Munga v Parpia (Cause E142 of 2021) [2022] KEELRC 1255 (KLR) (18 July 2022) (Ruling)

Neutral citation: [2022] KEELRC 1255 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E142 OF 2021

JK GAKERI, J

JULY 18, 2022

BETWEEN

TEDDY WAWERU MUNGA ..... CLAIMANT

AND

SALEH PARPIA ..... RESPONDENT

RULING

1. Before me for determination is a Notice of Motion Application dated 8th March 2022 filed under Certificate of Urgency seeking orders:

    i. That the application be certified urgent.

    ii. That Judgement be entered on admission for Prayer No. (e) of the further amended memorandum of Claim dated 6th April 2021 which seeks the following order:

        (e) Kshs 26,250/= (at the rate of Kshs 5,250/= per month) compensation for leave days not taken between 17th June 2020 to 25th November 2020.

    iii. That the Claimant suit ELRC C E142/2021 be certified urgent and a hearing date of the said suit be issued on a priority basis, or in or before the lapse of 60 days from the date of the Notice of Motion Application herein;

    iv. That the Court do issue any other orders it deems fit.

    v. That Costs of the Application herein be in the cause

2. The application is stated under Article 50 (1) of *the Constitution* of Kenya, 2010, Article 159(2), Order 13, Rule 2 of the *Civil Procedure Rules*, Rule 3 of the *Employment and Labour Relations Court (Procedure) Rules* 2016 and all other enabling provisions of law.

3. The application is supported by the affidavit of Teddy Waweru Munga and on the following grounds.

i. That in response to the Claimant's demand letter dated 3rd December 2020, the respondent admitted owing the Claimant leave pay for 5 months and requested for computation of the amount which were sent via letter dated 23rd February 2021 sent by email. The sum of Kshs 26,250/= and the letter was not responded to.

ii. That it is in the interest of justice that Prayer (e) be allowed having been admitted by the respondent and the suit be certified ready for hearing on 7th June 2021 with 21 days leave to the respondent to comply with pre-trial directions.

iii. That the respondent is a Canadian Citizen contracted in Kenya by the Kenya National Highway Authority as a resident Engineer for the construction of the Nairobi-Western By-pass contract No. Crbc/ken/2018/147 which is nearing completion.

iv. That the Claimant is apprehensive that the respondent could relocate to Canada once the Project is finalised since the suit was filed in 2021 and the Court diary is not accommodating such matters and by the time it is finalized, the respondent will have left the country making execution of judgement impossible.

v. That the case be heard at the earliest possible instance to avoid miscarriage of justice.

vi. That the Claimant has complied with pre-trial directions.

4. The affidavit of Teddy Waweru Munga reinforces the facts and the law relied upon to urge the application.

5. The Claimant/Applicant's further affidavit buttresses the application and raises no new issues.

Respondent's Case

6. In its Replying Affidavit dated 26th April 2022, the respondent depones that the application is misconceived, incompetent devoid of merit, bad in law and an abuse of the court process as no reasonable ground has been demonstrated for the grant of the orders sought. That the law relied upon by the Claimant/Applicant is not applicable.

7. It is further deponed that neither the respondent nor his advocate made any admission to entitle the Claimant/Applicant to judgement on admission.

8. That the allegations raised by the Applicant ought to be proven at the hearing of the suit where evidence is required and witnesses cross-examined.

9. It is the respondent's averment that the pleadings on record explicitly deny the claim for pay in lieu of leave in paragraph 12 of the Amended Response to the Further Amended Memorandum of Claim dated 28th April 2021.

10. That fixing of hearing dates was to be effected by the Registry as directed on 7th June 2021 and the Claimant's Counsel has not invited the respondent's counsel to take out a hearing date at the registry.

11. The respondent depones that he was ready to defend the claim against him that the Application is a deliberate attempt to circumvent due process and condemn the respondent unheard.

12. The respondent prays for dismissal of the application with costs.

Claimant/Applicant's Submissions

13. The applicant identifies two issues for determination;

i. Whether the respondent unequivocally admitted owing the Claimant outstanding dues for leave days.

ii. Whether the claim herein should be certified urgent and given a hearing date on a priority basis for expeditious disposal.

