



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1033 OF 2012

JOHN E. KIHUMBA MUYA.....CLAIMANT

VERSUS

NAIROBI INSTITUTE OF BUSINESS STUDIES LIMITED.....RESPONDENT

RULING

Introduction

1. The application before the Court is the respondent's Notice of Motion dated 27.4.18. It basically seeks for setting aside of the order dated 20.3.2018 by which the hearing of this suit was closed. It also seeks for the reopening of the hearing and for leave to have respondent to file and serve its list of documents and defend the suit. The motion is supported by the affidavit of Antony Mburu Wanyoike and the grounds set out on its body. The gist of the applicant's case is that unless the orders sought are granted she stands to be condemned unheard and the ends of justice will not be met.

2. The Claimant has opposed the motion by filing a Replying Affidavit sworn on 14.6.2018. The gist of the claimant's case is that the application is not justified and it seeks to introduce documentary evidence too late after close of his case.

3. The motion was disposed of by written submissions and the rival affidavits. The applicant filed her submissions on 11.6.2018 while the claimant filed on 14.6.2018. After careful consideration of the affidavits and the written submissions filed, the following issues arose for determination:

(a) Whether the hearing should be reopened and the respondent given leave to tender her defence.

(b) Whether leave should be granted to the respondent to file her list of documents and produce them as exhibits.

Analysis and Determination

4. There is no dispute that on 6.2.2018, the parties herein met at the Court registry and mutually fixed this suit for hearing on 20.2.2018. There is also no dispute that on 20.2.2018, the claimant attended Court and tendered his evidence and closed his case. There is further no dispute that on the said day, the respondent never attended the hearing and a last adjournment was granted to her. It is also a fact that by consent of both parties, the defence case was fixed for hearing on 20.3.2018 but again only the defence counsel attended court without any witness and sought adjournment to enable her obtain certified copies of documents produced as exhibits in Makadara Criminal Case No. 495 of 2012. The documents were described as forensic Expert Report, Receipts, Dormant Hardware and Victory Stores.

5. The claimant opposed the requested adjournment and contended that the respondent was not serious in perusing the documents he had served her on 6.2.2018 which included the alleged documents. After considering the arguments by both parties I declined the adjournment sought on ground that a last adjournment had been granted a month before; the witness was absent; and the documents being introduced as exhibits were potentially prejudicial to the claimant as they were never filed in Court in good time before the claimant closed his case. The respondent was given time to avail his witness the same day but she did not and the hearing was declared closed.

6. In view of the foregoing background from the court record, it is not true that the respondent was unfairly denied adjournment. It is also not true that she is being condemned unheard. This suit is fairly old having been commenced more than 6 years ago. It is absurd for the respondent to purport that she still has documents which are yet to be filed and therefore entitled to another adjournment after squandering the last one given one month earlier.

7. The foregoing notwithstanding, I wish to observe that the application before the court is not competent because it is asking the Court to

sit on appeal over its own decision. The reliefs being sought by the applicant are the same ones which were sought on 20.3.2018 and I declined to grant. No appeal was ever preferred to impugn the order declining the adjournment and introduction of new documents after the close of the claimants case. Consequently, I decline to entertain the respondent's application because I lack jurisdiction to do so after declining the same on 20.3.2018.

Conclusion and Disposition

8. For the reason that the application before the Court is *rejudicata*, I dismiss the Notice of Motion dated 27.4.2018.

Dated, Signed and Delivered in Open Court at Nairobi this 17th day of August, 2018

ONESMUS N. MAKAU

JUDGE