



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1321 OF 2015**

**BEN OTIENO AKETCH.....CLAIMANT**

**VERSUS**

**MACHARIA MWANGI & NJERU ADVOCATES .....RESPONDENT**

**RULING**

1. Before me is a Notice of Motion dated 5<sup>th</sup> August, 2021 filed by the Claimant on 11<sup>th</sup> August 2021 and shown to be brought under Sections 3 and 16 of the Employment and Labour Relations Court Act, Rule 33 of the Employment and Labour Relations Court (Procedure) Rules and Rule 16 of the High Court (Organization and Administration) General Rules. The following orders are sought in the said Application: -

- a. That the application be certified urgent and service be dispensed with in the first instance;
- b. That the Court grants leave for the application to be heard during the August 2021 recess;
- c. That the Court stays the order made on 2<sup>nd</sup> August 2021 directing the parties to file final submissions;
- d. That the Court grants the applicant leave to file a further witness statement and a further list of documents and reopens the Claimant's case for further hearing; and
- e. That costs of the Application be provided for.

2. The Application was on 11<sup>th</sup> August 2021 placed before the Duty Judge who certified the same as urgent and fixed it for hearing on 12<sup>th</sup> August 2021, a date that had already been scheduled for mention of the case to confirm filing of final submissions and fixing of a date for delivery of judgment.

3. Indeed, both the Claimant and Respondent had fully testified, had been cross-examined, re-examined and had closed their respective cases on 2<sup>nd</sup> August 2021 when the main suit came up for hearing.

4. Hearing of the application did not proceed on 12<sup>th</sup> August 2021 as scheduled as virtual court proceedings could not be taken due to internet outage in the court building on the said date.

5. When the matter was virtually mentioned in court on 13<sup>th</sup> August, 2021, counsel for both parties sought to be heard on the application and the court agreed to hear the application after the day's cause list.

6. Counsel for the Respondent told the court that on 9<sup>th</sup> August 2021, he filed the Respondent's submissions on the main cause pursuant to the court's directions given on 2<sup>nd</sup> August 2021, and that he had already served the same on the Claimant's advocates. He further told the court that, although he was yet to be served with the Claimant's application dated 5<sup>th</sup> August 2021, he had accessed the same through the Court's e-filing system and had already filed and served a replying affidavit as well as a list of authorities.

7. The Claimant/Applicant's counsel confirmed that he had indeed been served with the Respondent's replying affidavit and list of authorities. He also confirmed having accessed the Respondent's submissions on the main cause.

8. The application is based on the supporting affidavit of Ben Otieno Aketch (the Claimant) sworn on 5<sup>th</sup> August 2021, in which it is

deponed as follows:-

- a. That during his testimony on 2<sup>nd</sup> August 2021, the Claimant discovered that his counsel had inadvertently missed to file some crucial documents in support of his case;
- b. That these documents, which are mainly email communications, were already mentioned in the Claimant's Reply to the Memorandum of Response dated 23<sup>rd</sup> November 2016; and are communications between the Claimant and the Respondent; the contents of which the Respondent is aware.
- c. That the fact that the Claimant/Applicant is based abroad greatly contributed to delay in making the discovery; and
- d. That granting the application would greatly facilitate a full determination of the issues in the case as it would show the circumstances in which the Claimant/Applicant signed a discharge voucher in favour of the Respondent.

9. The Respondent opposed the application and in so doing filed a Replying Affidavit sworn by Elijah Kimani on 10<sup>th</sup> August 2021 in which it was deponed as follows: -