14. On the 1st issue, the Applicant relies on Order 13 Rule I which entitles a party to apply for judgement or order upon any admission by the other party either by its pleadings or otherwise and the application may be made at any stage of the suit.

15. Reliance is also made on the decision in *Ideal Ceramics Ltd V Suraya Property Group Ltd* (2017) eKLR to urge that the respondent by letter dated 3rd December 2020 admitted owing the applicant leave days for the 5 months he worked for him and had requested the applicant's counsel on record to compute the amount due and the same was forwarded but respondent did not respond.

16. It is submitted that the fact that the respondent acknowledged that the Claimant worked for 5 months and requested for the computation of the amount dues is a clear, unconditional, obvious and unambiguous admission by the respondent.

17. That the admission suffices under Order 13 Rule 2 of the *Civil Procedure Rules*, which recognises admission on the pleadings or otherwise.

18. It is further submitted that the contents of the respondent's Replying Affidavit do not in any way negate the earlier admission which he did not disown.

19. As regards certification of the suit urgent and early hearing date, reliance is made on Article 48 of *the Constitution* of Kenya 2010 on access to justice as well as Article 50(1) and 159(2) (b) on the right to fair hearing by an independent and impartial body and expeditious resolution of disputes.

20. Further reliance is made on Section 3 of the *Employment and Labour Relations Court Act* 2011 on the principal objective of the Act which is "to facilitate the just expeditious, efficient and proportionate resolution of disputes governed by the Act."

21. The decision in *Benjoh Amalgamated Ltd V Kenya Commercial Bank Ltd & Another* (2018) eKLR is relied upon to underscore the exercise of Judicial discretion in the certification of a matter urgent for immediate hearing. That it must be based on evidence and reason.

22. Reference is also made on paragraphs 16, 17, 18 and 19 of the Claimant's Supporting Affidavit to urge that there is a strong case for an early hearing date to forestall the consequences of the respondent relocating to his country of origin after completion of the project at hand. That the respondent has not disputed these issues.

23. It is submitted that should the respondent exit the country before defending the suit, this will prejudice the Claimant/Applicant as any Judgement against him will be difficult to enforce and the court has an opportunity to avert such eventuality.

24. The court is urged to decree the prayers sought in the Notice of Motion Application.

Respondent's Submissions

25. The respondent isolates two issues for determination;

i. Whether the Claimant is entitled to Judgement on admission.

ii. Whether the matter should be certified urgent and hearing date issued on priority basis.

26. As regards the first issue, the respondent submits that Order 13 Rule 2 of the *Civil Procedure Rules*, 2010 provides for Judgement on admission and Courts have pronounced themselves on it. For instance, in *Choitram V Nazari* (1984) KLR 327, the court was clear that admission must be plain and obvious on the face.

27. It is submitted that the respondent's letter was on a Without Prejudice basis despite the fact that the respondent has denied owing the Claimant any monies.

28. As to whether the Without Prejudice letter is admissible, counsel relies on the decision in *High Chem East Africa Ltd V David Njau Wambugu* (2020) eKLR where the court cited with approval the words of Oliver L. that "The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence."

29. That the respondent's letter was intended to facilitate negotiations. The respondent simply asked for computations.

30. It is submitted that the letter is inadmissible.

31. It is further submitted that the respondent did not admit owing the applicant leave days. It was neither plain nor obvious. There was no explicit admission.

32. It is the respondent's contention that the issue be canvassed at the main hearing.

33. As to whether the matter should be certified urgent and hearing date issued on a priority basis, it is submitted that the Claimant led no evidence of the possibility that the respondent is likely to relocate from Kenya. Reliance is made on the decision in *Joseph Kipchirchir Koech V Philip Cheruiyot Sang* (2018) eKLR for the proposition that he who alleges must prove as ordained by Section 107 (1) of the *Evidence Act*. Reliance is also made on Sections 9 and 112 of the *Evidence Act*.

34. It is the respondent's submission that the Claimant has not shown that the respondent is a flight-risk. That at any rate the respondent had shown willingness to defend the claim by the Claimant/Applicant.

