



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

CAUSE NUMBER 457 OF 2016

BETWEEN

ALI ABUBAKAR ALICLAIMANT

VERSUS

CENTRAL ELECTRICALS INTERNATIONAL LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Otieno Otwere & Company Advocates for the Claimant

Muumbi & Company Advocates for the Respondent

RULING

1. The Claim was scheduled for hearing, on 6th February 2019.
2. The Claimant and his Advocate was present. The Respondent's Advocates sent Ms. Nzamsa Advocate to hold Respondent's brief.
3. The Respondent's Advocate informed the Court that the Respondent had filed a Notice of Preliminary Objection, and wished to have Preliminary Objection considered and determined through written submissions.
4. The Claimant's Advocate replied that on 31st May 2018, the Respondent had argued a similar point of Preliminary Objection, based on the principle of *res judicata*.
5. The Court made a Ruling on 11th July 2018, rejecting Preliminary Objection.
6. On 6th February 2019, the Court therefore rejected the fresh Notice of Preliminary Objection, and ordered hearing of the main Claim to go on.
7. The Claimant gave his evidence, and closed his case. He was not cross-examined, as Ms. Nzamsa left the Court precincts as soon as Respondent's Preliminary Objection was rejected. It was ordered Respondent's case is closed, and Parties to file their Closing Submissions within 28 days.
8. The Respondent filed an Application on 21st February 2019, asking the Court to set aside *ex-parte* proceedings of 6th February 2019, and re-open the hearing to allow the Respondent "*participate in the proceedings*".
9. The Application is supported by the Affidavit of Mr. Boniface M. Muumbi, Advocate for the Respondent, sworn on 15th February 2019.
10. He deposes that: hearing took place on 6th February 2019 without according the Respondent opportunity to participate in the proceedings; failure by respondent's Advocate to attend Court during the main hearing was not deliberate; the Respondent has a good response; mistake of the Respondent's Advocate should not be visited upon the Respondent; and that the Respondent's Advocate had secured time for hearing of the Claim, and went for hearing of another Suit at the High Court Mombasa.

11. The Application is opposed through the Replying Affidavit, sworn by the Claimant on 13th March 2019.

12. He faults the application because: the Supporting Affidavit is sworn by the Advocate, not the Respondent; the Supporting Affidavit is full of falsehoods and un-substantiated allegations; the name of the Advocate who held brief on the main hearing, who secured hearing time and went for another hearing at the High Court, is undisclosed; there is no Affidavit filed by the said Advocate; there is no Affidavit from Respondent's Witness alleged to have been present in Court, ready to give evidence; the Application is aimed at delaying finalization of the matter; and no list of Witnesses and their Statements has been filed by the Respondent.

13. The Application was heard on 21st March 2019. Parties restated their respective positions, as summarized above.

The Court Finds:-

14. The position advanced by the Respondent, is not borne by the Court record.

15. The Respondent first raised Preliminary Objection on 22nd September 2017.

16. It was argued that the Claim herein is *res judicata*.

17. A Ruling delivered on 11th July 2018, rejected the Preliminary Objection.

18. The Cause was listed for pre-trial conference on 26th July 2018. Parties were directed to comply with Rule 15 of the E&LRC (Procedure) Rules 2016. Both Advocates were present.

19. The next mention date, taken with the consent of the Parties, was on 11th October 2018. The Claimant's Advocate was present, while the Respondent's Advocate was not.

20. The Claimant confirmed that he had complied with Rule 15. The record indicates Claimant's list of Issues was filed on 21st September 2017. The Respondent made no attempt to comply with Rule 15.

21. Hearing date was therefore scheduled for 6th February 2019.

22. The Respondent filed a second Notice of Preliminary on the morning of 6th February 2019, based on the same ground advanced earlier - *res judicata*.

23. The Court rejected the Preliminary Objection, ordering the main Claim to proceed as scheduled.

24. The Claimant gave evidence, and closed his case.

25. The record does not indicate that there was any other Advocate, holding brief for Respondent's Advocate, other than Ms. Nzamsa.

26. No Affidavit has been sworn by such Advocate.

27. Ms. Nzamsa has not sworn any Affidavit, detailing the scope of her instructions on the hearing of 6th February 2019.

28. There is similarly no affidavit sworn by any intended Witness for the Respondent, to show such Witness was in Court on the hearing date, and to show such Witness is disclosed in a List or Statement of Witnesses, filed by the Respondent.

29. There is no List or Statement of Witnesses filed by the Respondent to-date.

30. The order of 26th July 2018 issued in the presence of the respective Advocates. Respondent's Advocate cannot therefore allege error on his part, in his perception of the nature of the proceedings of 6th February 2019.

IT IS ORDERED:-

a) The Application by the Respondent filed on 21st February 2019, seeking to re-open proceedings is rejected.

b) The Respondent is granted another 14 days from the date of this Ruling, to file and serve its Closing Submissions.

c) The matter will be mentioned on 6th June 2019 when the Court reconvenes, for further orders.

d) Costs in the cause.

Dated and delivered at Mombasa this 28th day of March 2019.

James Rika

Judge