



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 526 OF 2012

BETWEEN

KENYA ELECTRICAL TRADES & ALLIED WORKERS UNION.....CLAIMANT

VERSUS

KENYA POWER & LIGHTING COMPANY LIMITED.....RESPONDENT

RULING

1. This Claim was filed way back in the year 2012. It is brought by the Claimant Union on behalf of about 2000 former Employees of the Respondent State Company. The Claimant seeks to have the Employees, who are Claimant's Members, reinstated or compensated for unfair termination.
2. The Claim was initially heard at interlocutory stage by Justice Stewart Madzayo in the year 2012. The Claimant applied to have Justice Madzayo disqualify himself. The Judge obliged, and the matter was placed before Justice Paul Kosgey. Justice Kosgey did not hear the matter but instead directed the matter is heard before the undersigned Judge. Hearing before the undersigned Judge commenced at the Court sitting in Nairobi, on 22nd May 2013. Hearing did not conclude in Nairobi, the undersigned Judge, having been transferred to Mombasa late in the year 2014.
3. On 12th November 2014, it was ordered by Justice Jorum Abuodha sitting in Nairobi, that given the length and depth of the proceedings, the file is forwarded to the undersigned Judge at Mombasa for further hearing.
4. The matter was scheduled to be heard, with the consent of the Parties before the Court at Mombasa, on 25th and 26th November 2015, 27th and 28th October 2016, and 22nd and 23rd June 2017. Hearing did not proceed on these dates for one reason or the other.
5. On 22nd June 2017, adjournment was granted to the Respondent on the ground that Respondent's Representative, the Federation of Kenya Employers [FKE], no longer had instructions to continue representing the Respondent. The Court directed FKE to file a formal Application for leave to cease acting for the Respondent.
6. The Application by FKE was allowed on 14th July 2017. Hearing of the main Claim was scheduled for 24th and 25th October 2017, with an order that the Respondent is notified in person.
7. On 24th October 2017, the Court was informed that the Respondent had engaged a new Law Firm, KTK Advocates. Adjournment was sought by the Respondent on the ground that KTK had not been able to obtain Pleadings. The Claimant was ready to continue with the hearing, and told the Court it had

written to KTK, confirming its readiness to proceed with the hearing. The Court rejected the Application for adjournment.

8. The 1st Witness for the Claimant, Deputy General Secretary of the Claimant Kosgey Kolil, gave evidence on redirection on 24th October 2017. He had given evidence in chief and was cross-examined by the Respondent's previous Advocates at length, when hearing took place at Nairobi. 2 other Witnesses, former Employees of the Respondent, testified on the same date, 24th October 2017. As the Respondent was not prepared to present its case, the Court ordered proceedings closed, and Parties were granted 14 days, each to file their Closing Submissions.

9. The Respondent filed an Application on 25th January 2018, asking the Court: to re-open hearing; the Claim is dismissed and/or struck out; such other orders as the Court deems necessary; and costs in the cause.

10. The Application is the subject matter of today's Ruling. Supported by the Affidavit of Respondent's Advocate Donald B. Kipkorir, sworn on 19th January 2018, the Respondent states its understanding, was that the matter was coming up for hearing *de novo*, on 24th October 2017. The Respondent states the Court file does not contain Memorandum of Claim and Summons attached to Memorandum of Claim. The Claimant filed Nairobi Industrial Court Cause Number 1788 of 2011 against the Respondent, over similar issues, and Judgment was delivered on 20th April 2017. The present Claim is in abuse of the Court Process.

11. The Claimant filed a Replying Affidavit sworn by Deputy General Secretary Kosgey Kolil, on 15th February 2018. Its position is that the Respondent has flagrantly refused to obey the orders of the Court in relation to hearing directions and production of Witnesses. Hearing should not reopen. The Respondent had the opportunity to be heard, but failed to utilize that opportunity. There is no relationship between this Cause and Cause Number 1788 of 2011. Cause Number 1788 of 2011 has never been mentioned by the Respondent under the proceedings herein.

12. The Respondent filed its Statement of Response in the year 2012. It is impossible that the Respondent did not have access to the full Pleadings as alleged. The Respondent was aware about hearing of the Claim on 24th October 2017.

13. Parties agreed to have the Application considered and disposed of through Written Submissions. Claimant's Advocate highlighted Claimant's Submissions on 6th July 2018, while the Respondent wholly adopted its Submissions as filed.

