



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1846 OF 2015
(Formerly Kisumu ELRC cause No. 209 of 2013)

(Before Hon. Justice Hellen S. Wasilwa on 29th June, 2017)

KENYA PETROLEUM OIL WORKERS UNION.....RESPONDENT/ CLAIMANT

VERSUS

KENYA PIPELINE COMPANY LIMITED..... APPLICANT/RESPONDENT

RULING

1. Before the Court is a Notice of Motion Application dated 19th December 2016 brought under Article 159 of the Constitution, Section 1A, 1B, 3A and 63 of the Civil Procedure Act, Rule 17(1) and 26(2) of the Employment and Labour Relations Court (Procedure) Rules 2016, Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law for Orders that:

- 1. That this Honorable Court be pleased to certify this application as urgent and the same be heard ex parte in the first instance.***
- 2. That pending the hearing and determination of this Application inter parties, this Honorable Court be pleased to grant stay of further proceedings in this matter other than this Application.***
- 3. That this Honorable Court be pleased to rescind and or set aside its ex parte Order made on the 13th December, 2016 directing that the Respondent's case be closed (without calling the Respondent Witnesses) and that the matter proceeds to written submissions.***
- 4. That this Honorable Court be pleased to re-open the hearing herein and to allow the Respondent to call its witnesses.***
- 5. That this Honorable court be pleased to make such further orders as are necessary for the ends of justice.***
- 6. That costs of the application be in the cause.***

2. The application is supported by the annexed affidavit of Grishon Ng'ang'a Thuo and on the grounds that:

1. On the 13th of December 2016, the Court made an ex parte Order directing that the Respondent's case be closed without calling the Respondent's witnesses and that the matter proceed on written submissions, it was then scheduled for mention on the 23rd of January 2017 for confirmation that the submissions had been filed and to take a judgment date.

2. The advocate failed to attend Court on the 13th of December 2016 but it was not a deliberate move, but the same was caused by a faulty time-setting on the watch of Counsel for the Respondent.

3. The Applicant/Respondent had duly informed the Respondent/Claimant of the hearing date of the 13th of December 2016 and requested them to avail their witnesses for pre-trial session ahead of the hearing. Unfortunately, it was not possible to hold such a pre-trial session before the hearing date since it emerged that two (2) witnesses, namely, Capt. Jotham Kiptoo and Mr. Allan Engoke had transferred from Nairobi to Eldoret and Mai Mahiu Pump Station, respectively. As such witnesses were not very conversant with court hearings and especially the procedures thereof, I had no option but to conduct the pre-trial briefing outside the court on the very day of the hearing.

4. On attendance of Court on the said day, they duly attended court for the scheduled hearing and ready to proceed. The matter was called out at around 10.30 am and the advocates both called out informing the court they were ready to proceed. The Advocate for the applicant stepped outside to brief his witnesses lost track of time and rushed back to court to find his matter had already been called and directed to proceed on final submissions.

5. If the application is not heard and orders sought not granted, the Applicant/Respondent will be extremely prejudiced as it will be condemned unheard, and granting this application will enable the court meet its objectives of dispensing justice fairly, expeditiously and affordably.

6. The Applicant/Respondent had a good defense on the merits and it is only fair that it be allowed to ventilate the same at the hearing. They state that in particular the Respondent intends to demonstrate that the Claimant was involved in theft of fuel at the Respondent's pipeline premises thereby warranting summary dismissal. The Respondent also states that they intend to demonstrate that in terminating the Claimant, the Respondent followed the procedure stipulated in law.

3. The Application has come without delay and the Respondent is willing to abide by any order that may be given by this Honourable Court by way of thrown away costs.

4. The Respondent /Claimant reply has not been dated but they filed a Reply Statement on 31st January 2017 where they state that on the material date of 13th of December 2016 the Applicant /Respondent themselves through their advocate asked the Honourable Court for time allocation and the Court granted them time allocation for 11 am.

5. They state that at the resumption of court, the Court Clerk called the matter waited and called it again waiting a further ten minutes but the Applicant /Respondent did not appear in Court.

6. They state that they have been patient enough as the matter is a 2013 matter transferred from Kisumu, the direction to file submissions has already been complied with.

7. The Respondent/Claimant would be prejudiced if this Application is allowed and the case is re-opened, since the Applicant /Respondent has already received the written submissions and their witnesses and would therefore have advantage on areas they would have cross examined them on.

8. They state that the only recourse available to the Applicant/ Respondent is after the judgments to file for a Review of the Judgment or lodge an Appeal with the Court of Appeal as per the Employment and

Labour Relations Court Rules and Procedure.

9. They state that should the court allow this Application, since the applicant has offered to pay Kshs. 10,000.00 without prejudice as per annexure GNT-1 Copy of email dated 13th December 2016 and also order that the Applicant/Respondent produce and make available copies of Clear Legible Documents requested by the Respondent/Claimant and also give clear List of witnesses they intend to bring.

10. They ask the Court to rely on precedence case in support of our prayer for dismissal of the Application which is cause number **1224 of 2012 Josephat Muthui Muli vs. Ezeetec Ltd [2014] eKLR.**

11. They pray that the Application is dismissed with costs.

12. I have considered this Application and the attendant reason given by the Applicant for failing to attend Court. It is apparent from the record that the Respondent/Applicant had been in Court on 13/12/2017 and the Court ordered hearing to proceed at 11 am that morning.

13. The Respondents did not attend at the set time and they prompted the Court to order closure of Respondents' case. The fact of appearing before Court that morning by Respondent was an indication that they were willing to proceed and present their case.

14. The attendant duty of this Court is to grant justice and it would not be in the interest of justice to lock out the Applicants from accessing justice by refusing them the opportunity to be heard.

15. I will therefore exercise my discretion and allow the application. The order dismissing this case is reviewed and the case now reopened.

16. The Applicants will pay the Claimants 10,000/= as thrown away costs.

Read in open Court this **29th day of June, 2017** in Nairobi.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Matasi for the Respondent – Present

Obure for Claimant - Present