



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1328 OF 2014

KENNEDY NYAMWAYA BUNDI.....CLAIMANT

VERSUS

INSTA PRODUCTS (EPZ) LIMITED.....RESPONDENT

RULING

1. On 11th Augusts 2014, the Claimant filed a claim against the Respondent for unlawful termination of employment. The Respondent filed a response on 4th March 2015, to which the Claimant replied on 30th March 2015.
2. The matter came up for hearing on 8th March 2016 when the Claimant testified and closed her case. The defence hearing was scheduled for 5th July 2016 on which date the Respondent's witness was absent. Counsel for the Respondent sought an adjournment and the Claimant's Counsel did not object. The matter was rescheduled for 17th November 2016.
3. On 17th November 2016, Counsel for the Respondent sought an adjournment again, stating that the Respondent had discovered further losses incurred as a result of the Claimant's misconduct. He sought leave to file further documents. The Claimant's Counsel objected to the adjournment and production of additional documents, pointing out that the Claimant had closed his case.
4. Upon hearing submissions on behalf of both parties, I directed the Respondent to make its request by way of a formal application. The application is dated 14th December 2016 and was filed on 9th January 2017. By it the Respondent seeks leave to file supporting documents and witness statement.
5. The application is supported by the affidavit of the Respondent's Managing Consultant, Gabriel Mugendi and is founded on the following grounds:
 - a) That audits conducted by the current investors and managers of the Respondent have revealed new evidence of the Claimant's misconduct leading to his dismissal;
 - b) That there is new documentary evidence which was not available to the Respondent at the time the cause was filed and served, as the documents proving the Claimant's misconduct could not be traced or had been hidden;
 - c) That the documents now discovered prove and establish the Claimant's negligence of duty to the extent of exposing the company to a loss of over Kshs. 400 Million;
 - d) That the Claimant who worked as Logistics Manager, deliberately and fraudulently failed to

cancel bonds leading to suspension of the Respondent's trading licence;

e) That the Claimant's actions and omissions exposed the Respondent's business partners leading to strained business relations and loss of crucial clients and business;

f) That it is very important that the Respondent be allowed to present the additional documents together with the witness statement of one Gabriel Mugendi, as these documents and statement help the Respondent to meet the requirements and standards set by Section 43 of the Employment Act;

g) That this new and important evidence was not within the Respondent's knowledge at the time of filing the response and could not therefore be presented in the form of documentary evidence or alluded to in a written statement;

h) That allowing the Claimant to benefit from this apparent error would be an injustice;

i) That the Claimant would not be prejudiced in any manner if the Respondent is allowed to present a witness and file the attached documents;

j) That the rules of natural justice and the Employment Act demand that an employer be accorded an opportunity to defend himself and present evidence and witnesses in his defence.

6. The Claimant's response is contained in his replying affidavit sworn on 17th January 2017. He states that the Respondent's application lacks merit, is baseless and is an abuse of the court process.

7. Tracing the history of the case, the Claimant states that he filed his claim on 11th August 2014. The Respondent filed a response on 4th March 2015. Prior to filing the claim, the Claimant had served a demand letter upon the Respondent. The Respondent was therefore aware of the Claimant's claim and the current application is not *bona fide*.

8. The Claimant goes on to state that when he testified on 8th March 2016 and during a subsequent court appearance on 5th July 2016, there was no mention of any documents by the Respondent. He adds that all the documents attached to the supporting affidavit sworn by Gabriel Mugendi were within the Respondent's knowledge and there is no justifiable reason why they were not filed together with the response to the claim.

9. The Claimant avers that the documents sought to be introduced at this stage are of no evidential value in the Respondent's case and that they are being used as a ploy to delay the finalization of this case. He states that allowing the introduction of new documents after he has closed his case will be prejudicial to his right to disclosure of all evidence prior to commencement of hearing.

10. By consent of the parties, the application proceeded by way of written submissions. In the submissions filed on behalf of the Respondent on 15th February 2017, it is submitted that under the Employment and Labour Relations Court Act and the Procedure Rules, the Court has discretion to allow introduction of fresh evidence during trial. It is further submitted that the only way the Respondent can prove the reason for terminating the Claimant's employment as required under Section 43 of the Employment Act is by introduction of the documents attached to the present application.

11. In the submissions filed on behalf of the Claimant on 27th March 2017, it is submitted that being aware of the Claimant's claim when the demand was made, the Respondent was legally bound to put forward its entire case.

12. The issue for determination in this application is one; whether the Respondent has laid out sufficient cause to move the Court to allow additional documentary evidence after closure of the Claimant's case. The parties hold divergent views; the Respondent states that the new evidence is crucial to its evidence and the Claimant states that the Respondent's request amounts to trial by ambush, as he will have no

opportunity to rebut the new evidence.

13. The rationale behind the requirement for parties to file all their documents prior to commencement of trial is clear and straightforward; that by the time a party takes the witness stand, they ought to know the exact case of their opponent. This is the whole essence of Rule 14(10) of the Employment and Labour Relations Court (Procedure) Rules, 2016 which provides as follows:

(10) Where a party intends to rely on a document that has not been filed as part of its pleadings, the party shall make sufficient copies of each document for the Court, file and serve the other party with a copy at least fourteen days before the case is set down for hearing or such shorter period as the Court may order: Provided that after the close of pleadings, the Court may allow the filing of a supplementary bundle of documents.

14. Instructively, the succeeding rule is Rule 15, which sets out the pre-trial procedure. It would appear therefore that after the pre-trial conference is held, no more documents are expected to be filed. However, the litigation chain does not always operate smoothly and in some cases, a party may seek to file additional documents on the day of trial. If the trial has not commenced, the Court may exercise its discretion and admit new documents, if it is in the interest of justice.

15. If on the other hand trial has commenced and one party has shown their hand, the parameters change. Once one party has presented their case, the Court must frown at an application by the opposing party to introduce new evidence. I say so for two reasons; one the party who has already testified will have no opportunity to rebut the new evidence and second, the party making the application could well be fixing their case in the course of trial. I therefore agree with the holding in ***Johana Kipkemoi Too v Hellen Tum [2014]*** where **Munyao Sila J** stated thus:

“It will be unfair to the plaintiffs, if I am to allow the defendant, at this late stage of the proceedings, to fundamentally alter the character of her case, to one that the plaintiffs never contemplated when tabling their evidence. In essence, the trial will end up being unfair to the plaintiffs and will violate the provisions of Article 50(1) of the Constitution.”

16. In the case now before me, the Claimant testified and was cross examined more than a year ago. No good reason has been given why the documents attached to the application were not filed before presentation of the Claimant’s case. It seems to me that the Respondent is attempting to fix its case at this stage. Indeed in its submissions the Respondent states the following:

“the claim is defended though not sufficiently, we ask that the Applicant be granted the opportunity to adequately defend the claim by being enabled to prove the reasons for the termination.”

17. The Court is an impartial arbiter and does not aid either party in their case. The Respondent had every opportunity to file its evidence in defence of the Claimant’s claim, at the very latest, before the Claimant’s testimony. Having failed to do so, they cannot be allowed to delay this case any further.

18. The Respondent’s application dated 14th December 2016 is therefore declined. As the Respondent has already paid the sum of Kshs. 20,000 as thrown away costs, I make no order for costs in the application.

19. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 28TH DAY OF JULY 2017

LINNET NDOLO

JUDGE

Appearance:

Mr. Ambani for the Claimant

Mr. Maramba for the Respondent