



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 655 OF 2010

THOMAS OGUTU.....CLAIMANT

VERSUS

POSTAL CORPORATION OF KENYA.....RESPONDENT

RULING

1. This Cause has a chequered history. The Claimant closed his case on 4 July 2013.
2. At the time, the Respondent indicated that it would present two witnesses, an Employee Relations Manager and the Chief Security Officer. The first witness, the Employee Relations Manager testified on 20 February 2014 and 21 March 2014 but did not conclude her testimony.
3. The Judge who heard the witness was also transferred from the station before he could conclude the Cause.
4. On 4 February 2019, the parties consented to a hearing before the Judge during the service week on 3 April 2019 (the Judge was in Nairobi for the service week).
5. On 3 April 2019 when the parties appeared before the Judge, the Respondent's advocate sought an adjournment on the grounds that he had just taken over the case and that he needed witness summons against the first witness who had retired.
6. The Court granted the Respondent 30 days to prepare its witnesses ahead of hearing on a date to be scheduled before any other Judge.
7. The Court also directed that witness summons issue against the first witness.
8. When the suit came for directions on 22 May 2019, the Respondent's advocate informed the Court that he was still waiting for the Respondent to identify new witnesses.
9. The Deputy Registrar scheduled the Respondent's case for 16 October 2019.
10. However, the hearing did not proceed on that date and was rescheduled to 28 November 2019.

11. When the file was called out on 28 November 2019, an advocate holding brief for Mr. Akello for the Respondent sought an adjournment and also applied for the fresh commencement of the hearing of the Respondent's case.
12. The Claimant objected to the grant of an adjournment.
13. The Court declined to allow the adjournment due to the age of the Cause, and conduct of the Respondent in failing to comply with previous Court orders.
14. The Court, as a result, directed the filing and exchange of submissions, with Judgment reserved for 21 February 2020.
15. On 17 February 2020, the Respondent filed a motion seeking orders
 - a). ...
 - b). THAT there be a stay of the orders/directions given by this Honourable Court on 28th November 2019, that is, that there be stay of filing written submissions, and arrest of judgment in this case pending the hearing and determination of this application.
 - c) THAT the case be re-opened for hearing of the Respondent's case.
 - d) THAT Mrs Nancy Mathenge substitutes Mrs Ann Koech as the Respondent's witness and the Respondent be granted leave to file her statement annexed hereto as her testimony in chief.
 - e) THAT costs be in the cause.
16. The main reasons advanced in support of the application were that the Respondent's first witness had left employment before concluding her testimony and had become uncooperative and there was a need to substitute her with a new witness and that the advocate handling the brief was not ready to proceed on 28 November 2019 because of a congested diary.
17. The Respondent filed its submissions on 5 June 2020 in which it more or less repeated the assertions on the face of the motion and the supporting affidavit.
18. In the submissions, the Respondent acknowledged the delay in presenting the application but contended that it had offered a good explanation, that the witness who had already commenced testifying became reluctant at the last minute, a decision which was not foreseen.
19. The Respondent further urged that it could not file a fresh witness statement before securing leave of the Court.
20. Lastly, the Respondent submitted that the Court should disregard procedural technicalities in light of Article 159(3)(d) of the Constitution.
21. The Claimant filed a replying affidavit in opposition the motion on 12 March 2020 contending that the application was an abuse of the court process and lacked merit.
22. According to the Claimant, the Respondent had invoked the Civil Procedure Rules which did not apply in this Court as the Court had its

Rules; the Respondent should have applied for review under Rule 33 of the Employment and Labour Relations Court (Procedure) Rules with a copy of the Ruling attached; there had been an inordinate delay; the orders of 28 November 2019 were not *ex parte* orders capable of being set aside and that the Respondent had been indulged on 3 April 2019 but had not complied.

23. The Claimant filed his submissions on 15 June 2020 in which he urged that the fact that the motion was filed only 4 days before Judgment showed inordinate delay and that the Court could not grant the orders sought as its jurisdiction had been invoked improperly.

24. The Court has considered the motion, affidavits filed and the submissions.

25. The Constitution, 2010 has expressed a desire that Courts do not pay undue regard to procedural technicalities.

26. In answering the question whether there was any prejudice if wrong procedures were invoked, the Court is of the view and finds that the Claimant knew the substance of the Respondent's motion as set out in the motion and supporting affidavit. Further, the Court is of the view that the mere invocation of the Civil Procedure Rules does not divest it of jurisdiction to grant any merited and appropriate orders.

27. On the merits of the application, it is not lost to the Court that the Respondent is seeking discretionary orders.

28. When the Court declined to grant an adjournment on 28 November 2019, all the material now sought to be relied on by the Respondent were well known to all the parties except that the Respondent did not expressly disclose when the witness who had not completed her testimony had left employment.

29. But by inference, by the time witness summons were being applied for and issued, the Respondent was aware of the reluctance of the witness to return for cross-examination. It can, therefore, be concluded that the Respondent had ample time from 4 February 2019 when it agreed to scheduling of the hearing to 3 April 2019 and from the latter date when it was granted leave to file and serve substitute witness statement. Why no action to substitute was taken before 28 November 2019, only the Respondent knows.

30. The Court also notes that the Respondent has not disclosed whether the Chief Security Manager who was lined up as the second witness also left employment and/or why his witness statement was not filed.

31. On 28 November 2019, the Court declined to allow an adjournment and directed the filing and exchange of pleadings with judgment reserved.

32. The Respondent only moved Court 4 days before delivery of judgment. No good or sufficient reason was tendered for the indulgence.

33. In the view of the Court, the Respondent took the prosecution of its defence casually and is thus guilty of indulgence. It has not made out a case for the grant of the orders sought.

34. The motion is dismissed with costs.

Delivered through Microsoft teams, dated and signed in Nairobi on this 26th day of June 2020.

Radido Stephen

Judge

Appearances

For Claimant Mbugwa, Atudo & Macharia Advocates

For Respondent Okoth & Kiplagat Advocates

Court Assistant Judy Maina