



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1899 OF 2016

JACKSON NTHUKU MUTISO.....CLAIMANT

VERSUS

TANATHI WATER SERVICES BOARD.....1ST RESPONDENT

KITUI WATER AND SANITATION COMPANY.....2ND RESPONDENT

THE CHIEF OFFICER, MINISTRY OF AGRICULTURE,

WATER AND IRRIGATION, COUNTY GOVERNMENT OF KITUI.....3RD RESPONDENT

RULING

1. The 1st Respondent’s Counsel seeks to re-open the case and recall the Claimant whose testimony was taken on 9th June, 2021. Mr. Oyagi for the 1st Respondent asserts that the said Respondent has a right to fair administrative action and the safeguard under Article 159, 47, 50, 48 and 62 of the Constitution as well as Section 3 of the Employment & Labour Relations Court Act and the Rules of the Court. He submits that the 1st Respondent was denied an opportunity to cross examine the Claimant and he asserts they are ready and willing to do so. He argues that he did not hear the directions given that case was to continue on 9th June 2021 as he was free on that day and did not know it had been set for the further hearing. He urges the Court to exercise its authority under Section 3 of the Employment Court Act and bring to effect, the purpose and intent of the Act which is the just and expeditious disposal of cases before it. He states too that is wrong being enjoined in the suit.

2. Counsel for the Claimant is opposed. He argues that to re-open and call the Claimant for cross-examination by the 1st Respondent would be a waste of precious judicial time as the 1st Respondent was present for the hearing of the matter and never indicated any issue. He argues that if Counsel for the 1st Respondent had any internet connectivity issues that is a matter of the client and his advocate. He termed it internal affairs and thus urges the denial of the Motion. He asserts the witness for the 2nd Respondent has testified and as such is at the place of cross-examination.

3. The advocate for the 2nd Respondent – Miss Kyany’a asserts that the matter was last in Court on a date taken by consent and the Parties availed themselves and testimony was taken from the 2nd Respondent’s witness. She asserts that the witness was to go through cross examination today. The Counsel urges that the position taken that the 1st Respondent is wrongly enjoined is incorrect. She avers that the 1st Respondent is a necessary party to the suit and as such cannot be said to be wrongly enjoined. She stated she leaves the matter to Court to determine whether there is basis to recall the Claimant.

4. The Counsel for the 3rd Respondent- Mr. Mbeche asserts that he is not opposed to the application by the 1st Respondent but will be amenable to the directions of the Court as will issue. He stated they abide the directions of the Court though they are not opposed to the Motion to recall Claimant.

5. In a brief reply, Mr. Oyagi asserts that the 1st Respondent did not abandon the cross-examination and urges the Court to bear in mind the provisions of the law regarding the right to a fair hearing. He urges Court not to expunge the cross examination taken by the 1st Respondent and if not inclined to allow the present Motion to leave the rest of the examination on record.

6. The Court is at pains to allow the Motion by the 1st Respondent's Advocate. It is clear to allow the recall of the Claimant would go against the very provisions of the Constitution the 1st Respondent has cited. Article 50 provides for a fair hearing. What is fair in recalling a Claimant who has testified, cross-examined, his re-examination taken and case closed, a witness for the defence has testified to the point of cross-examination and then recall the Claimant? What is fair in that? Article 159 and Article 47 provide for the determination of cases expeditiously a concept that is given light under Section 3 of the Employment and Labour Relations Court Act. Section 3(1) & (3) provides as follows:-

“3(1) The principal objective of this Act is to enable the Court to facilitate the just, expeditious, efficient and proportionate resolution of disputes governed by this Act.

(2)

(3) The Parties and their representatives, as the case may be, shall assist the Court to further the principal objective and, to that effect, to participate in the proceedings of the Court and to comply with directions and orders of the Court”.

7. The 1st Respondent has by omission, design or otherwise hindered the expeditious, efficient and proportionate resolution of this dispute by wishing to take us back to another witness who has testified and closed his case. By the action taken today, the 1st Respondent has not assisted the Court to facilitate the just expeditious and efficient resolution of the case by failing to comply with orders of the Court and directions of the Court given herein. The case proceeded on 9th June as directed by the Court. The 1st Respondent was not there. If there were internet challenges as alleged how they did Counsel not taken any steps since then to bring to the Court's attention his handicap?

8. As the time for hearing the case today has been taken up by this, by this Ruling, the Court will unfortunately have to defer further hearing. The 2nd Respondent's witness is to be heard on a date in the new term but the 1st Respondent must pay Court adjournment fees of Kshs. 2,500/-, the Claimant's costs of Kshs. 5,000/-, the 2nd Respondent's costs of Kshs. 5,000/- for getting up to the hearing which has aborted thanks to the advocate of the 1st Respondent suit shall be listed and part heard on the date I will assign it and it must proceed on that date with no adjournments or applications of this nature being presented at the hearing. Court record to stay as is no record was expunged. So ordered.

Dated and delivered at Nairobi this 26th day of July 2021.

Nzioki wa Makau

JUDGE