



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA

CAUSE NO 108 OF 2018

MOHAMMED BOCHA GOBU.....CLAIMANT

VERSUS

BGP KENYA LIMITED.....RESPONDENT

RULING

1. By its application brought by Notice of Motion dated 20th January 2020, the Respondent seeks the following orders:

- a) That the Court be pleased to put off, suspend and/or set aside the court proceedings of 19th December 2019 and all consequential processes arising therefrom;
- b) That the Respondent be granted an opportunity to be heard;
- c) In the alternative that the Court be pleased to recall the Claimant for purposes of being cross examined on his testimony given on 19th December 2019 and to further allow the Respondent to call one witness to testify in the matter.

2. The application, which is supported by an affidavit sworn by the Respondent's Administration and Human Resource Supervisor, Timothy Chemweno is based on the following grounds:

- a) The matter came up for hearing on 19th December 2019, when the same proceeded in the absence of the Respondent and a mention date for confirmation of filing of submissions and setting a judgment date given;
- b) The Respondent's Counsel handling the matter had requested Mr. Onyango, Advocate to hold his brief and request for the matter to be adjourned on the ground that the Counsel was held up in highlighting submissions in another contentious matter before another court of coordinate jurisdiction;
- c) The application for adjournment was opposed by the Claimant on the alleged ground that the Respondent had previously made many such applications and declined to pay adjournment fees plus costs;
- d) The above presentation by the Claimant was deliberately misleading as the matter was filed in March 2018 and had only come up for hearing on 21st May 2019 when it was adjourned to 19th December 2019;
- e) The Respondent's Advocate was honestly involved in highlighting submissions before Lady Justice W. Okwany (a court of coordinate jurisdiction) in three consolidated matters being *Nairobi High Court Comm. Misc. Applications Nos. E052 of 2018, E341 of 2018 and 17 of 2019: Digital Devide Limited v Coretec Systems & Solutions Limited*. The highlighting of submissions proceeded for the better part of the day;
- f) The Respondent wishes to be heard in the matter with a view to assisting the Court to do justice between the parties considering the fact that the Claimant served on a term contract which lawfully expired hence the absence of any termination letter in the proceedings;
- g) The Respondent profusely apologises to the Court for its failure to proceed with the matter on 19th December 2019 which was not deliberate but due to the matters explained above;
- h) The Respondent has a *prima facie* good defence filed in opposition to the Claimant's claim and it is only proper that the

Respondent is granted unconditional leave to defend the Claimant's unmeritorious claim which application has been filed timeously without undue delay and in utmost good faith;

i) The Respondent has a right both under the Constitution of Kenya, 2010 and the Civil Procedure Act and Rules to defend itself against the Claimant's unmeritorious claim herein, whose rights should be protected by the Court by granting the Respondent an opportunity to be heard;

j) The subject application has been made in good faith with the sole intention of assisting the Court to do substantive justice to all parties;

k) Unless the orders sought are granted the Respondent will be condemned unheard as the Claimant will proceed and obtain judgment to the detriment of the Respondent against the Respondent's rights as enshrined under the Constitution;

l) It is only fair and just in the circumstances that the orders sought herein are granted.

3. The Claimant's response is contained in a replying affidavit sworn on 3rd February 2020 and filed in court on 7th February 2020. The Claimant sets out the following chronology of pre-trial events:

a) The cause was fixed for mention on 18th December 2018 when the Court set it down for hearing on 21st May 2019;

b) On 21st May 2019 Mr. Oduor, Advocate who had been instructed to hold brief for Mr. Agwara, Advocate for the Respondent applied for an adjournment on the ground that the hearing date had been taken *ex parte* and Mr. Agwara was engaged in the High Court at Nairobi in *Petition No 10 of 2016*;

c) The Claimant's Advocate opposed the application for adjournment because the Claimant had endured a difficult two-day journey from Witu to attend Court and his Advocate had travelled from Nairobi, yet Mr. Agwara, who practises in Nairobi, in the same neighbourhood with the Claimant's Advocates on record, did not have the courtesy to inform the Claimant's Advocates that neither he nor the Respondent's witness(es) would be attending Court on 21st May 2019;

d) Nonetheless, the Court allowed the application for adjournment because the date had been taken *ex parte* and ordered the Respondent to pay Kshs. 15,000 in witness costs. By consent of both Advocates, the Court set down the cause for hearing on 19th December 2019;

e) On 10th June 2019, the Claimant's Advocates wrote to the Respondent's Advocates requesting for remittance of Kshs. 15,000 ordered by the Court on 21st May 2019;

