



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 410 OF 2016**

**JACOB OKECHE.....CLAIMANT**

**VERSUS**

**WADIA CONSTRUCTION LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 15th November, 2019)

**RULING**

The respondent filed a notice of motion on 07.10.2019 through Onesmus Githinji & Company Advocates. The application is under section 16 and 20 of the Employment and Labour Relations Court Act; rule 17(3) and 28(1) (g) of the Employment and Labour Relations Court (Procedure) Rules, 2016; Article 50(1) and Article 159(2) (c) of the Constitution of Kenya 2010; and all enabling provisions of the law. The respondent prayed for:

- a) That the application is certified urgent.
- b) That the Honourable Court grants an order to set aside the order to dispose the hearing of the matter by way of written submissions and direct that the matter be heard by way of viva voce evidence.
- c) The costs of the application be provided for.

The application is based on the annexed supporting affidavit of Ian Duke Mworio Advocate and the Advocate's supplementary affidavit filed on 04.11.2019. The grounds in support of the application are as follows:

- a) On 14.11.2016 the Court gave ex parte orders that the suit be disposed by way of written submissions. On that date the claimant's advocate was not present in Court because the claimant had not served the mention notice for the respondent's advocates to attend the directions.
- b) On 12.07.2019 the respondent's counsel was served a mention notice to attend Court on 17.07.2019 for directions on judgment date. It is at that point that the respondent's counsel discovered that the matter proceeded ex-parte.
- c) Under Article 50(1) of the Constitution the respondent is entitled to resolution of the dispute in a fair and public hearing before the Court. The order to have the suit decided by way of written submissions undermines the respondent's right to a fair hearing. Thus the order of 14.11.2016 should be set aside.

The claimant opposed the application by filing his replying affidavit on 11.10.2019 upon the following grounds:

- a) The directions of 25.07.2019 that the respondent to file and serve submissions by 30.08.2019 have not been set aside or reviewed. Further the directions of 14.11.2016 thus, "**Based on the nature of claim and remedies sought parties shall file written submissions to the same. Claimant to file in 14 days; respondent to reply in 14 days after served. Take mention date at registry to confirm,**" has not been set aside or reviewed.
- b) The directions of 14.11.2016 were given after the Court being satisfied that the mention notice for the day had been duly served as per the exhibited affidavit of service.

The Court has considered the material on record. On 14.11.2016 the claimant applied that the matter be determined on the basis of written submissions and the Court directed accordingly. The rules permit the Court to make such directions upon a parties' consent and there was

nothing irregular for the claimant to apply and the Court to make the directions on 14.11.2016. The affidavit of service is on record and counsel for the respondent was duly served at his law office where a lady called Emily acknowledged receipt of the mention notice dated 12.09.2016. The service was on 16.09.2016 at 0920 and Emily signed to acknowledge the service. The Court finds that the respondent's counsel was duly served but for unexplained reasons failed to attend at the mention for directions on 14.11.2016 and instead seeks to mislead the Court that service was not received accordingly. The Court must discourage litigants from such malingering attitude and conduct that is inconsistent to provisions of section 3 of the Employment and Labour Relations Court Act, 2011 which obligates litigants to cooperate and comply with the rules and directions by the Court towards expeditious, fair and proportionate determination of the disputes before the Court.

The Court further finds that the claimant is justified in urging that even if the orders of 14.11.2016 are set aside, there are subsequent orders given in presence of both parties on 25.07.2019 that the respondent files submissions in 30 days. On 12.07.2019 counsel for the respondent knew that the matter was proceeding for directions on judgment, he attended Court on 25.07.2019 and applied to file submissions in 30 days, and did not file the present application until 01.10.2019. The Court finds that such conduct perfectly fits the submission made for the claimant that the respondent is simply engaging delaying tactics to derail the expeditious determination of the suit. The Court finds that the application must therefore fail and parties to take steps for expeditious determination of the suit.

In conclusion the application filed for the respondent on 07.10.2019 is hereby dismissed with costs and parties to take directions for the expeditious determination of the suit.

**Signed, dated and delivered in court at Nairobi this Friday, 15th November, 2019.**

**BYRAM ONGAYA**

**JUDGE**