



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**  
**CAUSE NO.1788 OF 2011**

**KENYA POWER &  
LIGHTING COMPANY LIMITED ..... CLAIMANT**

**VERSUS**

**KENYA ELECTRICAL TRADES AND  
ALLIED WORKERS UNION ..... RESPONDENT**

**RULING**

1. The claimant, Kenya Power & Lighting Company Limited by application and Notice of Motion filed on 28<sup>th</sup> February, 2017 filed under the provisions of article 50(1) of the Constitution, section 16 and 20 of the Employment and Labour Relations Court Act, Rule 17(3) and 28(1)(g) of the court rules and seeking for orders that;

*the court be pleased to set aside the consent for parties to dispose this matter by way of written submissions and direct that the matter be heard by way of viva voce evidence.*

*The court be pleased to issue an early hearing date or such further orders as it may deem fit to do so.*

2. The application is supported by the affidavit of Francis Kangure and on the grounds that the claimant's advocate indicated to the court that parties may dispose the matter by way of written submissions but after consideration the evidence in this case, the claimant had a change of heart as the decision was made out of fears that there were no suitable witnesses to give evidence. It is imperative for the court to hear the claimant's viva voce evidence for determination of this matter on its merits.

3. Other grounds in support of the application are that it is the claimant's right under article 50(1) of the constitution to have the matter resolved by hearing and the respondent will not be prejudiced if this matter is heard by way of call for *viva voce* evidence. The claimant shall abide by any directions of the court to dispose of this matter expeditiously and in the interests of justice the consent to have this matter disposed off by way of written submissions be set aside and a hearing and call of evidence be allowed.

4. Mr Kangure avers that on 5<sup>th</sup> October, 2016 and 2<sup>nd</sup> November, 2016 when the matter came for hearing the parties indicated that they were willing to dispose off the same by way of written submission. This decision was arrived at on the assumption that this matter being fairly old, it has been difficult over the years to procure suitable witnesses to give evidence in court or that there are no suitable witnesses but the claimant wish to change this position and proceed by way of call of *viva voce* evidence. There are

various developments and evidence which the claimant shall call and which cannot be relayed in written submissions. For the court to make a determination it is imperative to call *viva voce* evidence and to secure the claimant's right under article 50(1) of the constitution.

5. The claimant in response filed a Replying Affidavit sworn by Kosgey Kolil, the respondent Deputy General Secretary and who avers that the consent order recorded by the parties to proceed by way of written submissions on 2<sup>nd</sup> November, 2016 was in the presence and knowledge of the claimant's advocate. The claimant was aware that there was the option to call any witness and opted not to but recorded consent to proceed by written submissions. The consent is therefore not based on any misrepresentation. There was no coercion, undue influence, fraud or error. The change of heart is not a reason that can apply to set aside consent as to do so will prejudice the respondent as this will delay the finalisation of this long standing economic dispute. There is no fraud or error demonstrated to warrant the setting aside the consent order. The claimant has not demonstrated what prejudice that will be suffered where the hearing is to proceed in terms of the consent order.

6. Mr Kolil also avers that the claimant's application is misconceived and meant to delay the matter from being concluded and should be dismissed with costs.

7. Both parties made oral submissions.

8. The claimant submits that when the parties entered consent to proceed by way of written submissions there was the view that the only questions to be addressed as such but since this has changed and there are substantive questions that can only be addressed by *viva voce* evidence. There are substantive developments between the parties since 2011 which relate to a CBA of 2011 and such can only be raised by *viva voce* evidence.

9. The respondent submits that the dispute herein arose out of a CBA of 2010/2011 where negotiations broke down and the respondent issued as strike notice and on 21<sup>st</sup> November, 2011 the claimant moved the court to stop the same. Since, the claimant has not done anything in the last 6 years to get a hearing. The claimant stopped a strike and stopped at that. The hearing has not been requested on any justifiable grounds. Both parties were in court and looked at the pending issues and agreed this is an economic dispute and thus agreed to file written submissions.

10. The respondent proceeded and filed written submissions on 17<sup>th</sup> November, 2016. The claimant has not filed. Time can be extended for the claimant to file their written submissions but the application to vary the consent order has no merits as there are no reasons of fraud, error or misrepresentation made out to warrant the same. Parties have not been able to conclude a CBA due to this suit. The application should be dismissed.

## **Determination**

11. Article 50(1) of the Constitution on the right to fair hearing exclusively applies to trial inquires in judicial proceedings where a final decision is to be made through the application of law and facts. This right under the constitution is set out that;

***Every person has a right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or if appropriate another independent and impartial tribunal or body.***

12. Any dispute that can be resolved by application of the law can proceed and be decided in a fair and by public hearing before a court. The Court of Appeal in **Judicial Service Commission v Mbalu Mutava & another [2015] eKLR** in distinguishing the right to fair administrative action with the right to fair hearing and the right to natural justice held that;

*Fair administrative action on the other hand refers broadly to administrative justice in public administration. It is concerned mainly with control of the exercise of administrative powers by*

state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations. The right to fair administrative action, though a fundamental right is contextual and flexible in its application and as article 24(1) provides, can be limited by law. “**Fair hearing**” in article 50(1) as the text stipulates applies where **any dispute can be resolved by the application of the law** and applies to proceedings **before a court or, if appropriate, another independent and impartial tribunal or body**.

It is clear that fair hearing as employed in article 50(1) is a term of art which exclusively applies to trial or inquiries in judicial proceedings where a final decision is to be made through the application of law to facts. By article 25 that right cannot be limited by law or otherwise.