f) On 19th December 2019, Counsel who had been instructed to hold brief for Mr. Agwara for the Respondent again sought an adjournment on the basis that Mr. Agwara was held up in the High Court at Nairobi;

g) The Claimant's Advocate opposed the application for adjournment because the Claimant had again endured a two-day journey from Witu to Mombasa and his Advocate had travelled from Nairobi, yet Mr. Agwara who practises in Nairobi in the same neighbourhood as the Claimant's Advocates on record, had not informed the Claimant's Advocates that neither he nor the Respondent's witness(es) would be attending Court on 19th December 2019 even though the hearing date had been fixed way back on 21st May 2019, by consent of both Counsel;

h) In addition, the Claimant's Advocates informed the Court that he had written to the Respondent's Advocates on 10th June 2019 (some six months prior to the 19th December 2019 hearing date) requesting for remittance of Kshs. 15,000 in witness costs as directed by the Court on 21st May 2019 but in defiance of the orders of the Court, the Respondent had not bothered to respond to the letter, leave alone pay the witness costs, which the Respondent had not paid to date;

i) That the Court declined to allow the application for adjournment for the reason that it was clear that both the Respondent and its Advocate only wished to delay the hearing of the case to the Claimant's detriment.

4. The Claimant states that the Court was right in declining to allow the Respondent a second adjournment and maintains that the present application is made in bad faith with the sole aim of stalling the proceedings of this cause.

5. The Claimant adds that even though the Respondent entered appearance almost two years ago, it had not filed any list of witnesses, witness statements or bundle of documents and any assertion that the Respondent was denied the right to present its case is deceitful.

6. The gist of the Respondent's application is that the proceedings of 19th December 2019 be set aside and the case be reopened for hearing. As held in *Kenya Power & Lighting Co. Ltd v Esther Wanjiru Wokebii [2014] eKLR* an application for setting aside of proceedings calls for the exercise of judicial discretion which is to be done in the interest of justice.

7. In its application, all the Respondent states is that on 19th December 2019, when the matter came up for hearing, its Counsel was held up at the High Court in Nairobi. The Claimant states and the Respondent does not contest that the date of 19th December 2019 was taken by consent of the parties.

8. The Claimant also complains that the Respondent's Counsel did not bother to notify the Claimant's Counsel that they would not be attending Court on 19th December 2019. Moreover, the Respondent had failed to pay the Claimant's costs of Kshs. 15,000 as directed by the Court on 21st May 2019. Again, the Respondent does not deny these accusations.

9. In *Global Tours & Travels Limited (Nairobi HC Winding Up Cause No 43 of 2000) Ringera J* (as he then was) identified the need for expeditious disposal of cases plus scarcity and optimum use of judicial time as key factors to consider in determining an application for setting aside proceedings.

10. From the record, it is evident that the Respondent has not taken this matter seriously; not a single witness statement has been filed, the Respondent's Counsel did not bother to notify the Claimant's Counsel ahead of time that they would not be proceeding both on 21st May 2019 and on 19th December 2019, and when the Court allowed an adjournment, the Respondent failed to pay the Claimant's costs.

11. This paints a picture of a litigant taking the Court and the opposite party for granted. I must add that Advocates are responsible for planning and organising their dairies and the fact that an Advocate is engaged in another court of co-ordinate jurisdiction is not by itself a valid reason for adjournment.

12. For the foregoing reasons, the Respondent's application dated 20th January 2020 is disallowed with costs to the Claimant.

13. The Respondent is directed to file final submissions on the main claim within the next fourteen (14) days from the date of this ruling.

14. Orders accordingly.

DATED SIGNED AND DELIVERED AT MACHAKOS THIS 9TH DAY OF APRIL 2020

LINNET NDOLO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the

COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief

Justice on 15th March 2020, this ruling has been delivered to the parties electronically, with their consent. The parties have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, the Court is guided by Article 159(2)(d) of the Constitution of Kenya which commands the Court to render substantive justice without undue regard to technicalities, Article 40 of the Constitution which guarantees access to justice, and Section 18 of the Civil Procedure Act which imposes a duty to employ suitable technology to facilitate just, expeditious, proportionate and affordable resolution of civil disputes. Further, in view of the ensuing disruption of the court diary, this ruling has been delivered during the court recess.

LINNET NDOLO

JUDGE

Appearance:

Mr. Mwakio for the Claimant

Mr. Adala h/b Mr. Agwara for the Respondent