

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

CAUSE NO. 1 OF 2018

PAUL GITARI.....CLAIMANT

VERSUS

THE BOARD OF MANAGEMENT

KANYAKINE HIGH SCHOOL..... RESPONDENT

RULING NO. 2

1. Yet again there is objection to the provenance of evidence to be adduced for the defence Mr. Mbogo for the claimant objects to the witness on the stand testifying as there is nothing on affidavit or statement from the witness that has been availed. He submits that the witness is not therefore one who can testify.

2. Mr. Kiongo for the Respondent submits that the Respondent filed a statement of response whose content was contained from the Respondents' record maintained by the secretary to the BOM at the time who is the witness on the stand, the former principal. He submits that the document which contains the defence was admitted to have been received by the advocate for the Claimant. He submits that the statement of response was served a long time ago. It is on that strength that the witness was called to testify. He relies on Article 159 which bars technicalities and Article 25 on fair hearing.

3. Mr. Mbogo in reply argues that the said Article behooves a party to disclose evidence to the other and that the rules of procedure are set to allow for a party to avail evidence prior to hearing. He concedes that he received the statement to response and it was signed by his colleague Mr. Kiongo. He submits there is no affidavit nor is there a statement. He urges the witness cannot therefore testify.

4. The objection on tendering of evidence is to effect that having not availed any witness statement or affidavit the witness should not testify. In his opposition counsel for the Respondent asserts Article 159 bars procedural technicalities and that Article 25 assures parties of the right to a fair hearing. He urges the dismissal of the objection. The counter to that is that article 25 behooves parties to share evidence to be adduced before it is adduced at the hearing to enable the effect of a fair hearing to be actualized. The rules of this court being the Employment and Labour Relations Court (Procedure) Rules 2016 provide in Rule 14 (8) that a party in submitting a statement of claim or response to a statement shall notify the court of any witness it proposes to call in support of its submissions, file witness statements and shall at the same time notify the other party. As seen from Rule 14 (8) the fact that the Respondent does not have a witness statement precludes the testimony of the witness the Respondent proposes to call. The provisions of Article 25 are not abridged if parties are required to abide by certain rules in the quest for a fair trial. It would not be fair if the witness is permitted to testify absent any statement or an affidavit setting out his statement. It would be a travesty of justice to allow that and even Article 159 is no panacea to abridgment of procedure as proposed by the Respondent. The court will stand down the witness who was sworn in as he is not a proper witness and thus cannot testify. Since defence has no witness to offer, its case is closed and parties will be invited to propose timelines for filing final submissions.

It is so ordered.

Dated and delivered at Meru this 3rd day of October 2019

Nzioki wa Makau

JUDGE