



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 134 OF 2015

KENYA COUNTY GOVERNMENT WORKERS UNION.....CLAIMANT

VERSUS

COUNTY GOVERNMENT OF MURANG'A.....1ST RESPONDENT

MURANG'A COUNTY PUBLIC SERVICE BOARD....2ND RESPONDENT

RULING

1. The Application before me is the Respondents' Notice of Motion dated 5th July 2019 and served upon the Claimant on 19th September 2019 seeking the following orders:-

1. THAT the application and Further Documents that the Respondents are seeking to introduce are being done so, more than four (4) years after the suit was instituted.

2. THAT the application and Further Documents that the Respondents are seeking to introduce are being done so, more than two (2) years after the court on 28th November 2017 directed that the list of grievants 28th April 2017 be confirmed as the true list of grievants.

3. THAT the same amounts to inordinate delay and is a ploy to further delay the matter hence occasioning an injustice to the claimant's members.

4. THAT the said Application seeks to introduce new evidence in relation to the claimant's computations and amounts owed; of which have not been sustained or verified.

5. THAT the Respondents had been given numerous mentions to verify or present any evidence or documents before the Court; which they failed to do without lawful cause or reason hence an Order was issued on 31st October 2017 confirming the list of employees filed on 28th April as the true list of grievants.

6. THAT the said Application in essence seeks to set aside and/or vary the Order made on 31st October 2017 which the Court confirmed the list of employees filed on 28th April 2017 as the true list of grievants.

7. THAT *is a clear procedure in law for setting aside and/or varying a Court Order.*

8. THAT the said application was filed in Court on 5th July 2019 and served upon the Respondents more than three (3) months later on 19th September 2019; without any reasonable cause or justification.

9. THAT the Application is barred on account of unconscionable delay and the doctrine of laches.

10. THAT the Respondents have been passive and have no plausible explanation for their inaction to explain the delay.

11. THAT the said Application is vexatious, frivolous and an abuse of the Court process.

The Respondents' motion was supported by the Affidavit of Kimwere Josphat, Advocate and the grounds on the face of the motion. In short

it was argued that the Respondents were required to comply per the order of 31st October 2017 and that the further list of documents is to enable the court come to a full and proper determination of the claim. It was further argued that the Respondents would be prejudiced if they were not permitted to amend the list and amounts due as they would stand to suffer irreparable loss should the motion not be granted.

2. The Respondents' motion was opposed by the Claimant who filed grounds of opposition on 11th October 2015. The gist of the grounds in opposition was that the application was made more than 2 years after the court had directed that the list of Grievants dated 28th April 2017 be confirmed as the true list of Grievants. The Claimant asserts that the motion is a ploy to delay the matter and occasion further injustice to the Claimant's members. The Claimant argues that the application seeks to introduce new evidence in relation to the Claimant's computations and amounts owed which are not substantiated or verified. The Claimant asserts that the motion is an attempt to vary the order of 31st October 2017 which was unconscionable. The Claimant urged the dismissal of the motion with costs.

3. The parties filed written submissions in December 2019 in support and opposition of the motion and a date reserved for the Ruling. The Respondents submitted that it is in the interests of justice to permit the grant of orders sought. The Respondents submitted that the documents directly related to the facts in issue and are in no way introducing any new evidence and would not occasion any prejudice upon the Claimant's case in any way. The Respondents submit that the claim relates to Maragua County Council staff declared redundant vide a minute dated 15th April 2000 which came into effect in 2001. The Respondents submitted that the County Council being what it was and taking into account that devolution disrupted the filing system and there was movement of documents there was disruption of the filing system it was a herculean task as documents were misplaced and misfiled which caused a considerable time to lapse before the Respondents were able to trace the said documents. The Respondents submit that the evidence they wish to adduce is to demonstrate that the Claimants were paid and now sought to be paid again. The Respondents submitted that they anticipated the objection by the Claimant and argued that having taken 14 years to file the claim they ought not object to the introduction of the documents as any objection is laced with malice.

4. The Claimant submitted that the Respondents have purposely delayed the matter in whatever manner they can. The Claimant submitted that the Respondents being the custodians of the records cannot suggest that they had no access to the documents from the time the case was filed. The Claimant submitted that the Respondents were given ample time to put in all their documents specifically in relation to the computation and failed to furnish the full list of claimants as ordered by the Court. The Claimant submitted the effect of the orders sought would be to vary or set aside the orders of the court granted in October 2017. The Claimant relied on the cases of **Benjoh Amalgamated Limited & Another v Kenya Commercial Bank Limited [2014] eKLR** and **Alexander Kimutai Rotich v Governor, County Government of Kericho & Another [2019] eKLR** where the courts held that the length of the delay and the nature of the acts done during the interval are the factors to consider. The Claimant cited the cases of **Kibet TotT v Uasin Gishu County Government & 9 Others [2018] eKLR** and **Boniface Mugambi Marete (Suing as Legal Representative of S M Marete M'Amburu) v District Roads Engineer Laikipia East District & 2 Others [2019] eKLR** to argue that equity aids the vigilant not the indolent. The Claimants also cited the cases of **Mwangi Kimari v Shammi Kanjirappara, bil & 2 Others [2014] eKLR**, **Joseph Ouma Onditi v Jane Kisaka Mung'au [2019] eKLR** and the case of **Unga Limited v Magina Limited [2014] eKLR** to argue that delay was unconscionable and there was inordinate delay. The case of **Ann Njoki Murani v Kenya Commercial Bank Limited & 2 Others [2013] eKLR** was cited for the arguments on the general rule on amendments. The Claimant submitted that the list of documents is similar to the list filed on 4th December 2015 save for the facts that the Respondents have gone on to alter and amend the same without any verification as the court envisioned from the proceedings on 24th March 2017. The Claimant submitted that the list was settled on as part of a consent before court and that the reasons for vitiation of a contract and the grounds for setting aside a consent have to be satisfied. Among many others, the case of **Isaac Kinyanjui Njoroge v National Industrial Commercial Bank Limited [201b] eKLR** was cited for the submission that the Respondents were trying to set aside a consent judgment and they must demonstrate basis for this in order to be allowed to introduce new documents.

5. The motion is seeking to allow the introduction of new documents. In the case of **Ann Njoki Murani v Kenya Commercial Bank Limited & 2 Others (supra)** The court held that the general rule is that amendments should be allowed if the court is satisfied that:-

- a. the party applying is not acting mala fide.
- b. the amendment will not cause injury to the other side which cannot be compensated by costs.
- c. the amendment is not a device to abuse the court process.
- d. amendments must not be unduly delayed.
- e. the reasons why the subject matter of amendment was not included in the original pleading or offered sooner.

The Respondents make the application almost 5 years after the suit was filed. This fails the test as there is no proper basis laid for alleged failure to present the documents in court prior to late 2019. In the premises the motion is dismissed albeit with no order as to costs. Court will give directions on the disposal of the suit after this Ruling.

It is so ordered.

Dated and delivered at Nyeri this 10th day of February 2020

Nzioki wa Makau

JUDGE