



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 190 OF 2016

GEETA JOSHI.....CLAIMANT

VS

PANDYA MEMORIAL HOSPITAL.....RESPONDENT

RULING

1. By its application brought by Notice of Motion under certificate of service dated 18th October 2018, the Respondent seeks orders to re-open its case.
2. The application, which is supported by the affidavit of Faiyaz Anjarwalla, Advocate is based on the following grounds:
 - a) The Respondent's case was closed on 4th October 2018 by the Court without evidence of the Respondent's case being heard when the matter was called out at 10.45 am or thereabouts;
 - b) Counsel was attending to an urgent personal matter and the Advocate holding his brief requested that the matter be adjourned which application was disallowed;
 - c) Following refusal of the adjournment, the Counsel holding brief requested for the file to be placed aside for an hour or so, to enable the Respondent's witness to attend court to give evidence which request was denied and the parties ordered to file their respective submissions;
 - d) The matter was coming up for the Respondent's case for the first time and the Respondent is willing to proceed to defend this suit;
 - e) It is only fair and just and in the interest of justice that the matter be heard on merit after all the parties are given a chance to put forward their evidence in the same manner that the Claimant was allowed to re-open her case when the matter was fixed for the Respondent's case on 29th June 2017;
 - f) The Respondent has a good defence to this matter and deserves an opportunity to be heard on the same before the matter is determined;
 - g) The Claimant shall suffer no prejudice in the matter and can be compensated in costs and;
 - h) The application is brought without delay.
3. The Claimant's response is contained in a replying affidavit sworn by her Counsel, Natasha Chala on 22nd October 2018. Counsel depones that the current application is misconceived in law, fatally defective, without merit and an abuse of the court process.
4. She states that the application seeks to re-open the case when there are orders closing the defence case which have not been appealed, reviewed or set aside. Since the Court has not been asked to review or set aside the earlier orders, the orders now being sought cannot be granted.
5. Counsel for the Claimant takes the view that the application is made in futility and is meant to delay the Claimant's case as no reasonable grounds were given to the Court to warrant the adjournment of the matter when it came up for defence hearing, leading to the defence case being closed.
6. On the issue of prejudice, Counsel states that the Claimant has no source of income and has been waiting for the outcome of her case in order to access her dues from the Respondent.

7. The Respondent's application arises from refusal by the Court to grant an adjournment on 4th October 2018, when the matter came up for defence hearing. On this date, Miss Mutune, Advocate told the Court that Mr. Anjarwalla who had conduct of the matter on behalf of the Respondent, was attending to an urgent personal matter.

8. Miss Chala opposed the application for adjournment and the Court made the following ruling *ex tempore*:

*“This matter opened for trial before my brother **Makau J** on 4.5.2017 who has since left the station. I note from the record that the Respondent has previously sought an adjournment on the ground that Counsel for the Respondent has had to travel urgently. This reason was rejected by the Court.*

The Claimant closed her case on 29.5.2018 and today's date was taken by consent of the parties for defence hearing. The details of the reason for the absence of Counsel have not been disclosed to the Court. This is a 2016 matter and no good reason has been given as to why further delay should be allowed. The application for adjournment is therefore declined.

L.Ndolo

Judge”

9. Looking at the present application, it seems to me that the Respondent is making the same plea made orally on its behalf on 4th October 2018. There is nothing in the formal application that was not in the oral application. Significantly, the details of the reason for absence of Counsel for the Respondent have still not been disclosed.

10. What is important is that the Court has already rendered itself on the issue raised in the current application and to deal with it afresh in the manner anticipated in the application would be to overreach the mandate of the Court.

11. For the foregoing reasons, I find the application dated 18th October 2018 without merit and proceed to dismiss it with costs to the Claimant.

12. The Respondent is directed to file its final submissions on the main claim within the next fourteen (14) days from the date of this ruling.

13. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 29TH DAY OF NOVEMBER 2018

LINNET NDOLO

JUDGE

Appearance:

Miss Chala for the Claimant

Mr. Anjarwalla for the Respondent