



REPUBLIC OF KENYA



KENYA LAW
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**Nguyo v Kenya Ports Authority & another (Cause 434 of 2016)
[2017] KEELRC 2011 (KLR) (31 March 2017) (Ruling)**

John Ndiritu Nguyo v Kenya Ports Authority & another [2017] eKLR

Neutral citation: [2017] KEELRC 2011 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 434 OF 2016
ON MAKAU, J
MARCH 31, 2017**

BETWEEN

JOHN NDIRITU NGUYO CLAIMANT

AND

KENYA PORTS AUTHORITY 1ST RESPONDENT

WILLIAM KIPKEMBOI RUTO 2ND RESPONDENT

RULING

1. The claimant brought this suit on 6/6/2016 seeking the following orders:
 - a) declaration that the appointment of the second respondent as the Head of Marine Operations grade HE.2 on 17/5/2016 was in breach of section B12(g) and (h) of the first respondents' HR Manual 2011 and therefore null and void.
 - b) Injunction to restrain the first respondent from allowing the second respondent to assume and/ or take over office as the head of Marine Operations, Grade HE. 2.
 - c) compel the respondent to confirm the claimant to the post of Head of Marine Operations, grade HE.2, post No. 440-1001 in accordance with Section B12 (g) and (h) of the respondents HR manual 2011.
 - d) Payment of acting allowance for 15 months.
 - e) Payment of Ksh.152,472 per month till retirement to compensate the loss occasioned by the failure by the employer to confirm him to the position of Head of Marine Operations, Grade HE2 Post No. 440-1001.



2. The respondents denied liability and averred that the appointment of the second respondent was lawfully done and the suit is not only without merits but it is also overtaken by events. They therefore prayed for the same to be dismissed with costs.
3. The suit came up for hearing on 28/9/2016 when the claimant testified and closed his case. The respondents called the first witness and sought adjournment to call the second respondent who was abroad on official duties. When the suit came for further defence hearing on 12/10/2016, the defence brought the Notice of Motion dated the same date seeking for leave to file further documents in support of their defence. The Motion is brought under Rule 14(6) and 16(2) of this Courts Procedure Rules, Section 1A, 3 and 3A of the *Civil Procedure Act* and Rule 51 rule 1 of the Civil Procedure Rules. The claimant objected to the leave being granted alleging that it will prejudice his case which had been heard and closed. He also contended that the move was an attempt by the respondents to patch up their weak defence.

Analysis and Determination

4. The issue for determination is whether the leave sought by the defence is merited and that it will not prejudice the claimant. The reason given by the respondent for the delay in filing the documents is that the documents were in the custody of the claimant until 10/10/16 when he was evicted from the office of the Head of Marine Operations. That, it is only after the second respondent took over the office, that he discovered the material documents from the personnel files in that office. According to the respondents the documents are relevant because they will show how the office of the Head of Marine Operations had been filled overtime whenever it fell vacant. According to them the documents are necessary for effective determination of the dispute.
5. The claimant has on the other hand, contended that, the documents are not relevant to this case and that they relate to persons who are not parties or witnesses to this suit. He submitted that the documents in question are personnel documents and were kept by the HR department and they were never in his custody. He objected to the production of the documents as evidence contending that his case will be prejudiced because he has already closed it. He further contended that the respondents filed their further documents on 28/9/2016, the day the suit came up for hearing and he did not object to the same to avoid delaying the trial. He prayed for dismissal of the Motion because it infringes on the right to fair trial and expeditious disposal of the suit.
6. After careful perusal of the Motion, rival affidavits and submissions by counsel, it is clear that the claimant's case was heard and closed on 28/9/16. The documents being introduced by the defence were allegedly kept in an office occupied by the claimant. The claimant has denied that allegation and contended that the documents are personnel documents which are in the custody of the HR department. No evidence to contest that allegation by the claimant was adduced by the HR officers of the first respondent. The respondents have therefore not proved on a balance of probability that the said documents were in the custody of the claimant and that they could not access them before 10/10/16. In my view the reason for the delay in filing the document is because the second respondent was abroad until 10/10/16 when he returned to Kenya as per paragraph 4 of the affidavit. The Motion is therefore an afterthought.
7. In addition to the foregoing, the documents being introduced now are likely to prejudice the claimant's case which has already been closed. According to the respondents the said documents are necessary for effective and just determination of the suit. If I get the respondents well, they are submitting that the documents go to the merits of the case. Allowing such crucial documents after the close of the claimant's case, will in my view, prejudice the claimant's case which is already closed just like the case



for the first respondent. Even if his counsel will have a chance to cross examine defence witnesses on the documents that will not prevent the prejudice because the claimant will not have a chance to testify on the documents. The trial has gone so far and allowing the documents on board might require that we reopen not only the claimant's case but also the first respondent's case. That will not be possible because the case has gone too far to be reopened.

Disposition

8. For the reason that allowing the Motion might prejudice the claimant's case, and the fact that the applicants have failed to prove on a balance of probability that it is the claimant who prevented them from filing the documents in time, I dismiss the Notice of Motion dated 12/10/16. Costs in the cause.

DATED, SIGNED AND DELIVERED THIS 31ST MARCH 2017.

O.N. Makau

Judge

