Ngatia v Chemoquip Limited (Cause 1903 of 2016)
[2022] KEELRC 13305 (KLR) (25 November 2022) (Ruling)

Neutral citation: [2022] KEELRC 13305 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1903 OF 2016

SC RUTTO, J

NOVEMBER 25, 2022

BETWEEN

REUBEN KAMURI NGATIA ..... CLAIMANT

AND

CHEMOQUIP LIMITED ..... RESPONDENT

RULING

1. The main suit proceeded for full hearing on March 14, 2022 and both sides presented oral evidence. Subsequently, the trial closed and the court issued directions on the filing of submissions.

2. On May 4, 2022, when the matter came up for mention to confirm filing of submissions and taking a judgment date, the applicant notified the court that it had filed the instant application dated March 25, 2022 seeking the following orders:

    a. That this honourable court be pleased to order the re-opening of the defence case.

    b. That costs of this application be provided for.

3. The application is supported on the grounds appearing on its face and on the affidavit of Mr Bariki Wilfred, counsel on record for the applicant. Mr Bariki avers that:

    i. While he is aware that the court ordered a close of the defence case on March 14, 2022, the witness provided by the respondent was not properly informed and had little grasp of the facts of the case.

    ii. The witness relied heavily on hearsay evidence which is detrimental to the defence case and as such, there is a great need to supplement the defence evidence and get a proper account of events and production of additional evidence.

iii. The applicant wishes to call two additional witnesses being a director and the former Human Resource Manager at the respondent, who shall give first account evidence and produce the laptop that was being used by the claimant at the time of his employment.

iv. It is in the interest of justice that the defence case be reopened and the respondent/applicant be given an opportunity to be heard.

v. That the claimant will not be prejudiced in the event the defence case is reopened.

4. In response to the application, the claimant filed a replying affidavit sworn on June 30, 2022, through which he avers that:

i. The reasons given by the applicant's counsel are just excuses which do not merit as a justifiable cause as to allow reopening of the respondent's case.

ii. The application is an afterthought which is designed to deny him his constitutional right to be heard expeditiously especially given that it took the respondent close to 4 years to mount a proper response.

iii. Given that this suit was filed in 2016, it is trite law that cases must be determined expeditiously and save the court's precious time.

iv. The application is based on malice and a deliberate ploy to obstruct and delay the course of justice and as such, should be dismissed with costs to the respondent.

Submissions

5. The application was disposed off by way of written submissions. On its part, the applicant submitted that the decision whether or not to re-open an on-going case is purely left to the realm of judicial discretion which is to be exercised judiciously and in the interest of justice. It referenced the case of *Cason v State 140 MD App 379 (2001)* which espoused the principles governing an application seeking to reopen an ongoing case to adduce and admit further evidence.

6. It was further submitted on behalf of the applicant that the application was filed timely, which period was less than a month since the close of the hearing of the suit. To support this argument the applicant placed reliance on the case of *Hannah Wairimu Ngethe v Francis Ng'ang'a & Another {2016} eKLR* where the court held that the plea of re-opening a case will be rejected if there is inordinate and unexplained delay on the part of the applicant.

7. The applicant further urged that article 159 (2) (d) of the *Constitution* enjoins this court to dispense substantive justice without undue regard to technicalities. Thus, the primary consideration is whether the interests of justice require that the application be allowed.

8. In further submission, the applicant stated that the claimant has not demonstrated that he will suffer any prejudice that cannot be ameliorated by an award of costs if the application was allowed. The applicant further invited the court to consider the decisions in *Lucy Momanyi t/a L N Momanyi & Company Advocates v Joel Ombati Nyamweya & another [2021] eKLR*.

9. On his part, the claimant submitted that the application is an afterthought that is only designed to embarrass the court process. That the applicant and its counsel have chosen to take the court for a ride and want to be heard on their own terms thus stifling the smooth flow of the administration of justice. The claimant placed reliance on the provisions of section 1B of the *Civil Procedure Act* and on the overriding objective which requires the court to hear matters expeditiously.

10. As to whether the applicant meets justifiable cause for re-opening of the case, the claimant submitted that it has not shown why the witnesses were not availed before the close of the trial. The claimant thus urged the court to dismiss the application with costs.

Analysis and Determination

11. From the application, the response thereto and the parties' respective submissions, the singular issue falling for the court's determination is whether the instant application is merited.

12. The gist of the application at hand, is that the witness who testified on behalf of the applicant did not have a proper grasp of the facts of the case and heavily relied on hearsay. That there is therefore need to supplement the defence evidence and get a proper account of events and production of additional evidence. To this end, the applicant seeks to have one of the additional witnesses produce the laptop that was being used by the claimant at the time of his employment.

13. The decision whether to grant the orders sought as in the present application is based on discretion which must be exercised judiciously. As a guiding principle in determining an application as the one herein, the court must ask itself why the evidence was not adduced prior to the hearing of the case being closed.

14. The instant suit was brought to this court in 2016 and the applicant filed its response on January 12, 2017. Subsequently, it filed its list and bundle of documents. This was done simultaneously with the list of witnesses and witness statements. Among the witnesses identified then, was Mr Yose Musela whose evidence the applicant wants to introduce subsequent to the reopening of the case.

15. I have compared the initial witness statement by the said Musela and the one dated March 25, 2022, which the applicant seeks to introduce, and note that the two witness statements are fundamentally different.

16. Essentially, the second witness statement seeks to introduce new facts and a fresh twist to the case. Therefore, this changes the character of the applicant's case. Noting that the claimant had testified and closed his case, it is not in doubt that he would be prejudiced as he will not have a right of response, save during cross examination. As it is, he does not have an opportunity to present his case in chief in light of the evidence the applicant now seeks to introduce.

17. Further, the applicant has not offered any reasonable explanation as to why it did not produce the laptop it now seeks to produce. Afterall, the said laptop is its property hence has been in its possession all along. It is not evidence that is being sought from elsewhere. Why seek to produce it now after all this while?

18. The way I see it, the only reason the applicant is seeking to reopen its case at this stage and adduce additional evidence is solely to firm up its case based on the issues that arose from the trial. Indeed, the applicant has admitted that it seeks to call the two witnesses to rebut the claimant's case.

19. In light of the foregoing, I cannot help but find that the application is an afterthought and allowing the same would be prejudicial to the claimant who has already given evidence.

20. In the circumstances and for all the above reasons, I find no merit in the application and the same is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF NOVEMBER, 2022.

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STELLA RUTTO

JUDGE

Appearance:

Mr Bariki for the applicant/ respondent

Ms. Monyangi for the claimant

Court Assistant Abdimalik Hussein

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 March 15, 2020 and subsequent directions of April 21, 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 had 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.

STELLA RUTTO

JUDGE