



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT UASIN GISHU

COURT NAME: ELDORET LAW COURT

CASE NUMBER: ELRC.C/344/2017

CITATION: ONSARIGO MORABAI VS KENYA FISHERIES RESEARCH INSTITUTE

RULING

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

ELRC NO 344 OF 2017

ONSARIGO MORABAI.....PLAINTIFF

VERSUS

KENYA MARINE AND FISHERIES RESEARCH INSTITUTE.....DEFENDANT

RULING

1. On 24th February, 2021 when this matter came up for hearing counsel for the respondent informed the Court that he had filed an application to introduce minutes of the Board and introduce a new witness whose statement he sought to file. The Court observed that the application could be late coming after the Claimant had testified and closed his case and some of the respondent's witness had given evidence. The Court however directed Counsel for the respondent to file a formal application to be considered on merit.

2. The Motion dated 24th February, 2021 sought orders among others that the respondent be allowed to introduce Mr. Henry Nyabuto as a witness and his statement as evidence in its defence. The applicant/respondent further sought issue of summons to compel the said Mr. Nyabuto to attend court and testify as a witness.

3. The application was premised on the averment that the testimony of Henry Nyabuto was vital and pertinent in the resolution of the employment dispute between the parties in that Mr. Nyabuto's evidence will corroborate the respondent's factual averment that the Claimant was allowed a chance to be heard for his gross misconduct that culminated in the termination and further shed light on the occurrences at the disciplinary committee hearing. The respondent further alleged that if the evidence of Mr. Nyabuto was not admitted by the Court the respondent would be dealt a massive blow in its quest to defend itself against the Claimant's claim practically prejudicing it. The application was said to be supported by the affidavit Henry Nyabuto.

4. In his affidavit Mr. Nyabuto deponed among others that: -

(i) THAT I am advised by the Applicant /Respondent 's advocate on record, , which advice I verily believe to be true that my testimony and witness statement of one are vital and pertinent to the resolution of the employment dispute between the parties herein.

(ii) THAT I am advised by the Applicant/Respondent's advocate on record, which advice I verily believe to be true that my testimony and witness statement will corroborate the Applicant/Respondent's factual averment that the Claimant was allowed a chance to be heard for his gross misconduct that culminated in his termination and no shed light on the occurrences at the Disciplinary Committee.

(iii) THAT I am advised by the Applicant/Respondent's advocate on record, which advice I verily believe to be true if my testimony and witness statement of one are not admitted by this court as evidence, the Applicant /Respondent's will be dealt a massive blow in its quest to defend itself against the Claimant's claim, practically prejudicing it.

(iv) THAT the Applicant /Respondent will be prejudiced or suffer grave injustice if the prayers sought are not granted.

5. The Claimant opposed the application and filed a replying affidavit in which he deponed in the main that “-

(i) THAT the Respondent/Applicant has come to this court with unclean hands, half-truths, concealing of material facts and is therefore underserving of the Orders sought in this application.

(ii) THAT the Respondent’s application is marred by a myriad of falsehoods and aimed at misleading this Honourable court since at the inception of this suit, the parties were invited for pretrial conference, all the documents and witness statements for both the Claimant and the respondents were probed produced and exchanged by parties and it would be prejudicial and dishonest for the respondents to state that these particular witness statements were not in their possession of that particular time yet Mr. Nyabuto alleges he has been in the respondent employment for over 10 years.

(iii) THAT by attempting to introduce a new witness after the claimant has already testified it will deny him an opportunity to cross examine.

(iv) THAT the respondent had fully participated in this proceeding as can be evidenced by court records hence they cannot deny having no knowledge of the matter at this stage. It is unfair, illegal /unlawful for the respondents to introduce a new witness when the case is at its final stages as this is an afterthought on the part of the respondent.

6. Mr. Nyabuto filed a further affidavit in response to the Claimant’s affidavit in which he stated that: -

(i) THAT the Respondent/Claimant’s averment appearing at paragraph 3 and 4 of the replying Affidavit could not be further from the truth due to the following reasons: -

(a) THAT I am the pre-eminent person to testify as I have full knowledge of what transpired in the course of the disciplinary action of the respondent/Claimant.

