deputy Registrar requesting that the matter be fixed for mention for purposes of taking a hearing date. The suit was subsequently fixed for mention on 6th July 2021, on which date the Respondent was granted twenty one (21) days to file their documents. The suit was fixed for a further mention on 15th September 2021.
3. When the suit came up for mention before me on the aforesaid date, I granted the Respondent a further period of twenty one days to file its bundle of documents and witness statements, and I fixed the matter for a further mention on 2nd November 2021, with an order that there would be no further extension of time.
4. On 2nd November 2021, the Respondent had not filed the documents ordered to be filed on 2nd November 2021. Counsel for the Respondent orally sought to be granted fourteen more days to file the Respondent's documents and witness statements, an application which Counsel for the Claimant opposed. I put the Respondent at liberty to file a formal application for enlargement of time regarding any documents that it wished to file outside the timelines set by the Court.



5. On 29th November 2021, the Respondent filed the Notice of Motion dated 26th November 2021 seeking orders: -
- a) that the Honourable Court be pleased to extend/enlarge time for filing the Respondent's list and bundle of documents and list of witnesses and witness statements.
 - b) that the Respondent's list of witnesses and bundle of documents, both dated 26th November 2021 and filed on 29th November 2021, be deemed to have been duly and properly filed.
 - c) that the time for filing the Respondent's witness statements be extended by 15 days from the date of this Court's decision.
 - d) that costs of the application be in the cause.
6. This is the application before me. Grounds upon which the application is predicated are set out in the body of the application, and the application is supported by the supporting affidavit of Sanjeev Khagram Advocate sworn on 26th November 2021. It is deponed in the said affidavit, inter-alia:-
- a) that delay in obtaining witness statements from the Respondent's witnesses was occasioned by circumstances beyond the Respondent's control in that two of the witnesses were intermittently away while the main witness had left employment and travelled, and was engaged with a new employer, and had just become available and recorded a statement.
 - b) that the suit herein was yet to be set down for hearing and no prejudice had been occasioned by the delay in filing the Respondent's documents.
 - c) that it would be in the interest of justice if the Respondent is afforded an opportunity to present its case and evidence by presenting its witness statements and documents in defence of the claim against it.
 - d) that the Court is Constitutionally mandated to do justice to all parties by ensuring a fair trial.
7. The application is opposed by the Claimant, who on 3rd February 2022 filed grounds of opposition dated 9th November 2021. The Claimant cited, in her grounds of opposition, the case of *Rebecca Mijide Mungole & another -vs- Kenya Power & Lighting Company Limited & 2 others* [2017] eKLR where the Court of Appeal invoked, with favour, the following decisions: -
- a) *Charles Wanjohi Wathuku -vs- Githinji Ngure & Another* – Civil Application No. 9 of 2016 where it was held: -

“timelines are not technicalities of the procedure which may be accommodated under Article 159 of the Constitution or Sections 3A and 3B of the Appellate Jurisdiction Act”
 - b) *John Mutahi Mwangi & 28 others -vs- Mwenja Ngure & 4 others* – Civil Application No. 136 of 2014 where it was held:-

“that timeline is strict and is meant to achieve the constitutional, statutory and rule-based objective of ensuring that the Court processes dispense justice in a timely, just, efficient and cost effective manner.”
8. The Claimant further stated that delay on the part of the Respondent/Applicant is inordinate, and that delay of over two hundred and seventy (270) days had not been explained.



9. The *Employment and Labour Relations Court (Procedure) Rules 2016* are silent on enlargement of time where time has been fixed for doing any act or taking any proceedings under the said Rules or by an order of the Court. Under such circumstances where this Court's Rules of Procedure are silent on any particular procedural issue, this Court's practice has been to resort to the *Civil Procedure Act* and Rules.
10. Order 50 Rule 6 of the *Civil Procedure Rules* provides as follows:-
- “where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by Order of the Court, the Court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed, provided that the costs of any application to extend such time and any order made thereon shall be borne by the parties making such application, unless the Court orders otherwise.”
11. The orders being sought by the Respondent/Applicant are purely discretionary. Both parties have filed written submissions for and against the application pursuant to the Court's directions in that regard, which I have considered.
12. In the case of *D. Chandulal K. Vora & Co. Ltd -vs- Kenya Revenue Authority* [2017] eKLR (cited in *Pkeich Chesimaya -vs- Lumakorwai Achipa* [2020] eKLR), the Court of Appeal stated as follows:-
- “the main consideration for Court's is do (sic) justice to the parties in the suit. The discretion to dismiss a suit or strike out an appeal or pleadings generally should be exercised sparingly, judicially and only in deserving cases which cannot be mitigated. The practice nowadays is to elevate substantial justice to the parties over and above the strictures of rules of procedure, which have been stated to be mere hand maidens of justice...the Court has to weigh one thing against another for the benefit of the wider interest of justice before coming to a decision one way or the other...”
13. In the case of *Trust Bank Limited -vs- Amalo Company Limited* [2002] eKLR where the appeal was against the High Court's order expunging the Appellant's documents from record and denying the appellant the right to be heard in an application, the Court of Appeal held as follows:-
- “a) the administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors and lapses should not necessarily deter a litigate from the pursuit of his right.
2. the spirit of the law is that as far as possible in the exercise of judicial discretion, the Court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for it not to do so.”
14. In a trial, a Court cannot investigate and decide on the dispute involved unless parties thereto are given an opportunity to be heard and to present all the evidence that they consider to be relevant to the dispute. They do so by giving evidence, calling witnesses to testify and by producing such documents as may be relevant to their respective cases.
15. In the present application, the Respondent/Applicant is seeking enlargement of time and admission on record of documents and witness statements which have already been filed, thought out of time and without leave.



16. The explanation given by the Respondent as to why its documents were not filed within the timelines given by the Court is not satisfactory. I will, however, exercise the Court's discretion in favour of the Respondent/Applicant in the interest of justice. I proceed to allow the Notice of Motion dated 26th November 2021 and to give directions in the following terms: -
- a) time within which the Respondent ought to have filed a list and bundle of documents, list of witnesses and witness statements is hereby enlarged.
 - b) the Respondent's list of witnesses and bundle of documents dated 26th November 2021 and filed in Court on 29th November 2021 are hereby deemed to have been duly and properly filed.
 - c) the Respondent's further list and bundle of documents, amended list of witnesses and witness statements of Edward Memo Amaleba, Simon Karanja and Gideon Fondo Ngome, all dated 28th February 2022 and filed in Court on the same date, and the witness statement of Esther Muli filed on 8/3/2022, are hereby deemed as duly and properly filed.
 - d) both parties are granted leave to file and to serve such other and/or further documents and witness statements as may be necessary within fourteen days of this Ruling.
 - e) mention on 26th July 2022 for fixing of a hearing date.

17. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23RD 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:

Mr. Wafula for Claimant

Mr. Kagram for Respondent

