



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 230 OF 2018

(Before Hon. Justice Ocharo Kebira)

BENJAMIN WILLY MUENDO & 53 OTHERS..... CLAIMANTS

VERSUS

QUALITY INSPECTORS LIMITED.....RESPONDENT

RULING

1. The Claimant's through a notice of motion application dated 8th October 2021 has sought for the following orders from this Court:
 - a) That this matter be certified as urgent and service thereof be dispensed with in the first instance.
 - b) This Honourable Court admits the Claimant's further list of documents, further list of witnesses and witness statements of Benjamin Willy Muendo all dated 23rd September 2021, attached herewith and be deemed duly filed.
 - c) The Respondent's bears the costs of the application.

The application is expressed to be pursuant to the provisions of Rules 14 (10) and 17(1) of the Employment and Labour Relations Court (procedure) Rules, 2016. It is premised upon the grounds obtaining on the face of the application and an affidavit sworn by one of the Claimant's/Applicants, Mathews Okoth.

2. The Respondent has opposed the application upon basis of the grounds obtaining in the replying affidavit sworn by one John Kiragu on the 15th day of October 2021.

3. Imperative to put forth the procedural history of this matter, owing to the circumstances of the application. This matter first came up before Justice Radido on the 29th November 2018, for pretrial conference, when counsel for the Claimants/applicants indicated to the Honourable Judge that his clients had duly complied with the pre-trial procedures, but the Respondent indicated that they had not, and sought for 21 days' leave to file witness statements. The Hon. Judge gave the following directions.

- (i) Respondent to file and serve witness statements before 14th December 2018.
- (ii) Agreed issues to be filed before 21/01/2019.
- (iii) Hearing date in the registry after filing of the agreed issues.

4. On the 14th October 2019, the matter came up for mention before the Hon. Deputy Registrar of the Court, in presence of counsel for the parties, when she directed that a hearing date for the matter be picked at the registry. This direction(s) notwithstanding, on the 5th May 2021, the Claimant's counsel approached the registry and fixed the matter before the Deputy Registrar for mention. On the 3rd June 2021, she did direct that the matter be placed before the Judge for directions on its hearing.

5. On the 29th June 2021, the matter was placed before Hon. Justice Nzioki wa Makau, who directed that the Respondent does file and serve the witness statements, and documents within 14 days and fixed the matter for hearing for the 15th July 2015. As at this date the Respondent had not complied with the various orders that had been given on filing of documents and witness statement(s). The matter got slated for hearing for the 23rd September 2021.

6. On the 23rd September 2021, when the matter came up for hearing before me, counsel for the Respondent told the Court that one of the

Respondent's directors had informed him that a number of the Claimants had been paid their salary arrears. He consequently sought for time to enable his clients do a reconciliation of accounts, asserting that they would even narrow down the issues for determination in the matter. Owing to the history of this matter and the fact that the documents on the alleged payments, had not been served on them, counsel for the Claimants/applicants opposed the application. Counsel for the Respondent in a rejoinder, stated that the payments had been made whilst the matter was pending in Court and that some of the Claimants had withdrawn their claims against the Respondent.

7. This Court declined to adjourn the matter and directed the same to proceed. It took the testimony of one Claimant who was present in Court. At the close of his testimony, the Court re-slated this matter for hearing for the 18th October 2021. Apparently, in between the period 23rd September 2021 and 18th October 2021, the Claimants did some soul-searching culminating to the instant application.

8. The long and short of the Claimants'/applicants' application, as can be deduced from the grounds obtaining on the face of the application and the supporting affidavit is that the Respondent is misleading the Court that some Claimants have withdrawn their claims against it, and that the Respondent has settled salary arrears for a number of them. This pushes the imperativeness of the leave being sought, to enable the Claimants disabuse the misleading position that has been taken by the Respondent.

9. In sum, the Respondent contends that the documents that the Claimants are alleging that the documents by the former have taken them by surprise, is an untrue allegation. The documents were served upon counsel for the Claimants/applicants, almost two months prior to the hearing date of 23rd September 2021. That the 1st, 2nd, 5th, 11th, 17th, 26th, 28th, 29th, 30th, 32nd, 33rd and 34th Claimants withdrew their claims and in turn were compensated.

10. The Respondent took the view that the application herein by the Claimants/applicants is an afterthought and an attempt to seal cracks in their case, brought to the fore under cross-examination of the Claimant who testified. The Claimants want to bring in new evidence in the middle of proceedings. This shall prejudice the Respondent.

11. Article 159 (2) of the Constitution enjoins this Court in exercising its judicial authority to be guided by the principles *inter alia* that justice shall be administered without undue regard to procedural technicalities. I will abide by this commandment.

12. This Court is conscious of the fact that one of the Claimants has testified, and that in his testimony he purported to testify both on his behalf and that of the others. However, the Court has not lost sight of the fact that the suit herein is not a representative suit. The Claimants herein though many, did bring this suit in their individual capacities. The purport by the Claimant who testified does not impede any of them to testify on his case, therefore.

13. In the case of **Microsoft Corporation vs Mistumi Computer Garage Limited & another [2001] eKLR**, Justice Ringera (as he then was) stated and I agree, that:

***“..... Rules of procedure are handmaidens and not mistresses of justice and should not be elevated, to a fetish as theirs is to facilitate the administration of justice in a fairly orderly and predictable manner, not fetter it or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit, deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to the higher calling to do justice by saving the proceedings in issue*”**

14. The Respondent's fear that a grant of the orders sought by the Claimants will prejudice it, however, has not explained how. Its fears should be arrayed by the fact that its counsel will have a chance to cross-examine the Claimants on their statements, and the documents to be brought on board. I am of the view that the Respondent's will not suffer prejudice in any fundamental way.

15. So that no party herein benefits in a manner which is unjustifiable, or driven out of the seat of justice, it is necessary that the Claimants are allowed to bring on board the witness statements and documents sought to. This will at the end of the day aid the Court to determine the sticky issue as to whether the alleged Claimants have been paid as alleged by the Respondent, and further whether they at any time withdrew their claims, fairly.

16. The upshot of this matter is that I allow the applicants' application herein, grant the Claimants/applicants liberty to file a, further list of documents and documents, further list of witnesses, and detailed witness statements by all the Claimants, save the Claimant who has already testified.

17. Besides the witness statement, the 1st, 2nd, 5th, 15th, 17th 26th and 34th Claimants must swear affidavits, demonstrating whether or not they have withdrawn their claims against the Respondent, whether or not they have received any payments from the Respondent during the pendency of this suit and whether they intend to proceed with the claims against it.

18. The documents to be filed must include copies of National identity cards of all the Claimants.

19. When this matter finally comes up for hearing, all the Claimants shall be required to attend Court with their original identity cards.

20. The leave that this Court has granted has a life span of 21 days from the date hereof.

21. Costs of this application shall be in the cause.

22. Orders accordingly.

RULING READ AND DELIVERED VIRTUALLY ON THE 15TH DAY OF DECEMBER, 2021

OCHARO KEBIRA

JUDGE

Delivered in presence of;

Mr. Okoth for Claimants / Applicants.

Mr. Dachi for the Respondents.