The Court Finds:-

14. This is clearly an old matter, which needs to be brought to an end. It was initiated way back in the year 2012. It involves a large number of former Employees of the Respondent State Company. The Deputy General Secretary, in his evidence on record, gives the number of affected Employees at 2,076.

15. Evidence for the Claimant has mainly been given by the Deputy General Secretary of the Claimant Union. It is comprehensive evidence, given at Nairobi and Mombasa. The Witness was cross-examined by Respondent's previous Advocates while at Nairobi.

16. When the file was forwarded through orders of Justice Jorum Abuodha, from Nairobi to Mombasa, on 12th November 2014, it was recorded that the file was forwarded to the Judge in Mombasa to continue with the hearing. It was not directed either in Nairobi or Mombasa, that the matter would be heard *de novo*. On 24th October 2017, Mrs. Mohammed who held Mr. Kipkorir's brief, did not state that the Respondent thought the matter was due for *de novo* hearing; she told the Court that Mr. Kipkorir had been unable to have all the Pleadings. There was no change of the Trial Judge. There was no reason for the freshly instructed Advocates to have the impression, that the Claim would be heard afresh.

17. The Respondent filed a Statement of Response, in answer to the Memorandum of Claim. There would be no Statement of Response, without a Statement of Claim. It is also clear from the letters exchanged between the Parties' current Advocates that the Respondent requested the Claimant to be supplied with Pleadings; the Claimant asked the Respondent to pay a certain amount of money for the service; but in the end, the Respondent did not pay anything to the Claimant for supply of the Pleadings as requested. It is noted also that orders of costs made by the Court in favour of the Claimant, were not honoured by the Respondent. Why does the Respondent Company, itself, not have a complete record of the Pleadings and Documents filed in Court from the year 2012? If the Court is to accept the position adopted by the Respondent, there would be hearing *de novo*, every time a Party changes its Advocates. Parties who instruct new Advocates should be in a position to supply their new Advocates with the Pleadings, to avoid a back-and-forth situation, which results in delay in the hearing and finalization of Claims.

18. The question whether the matter is *res judicata* in light of Cause Number 1788 of 2011, can be determined with the rest of the Claim, after the Parties have filed their Submissions as directed by the Court. It is a new issue raised by the Respondent, which does not merit reopening of the hearing. It certainly does not warrant reopening, and peremptory striking out or dismissal of the Claim. The Claimant has given evidence and its Witnesses subjected to cross-examination, without the issue of *res judicata* being mentioned by the Respondent. No Court however, likes to, or should, adjudicate on issues which have been considered and finally determined by another Court. If a relevant Judgment on similar issues, between the same or similar Parties is brought to the attention of the Court before the Court has retired to write its Judgment, the Court must look at the Judgment of the other Court, and determine if the dispute is *res judicata*. The concept of *res judicata* is about law and order, preventing future Judgments from contradicting earlier ones, and also preventing litigants from multiplying decisions and confusion. The Court shall consider whether the Claim is *res judicata* with the rest of the issues, without having to reopen proceedings, now that the Respondent has brought Cause Number 1788 of 2011 into the mix.

19. Lastly, the Court does not think that the Respondent has been denied the right to be heard. The Respondent has been given the opportunity to respond to the Claim; filed Statement of Response; participated fully in the proceedings at Nairobi; cross-examined Claimant's main Witness at length and was represented when other peripheral Witnesses for the Claimant gave evidence; and was given the opportunity to file Closing Submissions. Midstream, the Respondent opted to change its Advocates and was given the opportunity to do so. The Court gave 2 consecutive days of hearing to the Parties on different occasions. There can be no complaint that either Party was denied the right to be heard. Time was set aside by the Court, to hear the Parties herein, at the expense of other litigants. The Court has an obligation under the Constitution and Statute, not to delay justice. This Claim was filed in the year 2012. It must be brought to an end.

IT IS ORDERED:-

- a) The Application filed by the Respondent on 25th January 2018 is rejected.***
- b) The Respondent shall file and serve its Closing Submissions, including submission on res judicata, within 14 days of this Ruling.***
- c) The Claimant may file Supplementary Submissions focusing on res judicata, within 14 days of receiving Respondent's Submissions.***
- d) Costs of the Application to the Claimant.***

Dated and delivered at Mombasa this 28th day of September, 2018.

James Rika

Judge