It was inappropriate therefore, for the 1<sup>st</sup> respondent’s counsel to invoke article 50(1) in this appeal particularly article 50(2) (k) which refers to right of an accused person to adduce and challenge evidence. The right to fair hearing under article 50 does not apply to the decision of the JSC under appeal. Rather, it would apply to proceedings in the tribunal appointed by the President. [emphasis added].

13. The right to fair hearing is further employed by the Court of Appeal in **Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR** where it was held that;

*This provision of law [Article 50(1) of the constitution] clearly refers to legal proceedings. It decrees that legal proceedings should be heard fairly and held in public. It is because they are legal proceedings that the locus is identified as a court. Courts are to hear disputes in the manner prescribed. Since they are disputes determinable by the application of law, they are generally disputes that would fall under the wider rubric of civil proceedings. In appropriate cases the disputes may be heard in the same fair and public manner, before tribunals which must, even as courts are (or ought to be), both independent and impartial.*

14. Article 50 of the constitution must therefore be understood in its full text and context. The right to fair hearing requires disputes to be resolved by application of the law by the court or if applicable by an independent tribunal. The parties herein entered into a consent order to be heard by way of written submissions noting the pending issues relate to an economic dispute. Such consent was confirmed by the court on 5<sup>th</sup> October, 2016 and further the court on this basis gave directions to the parties to file their written submissions as agreed. The respondent dully complied and on 2<sup>nd</sup> November, 2016 the claimant asked for more time to be able to file their written submissions which was allowed.

15. The claimant has dully been accorded the right to fair hearing secured under article 50(1) of the constitution. Further by agreement and consent order, the mode of hearing chosen by the claimant with the consensus of the respondent has since been adopted by the court.

16. On 17<sup>th</sup> January, 2017 the respondent took a mention date to confirm the filing of written submissions and seek a date for judgement noting they had filed their written submissions on 17<sup>th</sup> November, 2016 and the claimant had not yet filed any written submissions.

17. On the due date, the claimant made submissions that they wished to proceed by way of *viva voce* evidence and had not filed written submissions. This was opposed by the respondent who had secured the mention date so as to be allocated a date for judgement. And that the requirement to be heard by *viva voce* evidence was unprocedural as parties had a consent order on how hearing was to proceed. The court then allocated the matter for judgement on 2<sup>nd</sup> March, 2017 and allowed the claimant until 3<sup>rd</sup> February, to file their written submissions. The claimant opted to file the current application.

18. The claimant has relied on the provisions of Rule 28 of the court rules. I however refer to rules 25 and 27. Rule 25 provides that;

25. (1) *The Court shall give such directions as may be necessary to enable the parties to prepare for and conduct the hearing.*

(2) *The Court shall, at the beginning of the hearing, explain the order of the proceedings which it proposes to adopt.*

(3) *Evidence before the Court may be given orally or if the judge so orders, by affidavit or a written statement, and the Court may at any stage of hearing, require the attendance of a deponent or an author of a written statement for the purposes of examination of the facts deponed or written.*

(4) *The Court shall conduct the hearing in a manner it considers most suitable to the just handling and recording of proceedings and shall, if appropriate, avoid legal technicalities and formalities.*

19. Rule 27 provides;

27. (1) *Upon hearing the facts and evidence presented and upon consideration of the matters in question, the parties shall, subject to the Court's direction, agree between themselves on whether to orally submit or file written submissions summing up their respective cases before the Court.*

20. The parties herein have since confirmed that the issue in dispute is an economic one and agreed to proceed and file written submissions. The claimant has not set out what new matters that raise substantive questions that should be addressed by way of *viva voce* evidence.

21. The claim was filed on 21<sup>st</sup> October, 2011. Pleadings closed on 7<sup>th</sup> March, 2014 with the reply to defence and counter-claim.

22. With the consent order and the fact of the respondent filing their written submissions and the claimant failing to set out what *substantive questions that can only be addressed by way of viva voce evidence* I find no sufficient ground and or reasons to warrant the claimant to enjoy the benefit of having seen the respondent's written submission and then fail to file submissions despite being allocated sufficient and ample time to do so and for the court to set aside the consent order and proceed by call for *viva voce* evidence. I find the submission that there is *change of mind* now given as the reason for seeking to set aside the consent order is not a sufficient reason to warrant the orders sought and to do so will not facilitate the meeting of the ends of justice.

23. Where indeed there are *substantive questions* that have since arisen, no amendments to the claim have been made or been requested to be made. To therefore go out to change the questions addressed herein since the suit was filed in 2011 so as to appraise the court of the new issues not in the main Memorandum would be to infringe on the respondent's right to a fair hearing.

24. The claimant has had sufficient time at their hands to propose a hearing date which has not been done in the last 6 years since they obtained interim orders herein. I have gone through the record of the court, and find that all hearing and or mention dates herein since 2014 have been at the instance of the respondent who has a counter-claim. Such suit should also be heard on its merits as the claimant has not made any good effort to move court until now and seeking to negate the consent order so as to be heard by *viva voce* evidence.

**Application by the respondent dated 23<sup>rd</sup> February, 2017 shall not be allowed. The judgement due shall be delivered on 18<sup>th</sup> April, 2017. The claimant has until close of business 7<sup>th</sup> April, 2017 to file the written submission which have been due since 5<sup>th</sup> October, 2016. Application dismissed with costs to the respondent.**

Dated and delivered in open court at Nairobi this 6<sup>th</sup> day of April, 2017

**M. MBARU**

**JUDGE**

In the presence of:

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