35. The Court is urged to find that the Claimant has neither proved the admission, nor that the respondent is a flight-risk. That prayers I would deny the respondent the opportunity to prove its case at the hearing.

36. Finally, the court is urged to dismiss the application.

Analysis and determination

37. The issues for determination are;

    i. Whether the Claimant/Applicant is entitled to Judgment on admission.

    ii. Whether the suit should be certified urgent and heard on a priority basis.

38. As regards the 1st issue, the starting point is the law on Judgement on admission as provided by Order 13, Rule 2 of the *Civil Procedure Rules*, 2010, as follows;

    Any party may at stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such Judgement or order as upon such admissions he may be entitled to without waiting for the determination of any other question between the parties; and the Court may upon such application make such order give such Judgement, as the court may think fit.

39. In the words of Onguto J. in *Ideal Ceramics Ltd V Suraya Property Group Ltd* (Supra)

> " The Court's power to enter Judgement is discretionary: See Cassam V Sachania (Supra). The discretion is to be exercised only in cases where the admission whether express or implied, is plain, clear, unconditional, obvious and unambiguous: See Choitram V Nazari (Supra) and Momanyi V Hatimy & Another (2003) EA 600. The admission ought to be obvious on the face thereof and leave no room for doubt.
>
> An admission may be formal (typically an admission made in the pleadings) or informal (typically admission made pre-action being filed in court but after demand has been made)."

40. The court is guided by these sentiments;

Order 13 Rule 2 above is explicit that once an application for Judgement on admission is made, "The court may give such Judgement as the Court may think fit"

The discretion given to the court must be exercised judiciously.

41. The paragraph in contention is expressed as follows;

> " Your client had only worked for 5 months hence any demand for leave should be calculated under Section 28(1)(b) of the Act, where employment is terminated after the completion of two or more consecutive months of service during any twelve months leave earing period, to not less than one and three quarters days of leave with full pay, in respect of each completed month of service in that period to be taken consecutively. Let us have your computation of the amount."

42. While the applicant submits that the paragraph is a plain, obvious, unconditional and unambiguous admission of leave days, the respondent states that it was not an obvious admission of the outstanding leave days which are denied in the suit.

43. The respondent urges that there was no explicit admission of owed accrued leave days.

44. Relatedly, the respondent submits that the paragraph was intended to facilitate negotiations hence the letter was on a Without Prejudice basis typically used to facilitate negotiations and cannot be relied upon if they fail.

45. It is not in dispute that the respondent laid the basis of the computation and sought a computation of the days after admitting that the Claimant/Applicant had served for 5 months. The respondent did admit that the Claimant/Applicant had worked for 5 months only, explained to the Claimant/Applicant how leave days should be computed and requested for computations. In the circumstances, and for the computations, the court is in agreement with the Claimant/Applicant that the admission is express and unequivocal as it should be the fact that it was made on a Without Prejudice basis not withstanding.

46. The court is further guided by the sentiments of the court in *Rush & Tompkins Ltd V Greater London Council* (1989) AC 1280 cited by Mary Kasango J. in *High Chem East Africa Ltd V David Njau Wambugu & 4 others* (Supra) as follows;

> The "Without-Prejudice" rule is a rule governing admissibility of evidence and is founded upon the Public Policy of encouraging Litigants to settle their differences rather than litigate them to a finish. It is no where more clearly expressed than in the Judgement of Oliver L. J in Cutts V Head (1984) Ch. 290 at 306:

> "That the rule rests at least in part upon Public Policy is clear from many authorities and the convenient starting point of inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to Litigation and should be and should not be discouraged by knowledge that anything that is said in the course of such negotiations . . . may be used to their Prejudice in the course of the proceedings. They should as it was expressed by Clauson J in Scott Paper Co V Drayton Paper works Ltd (1927) 44 R.P.C 151 at 156 be encouraged fully and frankly to put their cards on the table . . .
>
> . . . These cases shows that the rule is not absolute and resort may be had to the "Without Prejudice" material for a variety of reasons when the justice of the case requires."

47. It is not in dispute that the respondent made the offer for the computations on 3rd December 2020 and the Claimant/Applicant submitted the computations on 24th February 2021 and that the letter was not responded to.

