



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.1186 OF 2016

SOLOMON OKOTH OGOLAH.....CLAIMANT

VERSUS

POSTAL CORPORATION OF KENYA.....RESPONDENT

RULING

The claimant in his Certificate of Urgency dated 12th June, 2017 filed together with his affidavit is seeking that the respondent's maker of witness statement is not made by a licenced officer to practice human resource affairs and the Institute of Human Resource Management has confirmed that Mr Charles Mangua Mbari is not a member of the Institute and therefore incapable to handle any human resource activities of the respondent. the entire action taken by the witness against the claimant is illegal, null and void and the respondent's defence and witness statement should be expunged.

The respondent filed Grounds of opposition to the application filed by the claimant.

Both parties made their oral submissions in court.

The essence of the matters brought to court by the claimant in his Certificate of Urgency and the affidavit thereto and filed without a Notice of Motion to support the nature of orders or prayers he is seeking the court to grant, in my humbly view is primarily seeking for court directions as to whether the witness statement of the respondent witness, Charles Mangua Mbari, the human Resource officer of the respondent should be admitted in evidence or not. This should have been a matter addressed in a mention rather than stall proceedings waiting for a ruling.

However, as the claimant is keen to have the witness statement of the respondent's witness expunged from the record on the grounds that Mr Mbari is not a registered human resource practitioner with the Institute of Human Resource Management and thus should not practice as such and as an employee of the respondent and further that he should not be allowed to testify herein, I feed these are matters that I can give directions.

The legal system for our country in judicial proceedings is adversarial. With it, there comes the challenge that a litigant seeking to assert his rights must first set out his case by filing a Memorandum of Claim and serve the other party. The party sued as the respondent has two option. That of filing a reply, defence or response or taking the option not to file any document. The other option is to seat back and waits for the court to address the claimant's claim and take the directions given.

When pleadings close with a defence or not, the matter must be set down for hearing. This is a crucial

step as the claimant has to give evidence to support his case. Equally, the other party has the right to be heard. The right to be heard is fundamental and a principle and right protected under the constitution, 2010 at article 50.

In this regard therefore and in recognition of the right to be heard thus protected, each party must be given a fair chance to articulate its case for the claimant and the respondent. In this regard also, each party has the right to call witnesses. At every level, each party has the right to cross-examine the evidence submitted by each party. These are fundamental rights that cannot be negated at the expense of the other, even the respondent.

In this case, the claimant's assertion that the respondent should withdraw the witness statement and particularly that of Mr Mbari must be addressed in the above context. First the claimant has to articulate his case and allow himself to be cross-examined as he has to prove his case. The respondent must also be allowed to articulate the defence and call witnesses who shall also be cross-examined. The claimant can therefore not control which witness to be called by the respondent. This is a right protected by our judicial practice, norms, procedures, the Rules of procedure for this court, and ultimately, article 50 of the constitution, 2010.

Where the claimant has a problem with a specific witness called by the respondent, he has the best chance to challenge the evidence of this witness at the cross-examination stage. To stop such a witness from testifying at this point and before the claimant has set out his own case would be to gag the respondent unfairly. Such would be to go contrary to the rules of procedure for this court and section 20 of the Employment and Labour Relations Court Act.

Rule 25 of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides at sub-rule 25(1) to (6) that;

25. Hearing procedure.

(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.

(5) The Court may use electronic modes of presentation and recording of evidence.

(6) The Court may require a witness to give evidence on oath or affirmation and shall, for that purpose, administer the oath or affirmation.

It is therefore imperative that each party must be given a fair chance to articulate its case without restrictions and without impinging on whatever material may or should be submitted. Every witness on the stand is subject to cross-examination. Where the witness is not the most appropriate person to give evidence in support of the case, such should come out in cross-examination.

Equally, the court cannot stop the respondent from employing any employee required for its business. Where the respondent finds Mr Mbari as the best paced person to hold the position of human resource officer for the entity and business, this is an absolute prerogative within the mandate of the respondent unless. The court should not interfere with this right without good basis.

In this case therefore, the directions herein are that the witness statement filed by the respondent to call a witness and Mr Mbari as the human resource officer shall remain part of the record. The respondent is at liberty to call such a witness in support of its case. The witness shall subject himself to cross-examination by the claimant.

Such direction shall apply to all witnesses to be called herein by either party.

As the claimant is acting in person and there was no Notice of Motion filed together with the Certificate of Urgency and Affidavit, he shall not be penalised in costs save to add that, caution must be taken in future to avoid unnecessary application on a matter that can well be addressed during pre-trial directions on a date fixed for mention.

Orders accordingly.

Delivered in open court at Nairobi this 26th day of September, 2017.

M. MBARU JUDGE

In the presence of:

David Muturi and Nancy Bor – Court Assistants

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