- a. That the application was without doubt an abuse of the court's process by the Claimant;
- b. That trial had been concluded on 2<sup>nd</sup> August 2021 when the matter came up in court and that the Respondent had filed submissions pursuant to the court's directions given on 2<sup>nd</sup> August 2021 and was awaiting judgment by the court.
- c. That the application was inordinately filed as the Claimant was seeking to introduce new documents six years after the claim was filed on 31<sup>st</sup> July 2015 and after hearing of the case had been concluded;
- d. That the Claimant had not given any plausible reason as to why he would seek to adduce fresh evidence and to introduce new documents after parties had closed their cases on 2<sup>nd</sup> August 2021; and especially when the email correspondences he sought to introduce had been in the Claimant's custody, access and possession for the last six years;
- e. That the matter did not only come up for pre-trial conference on 24<sup>th</sup> November 2016, but also came up for hearing on 22<sup>nd</sup> February 2018, 15<sup>th</sup> May 2019, 3<sup>rd</sup> December 2019 and 9<sup>th</sup> April 2020 without the Claimant seeking leave to file any further documents. That the application is an afterthought and an abuse of the court's process;
- f. That previous hearings had been adjourned at the Claimant's instance, forcing the court on 13<sup>th</sup> December 2019 to order that "the hearing on 9<sup>th</sup> April 2020 is cast in stone."
- g. That the email correspondences sought to be introduced were forwarded to the Claimant's advocates on 4<sup>th</sup> August 2021 after the hearing, and that the Claimant was out to build his case after cross examination by the Respondent's counsel, which conduct should be utterly frowned upon by the court;
- h. That there is utterly no nexus between the Claimant being abroad and the inordinate delay in filing the intended additional documents;
- i. That the application is extremely prejudicial to the Respondent which has not only closed its case, but has also filed its final submissions in readiness of a judgment and outcome of the fairly old suit herein.
- j. That the application contravenes the provisions of Article 159 (2)(b) which enjoins the court to administer justice without delay.

10. The application was argued virtually on 13<sup>th</sup> August 2021 with both counsel basing their respective arguments on matters deponed to in their respective affidavits aforesaid.

11. I have considered the application, matters deponed to in the parties' respective affidavits for and against the application and arguments by counsel for both parties.

12. The Claimant testified on 2<sup>nd</sup> August 2021, was fully cross-examined by the Respondent's counsel and was re-examined. The Claimant also produced documents in evidence as listed in his list of documents filed in court. The Claimant's case was then closed without any indication of an intention to seek the court's leave to file further documents or witness statements being made by the Claimant. The Respondent opened its case on the said date (2<sup>nd</sup> August 2021) and its witness testified. The Respondent's witness was cross-examined fully by the claimant's counsel and was re-examined.

13. The Claimant has not only heard the Respondent's case and cross-examined, its witness but has been served with the Respondent's written submissions filed pursuant to the court's directions in that regard.

14. No tenable and/or valid reason has been given as to why documents sought to be introduced at this stage were not filed before commencement of the trial. The Claimant has not told the court that the alleged documents were either not in his possession or were beyond his reach. Indeed, the claimant/applicant told the court that the documents sought to be introduced are mentioned in his Reply to

Memorandum of Response, a document shown to have been filed in court on 3<sup>rd</sup> March 2017, over four years ago; the Memorandum of Claim having been filed in court on 13<sup>th</sup> July 2015, about six years ago.

15. The Claimant is clearly seeking to build his case after hearing the Respondent's case and reading its final submissions filed in court and accessed by his counsel. This court will not countenance such conduct by a litigant. Faced with an almost similar situation in the case of **David Sugut & Another vs Mercela Cheptoo Chuma (2016) eKLR**, the court had this to say: -

***“The Defendant is out to build her case after hearing the Plaintiff's case. This cannot be allowed as to do so will prejudice the Plaintiff's case. The Defendant had the opportunity to lay her case before the hearing commenced. She cannot seek to introduce documents after closure of the Plaintiff's case....”***

16. In the present case, the Respondent stands to be greatly prejudiced if orders sought in the Claimant's application are granted. It is my finding that the application is not only an afterthought but an abuse of the court's process as well. I decline to exercise the court's discretion in favour of the Claimant/Applicant. The Notice of Motion dated 5<sup>th</sup> August 2021 is therefore dismissed with costs to the Respondent.

17. The matter will be mentioned before the Court's Deputy Registrar at Nairobi on 14<sup>th</sup> October 2021 to confirm filing of final submissions by the Claimant.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2021**

**AGNES M.K. 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 M.K. NZEI**

**JUDGE**

**APPEARANCE:**

**MR. OMOLLO FOR THE CLAIMANT**

**MISS NZUKI FOR THE RESPONDENT**