48. In the court's view, the offer made by the respondent cannot pass muster of good faith. If the respondent was interested in negotiations, a response of whatever nature was imperative to maintain the negotiations. He failed the test. One of the recognized exceptions to the rule of Without Prejudice is where a statement is not made as part of a proposal to negotiate a settlement. See Cross & Tapper on Evidence 8th Edition. He did not respond.

49. But more significantly, the disputed paragraph has no indication or hint that the respondent intended to negotiate on the outstanding leave days. This is vividly demonstrated by the non-responsiveness to the computations.

50. Contrary to the respondent's submission that the Applicant misconstrued the wording of the letter, the court is satisfied that the respondent admitted that the applicant's leave days for the five months he worked were owing and instructed the applicant on how the same should be computed and requested for the computation. This is an express admission that the leave days were owing and the court so finds.

51. As regards the issuance of a hearing date of the matter on a priority basis, it is essential to set out the timelines in order to appreciate the context of the application.

52. The Claimant/Applicant's employment was terminated by a letter dated 25th November 2020. The Claimant acted swiftly and the demand letter is dated 27th November 2020.

53. The suit was filed on 19th February 2021.

54. The Application herein is dated 8th March 2022 filed more than one (1) year after the suit was filed. It is unclear what prompted the application as there is no evidence of urgency for the entire 2021 and the early part of 2022.

55. Be that as it may, the Court is in agreement with the Claimant/Applicant's submissions on the need to dispense justice expeditiously as required by various Articles of *the Constitution* of Kenya, 2010 and the provisions of the *Employment and Labour Relations Court Act*, 2011, among other legislations.

56. Needless to emphasize, and as explained by the Court of Appeal in Benjoh Amalgamated Ltd V Kenya Commercial Bank Ltd & another (Supra), the power of the court to certify a matter urgent is discretionary. The Court stated inter alia;

> " . . . Whether or not to certify an application urgent for immediate hearing is a discretionary power.

> . . . The Court does not certify applications urgent as a matter of course. However, like all judicial discretionary powers, that power has to be exercised not arbitrarily whimsically or capriciously, but rather on the basis of evidence and reason."

57. The application herein is premised on the apprehension that the respondent who the Applicant states is a Canadian Citizen may not be in Kenya for too long to await a Registry generated date, bearing in mind that it is currently giving priority to 2018 matters.

58. That there is likelihood that the respondent will relocate to his country of origin before the case is heard and determined. That it would be difficult to conduct the hearing as the respondent would be untraceable in Canada as would be his assets and the Judgement would be unenforceable.

59. The Applicant's case is very well stated but for the apparent deficiencies in evidential requirements. First, the Claimant has provided no evidence of when the Nairobi-Western-Bypass Project is likely to be completed including his own estimation having been involved in the Project. He has provided no material on the timeline of the Project.

60. Second, no material has been placed before the court to demonstrate that there is a likelihood that the respondent will relocate to his Country of origin and is thus a flight risk.

61. Third and closely related to the foregoing is the fact that the nature of employment engagement of the respondent by the Kenya National Highways Authority (KENHA) is unknown, including his work permit details.

62. The Claimant/Applicant has not led any evidence on when the respondent's contract or engagement in the country is likely to end.

63. The fact that the respondent is allegedly foreigner is not sufficient evidence that he is a flight risk nor has it demonstrated that he is.

64. The upshot of the foregoing is that the applicant has tendered no evidence to prove his allegations as required by the provisions of Section 107, 109 and 112 of the *Evidence Act*.

65. The respondent has indicated that he is ready to defend the claim against him.

66. In the final analysis, it is the finding of the court the applicant has not placed sufficient material before the court on which to found a certification order that the suit herein be given a hearing date as a matter of priority.

67. In conclusion, the Notice of Motion Application dated 8th March 2022 is partially successful and it is ordered that;

    a. The respondent to pay the sum of Kshs.26,250 as payment for untaken leave days within 21 days.

    b. The parties to seek an early hearing date at the Registry.

    c. In light of the partial success of the application, there shall be no orders as to costs.

68. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18TH DAY OF JULY 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