REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2212 OF 2014

JENS REHM.....CLAIMANT

-VERSUS-

ZHONGFA ASIA AFRICA HOTELS COMPANY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 19th December, 2019)

RULING

The case came up for hearing on 29.10.2019. The claimant was present with counsel ready for hearing. The respondent's newly appointed counsel following change of advocates was present and applied to adjourn because the instructions were that the case had been concluded. The claimant opposed the application because it was another time the respondent had changed advocates and had failed to file a witness statement so that there was no purpose to adjourn. The parties consented to admission in evidence of the documents filed for parties. The Court considered the application to adjourn and ordered:

a. The documents filed for parties admitted in evidence as filed.

b. Being an old case over 5 years old hearing to proceed.

c. Respondent's case closed subject to final submissions.

d. Hearing in 5 minutes or soon thereafter.

The hearing then proceeded and the claimant closed his case. The Court gave directions on filing of submissions. The parties have filed their respective submissions on the main suit as directed by the Court.

The respondent in the suit has filed on 18.11.2019 the notice of motion under Order 18 rule 10 and section 146 of the Evidence Act and through Wambugu & Muriuki Advocates. The applicant prays for orders the Court grants leave to the applicant to have the claimant's witness herein recalled for purposes of cross-examination by the respondent; the applicant be granted leave to reopen its case and call its witnesses to defend the suit; and costs of the application be in the cause.

The grounds in support of the application are that the advocates were instructed to act in the matter on 20.10.2019. Thus on the hearing date the applicant's advocates had not studied the file to facilitate proper representation at the hearing. The instructions by the applicant to the advocates was that the suit had been concluded but upon perusing the Court file the present applicant's advocates discovered that the matter had not been concluded. Thus the advocates were ill prepared to act on the hearing date. It is therefore just to grant the orders as prayed for. The respondent should be given a chance to respond to the allegations by the claimant.

The supporting affidavit of Emmanuel Eredi Advocate was annexed to the application. The advocate refers to his client's instructions that the case had been concluded and that the client had been informed as much by the previous advocates on record. There is no explanation why the client did not swear the affidavit and the Court considers that the information as stated by the advocate largely amounts to hearsay.

The claimant has opposed the application by filing on 28.11.2019 his replying affidavit through Mulandi Kisabit & Associates Advocates. The claimant urges that the application is malicious, mischievous, incompetent, frivolous, abuse of the Court process and an afterthought. Counsel for the applicant has indeed cross-examined the claimant and the claimant's counsel and therefore the application is calculated to waste the precious judicial time. There is no reasonable ground why the applicant failed to file a witness statement and to comply with the rules on calling a witness. The case was over five years old since filing in Court and it was just that it is determined without further delay.

The Court has considered the application. The applicant relies on a misconceived position that the suit had been concluded whereas a hearing notice had been served. The Court further finds that the respondent seeks reopening of the case to re-examine the claimant and the claimant's witness whereas they were duly re-examined. To that extent the Court finds that the application was an abuse of Court process.

Rule 14 (8) of the Employment and Labour Relations Court (Procedure) Rules provides that a party shall notify the Court when submitting a statement of claim or a response to a statement of claim any witness it proposes to call in support of its submissions, file witness statements, and shall at the same time notify the other party. The Court returns that the applicant failed to comply with that rule.

The Court follows the opinion in its ruling in **Yaron Gurevich –Versus-Carnation Plants Limited [2019]eKLR**, thus, "**3). Further the documents to be admitted run into over 477 pages. In the opinion of the Court such amounts to massive evidence that may change the character of the suit completely and will require the claimant to go back and even reopen pleadings. There are no prayers for reopening pleadings and the Court will not allow the parties to prosecute their cases by instalment with the consequence that the purposes of the rules of pleading and pre-trial case management are defeated. The discovery by instalment in a case whose hearing is already underway and is hotly contested like in the instant one will lead to absurd outcomes in which the parties shift and re-shift the character of their respective cases and the scope of the dispute. Under Rule 14(10) of the Court's rules of procedure documents to be relied on at the hearing are to be served upon the other party in 14 days or shorter time the court may order, before the scheduled hearing date. If pleadings have closed, then leave of Court is needed to file supplementary documents. In the instant case leave is being sought after the claimant had closed his case and some of the respondent's witnesses had already testified. As submitted for the claimant, it will be prejudicial. Needless to state, allowing such massive evidence that may substantially change the character of the parties' respective cases is inconsistent with section 3 of the Employment and Labour Relations Court Act, 2011 that requires the Court to facilitate the just, expeditious and proportionate resolution of disputes governed by the Act**."

The Court finds that the application was belatedly filed and inexcusably so because the claimant who has already closed his case will be seriously prejudiced if it is granted.

In conclusion the application dated and file on 18.11.2019 is hereby dismissed with costs with orders that the parties to take directions forthwith for the expeditious determination of the suit.

Signed, dated and **delivered** in court at **Nairobi** this **Thursday, 19th December, 2019.**

BYRAM ONGAYA

JUDGE