

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 207 OF 2017

JULIUS IKAPES WASIKE.....CLAIMANT

VERSUS

CAPACITY OUTSOURCING LIMITED.....RESPONDENT

RULING

1. Directions in the matter took place in September 2017 in the absence of the Respondent. Miss Kiongera for Claimant now objects to the filing of documents by the Respondent on account of the delay since the directions were given. She submits the documents were filed without leave and in contravention of the court procedures and disadvantage the Claimant as they are an ambush. She says she was served this morning while on her feet.

2. The Respondent asserts the Claimant has not shown what prejudice the Claimant will suffer if the documents are allowed to remain on record. The Respondent through its Counsel Mr. Enonda submits that it is incumbent upon it to show the reasons for the termination as the burden shifts in this area of employment law. He submits that the documents should be allowed to remain on record albeit filed in a bit late. He asserts the pleadings had not closed.

3. The Employment and Labour Relations Court (Procedure) Rules 2016 make elaborate provisions on the nature of documents each parties to file. The Respondent is alive to the reverse burden of proof relating to dismissal. It is incumbent upon the respondent to prove the reasons for termination. The respondent therefore had an obligation to provide the documentation that discharge its burden. These were not filed until 25th May, 2018 3 days ago. This practice is not one that finds favour with court as it often leads to a scenario such as this. Parties had come for a hearing but now the spectre of adjournment looms it. I am to grant the orders sought.

4. The claimant would in my view suffer some degree of prejudice if the case were to proceed with documents that were handed to his lawyer a short while ago. In my view, the time between the call over and now may not have been sufficient to permit miss Kiongera for the claimant to obtain proper instructs from the Plaintiff before court. He had prepared for a hearing presumably on the basis that Respondent had not offered any documents in its defence. The Respondent on its part came to court ready to defend itself armed with its arsenal which is the pleadings filed last year and the documents plus witness statement filed last week. In my view, the Respondent did not anticipate their arsenal would be depleted by dent of late filing. The scales of justice tilt in favour of fairness. It would be unfair to deny the claimant an opportunity to offer a defence to the attack by Respondent through the documents. It would also not be fair if the Respondent was denied opportunity to proceed with the documents now that it has filed then. From a ready of the defence these documents are what may shed light on the defence advanced. In that regard, discretion will tilt on favour of the following termination. The documents filed are deemed to be properly in record. However, the claimant is to have leave to file and serve a response to these documents within 21 days of today.

As the hearing has not fallen apart, the Respondent must meet the costs of the adjournment occasioned by a late filing. The Respondent shall pay Court adjournment fees of 1,000/= as well as expenses..... For claimant at Kshs.5,000/= before the next hearing date to be set immediately I deliver the Ruling.

It is so ordered.

Dated and delivered at Nyeri this 28th day of May, 2018

Nzioki wa Makau

JUDGE