(b) THAT I have the full details of the procedure that was followed leading to the Respondent’s /Claimant’s dismissal and would like to be key lead evidence to that effect.

(c) THAT at no one time has the Applicant/Respondent addressed me through its pleadings of the main suit or the instant application, the issue of the particulars of my employment tenure, as such the Respondent/Claimant is severely misguided and by extension misleading this court.

(d) Without prejudice to the foregoing, my existence as an employee of the Applicant/Respondent qualifies me to be a witness in any case, as the same is subject to scrutiny.

(ii) THAT no prejudice would be suffered if I aim to testify as I have complied with filing a statement and the Respondent/Claimant has every right to file a further statement if any, and further I am advised by my Counsel on record, that the evidence before court would help put the matter to rest.

7. This claim was filed on 17th November, 2017. Together with the claim, the Claimant filed his statement and supporting documents. These were served on the respondent who filed a statement of response on 12th October, 2018 together with witness statements and documents to be relied on at the trial. The witnesses whose statements were filed by the respondent were Sabmia Firzwanja and Kennedy Omalala .

8. The Claimant’s suit was centered on the termination of his service which he considered was unlawful and unfair in terms of reason for termination and procedure followed prior to termination.

9. The respondent in its statement of response denied that the termination of the Claimant’s contract was done unfairly and without lawful cause. The respondent further pleaded in detail the circumstances which informed the decisions to terminate the Claimant’s service. They were more particularly contained in paragraph 5 of the statement of response and generally in the entire response to claim.

10. From the time the matter was filed, the same was mentioned severally and eventually proceeded on 5th December,2019 when the Claimant gave his evidence, was cross-examined by the respondent’s counsel and closed his case. The respondent thereafter called its witness a Mr. Kennedy Omalala who also gave his evidence in chief and was cross-examined by the claimant’s counsel. The respondent’s counsel therefore sought adjournment to call his last witness. The matter was adjourned to 28th February,2020 for further hearing. When the matter came up for hearing on 28th February, 2020 as scheduled, counsel for the respondent instead informed the Court that he had instructions to inform the Court that the respondent was willing to settle the matter out of Court. The Court rescheduled the hearing to 29th April,2020 meanwhile directed that the parties be at liberty to pursue amicable settlement.

11. The matter was thereafter mentioned severally to receive progress of settlement.

12. On 24th February, 2021 when the matter came up for hearing Counsel for the respondent informed the Court that he had filed the present application.

13. The court has observed that whereas the reasons and circumstances under which the Claimant’s service was terminated were central to this suit and necessary witnesses obviously known, at no time did the respondent inform the Court that the evidence of Mr. Henry Nyabuto

now sought to be introduced was necessary and therefore he ought to be admitted as a witness in time for the trial of the suit. The respondent considered Sabina Firzwanya and Kennedy Omalala as the most relevant witnesses in the matter.

14. The Claimant gave his evidence based on the pleadings on record including witness statements filed by the respondent. He has since closed his case. To introduce a different witness whose statement he had no benefit of reviewing while giving his evidence will change the character and content of the proceedings on record. This could occasion prejudice to the Claimant and even if he were to be recalled to be cross-examine the new witness and adduce new evidence, this would not only confuse the court record but also convolute the evidence already on record.

15. The Court has carefully reviewed and considered the Motion dated 24th February, 2021 herein and the grounds upon which the same has been brought and is not persuaded that it was not within reasonable contemplation of the respondent that the evidence of Mr. Henry Nyabuto sought to be introduced this late, was not critical. No reasonable grounds have been demonstrated in the application and supporting Affidavit to show why Mr. Nyabuto was never considered in the first instance as a necessary witness.

16. The application is therefore found without merit and is hereby dismissed with costs.

17. It is so ordered

Dated at Eldoret this 19th day of May, 2021

Delivered at Nairobi this 19th day of May, 2021

SIGNED BY: HON. JUSTICE J. N. ABUODHA

THE JUDICIARY OF KENYA.

ELDORET ELRC

EMPLOYMENT AND LABOUR RELATIONS COURT

DATE: 2021-05-19 04:05:41+03