



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 375 OF 2014

JOHN KIMANI MWEGACLAIMANT

VERSUS

CENTRAL BANK OF KENYA1ST RESPONDENT

BOARD OF TRUSTEES OF CENTRAL BANK

OF KENYA PENSION FUND 2ND RESPONDENT

Mr. Munyu for Respondent / Applicant

Mr. Muturi Kigano for Claimant / Respondent

RULING

1. The Claimant in this suit elected to rely on the memorandum of claim together with the list of documents filed on record and not adduce any oral evidence.
2. The Respondent on the other hand wishes to cross examine the Claimant but the Claimant has declined to testify in the matter.
3. The issue for determination is whether the Claimant may be compelled to take cross examination as demanded by the Respondent where he has elected not to give oral testimony.
4. Both parties have filed written submissions on the issue.
5. The Respondent in its submissions relies on **Article 50(1)** of the Constitution of Kenya 2010 to assert that, the right to cross examination in appropriate circumstances is a component of the right to a fair hearing.
6. The Respondent cites the case of **Republic Vs. Registrar of Companies Exparte Manchester Out Fitters Limited, Misc. Civil application No. 115 of 2007 (2011) eKLR** for that proposition.

7. The case is also relied upon for the proposition that **Article 159(2)(d)** of the constitution states that justice shall be determined without undue regard to procedural technicalities and that these are important constitutional principles which the Court should not overlook.

8. In that matter, the Court held:

“No prejudice will be suffered by the ex parte Applicant if the Respondent’s Application is allowed. Cross examination of Mr. Galot may cause a little delay in finalization of this matter but I think the interests of justice which include fair hearing cannot be sacrificed at the alter of expediency in disposal of cases.”

10. The Respondent further relies on the decisions in **Ferdinard Ndungu Waititu Vs. Independent Electoral & Boundaries Commission, IEBC & 8 others Civil application No. 137 of 2013 (CR 94 of 2013)** and **Emilio Delapaz, JR and others Vs. Hon. Intermediate Appellate Court, Adelaidas Trinidad, Corado P. S Antos and others.**

11. In the former case it was held citing **Bhandari Vs. Gantana (1964) E.A. 6606 at 6609** as follows:

“Any party is entitled to cross examine any other party who gives evidence or his witnesses; and no evidence affecting a party is admissible against that party unless the latter has had an opportunity of testing its truthfulness by cross examination.”

At page 144 of the Halsbury’s laws of England, 3rd Edition Vol. 15 is stated:

“Cross examination is directed to (1) the credibility of witness (2) the facts to which he has deposed in chief, including the cross examiner’s version thereof; and (3) the facts to which the witness has not deposed but to which the cross-examiner thinks he (witness) is able to depose.”

12. In the latter case, the emphasis is that the right of a party to cross- examine the witness of his adversary is as it is invaluable as it is inviolable in Civil cases, no less than the right of the accused in criminal cases.

That the right is constitutionally based in both criminal and civil cases.

13. All these cases deal with a situation where a party or witness has testified. None deals with the situation where a party has opted not to testify in chief nor call any witnesses in a civil trial such as this one.

14. The Claimant in his written submissions states that **Section 1(2)** of the Civil Procedure Act, is not applicable to this case since **Rule 24(3)** of the **Industrial Court (Procedure) Rules 2010** is applicable.

15. The Claimant submits that;

- i. The Claimant has closed its case and cannot be compelled to re-open it;
- ii. Cross-examination arises from examination-in-chief which has not happened in the instant case.
- iii. The subject of the dispute being employment contract is regulated by documents which exhaustively spelt out the rights and obligations of parties to the exclusion of oral evidential supply or “*in fills*”.
- iv. The issues in dispute have exhaustively been canvassed through these array of documents filed by both parties;

16. The counsel for Claimant therefore submits that the Claimant does not wish to testify before Court and therefore cannot be cross examined.

The counsel cited the case of **Nicholas Kiptoo Salat Vs. Independent Electoral and Boundaries Commission and 7 others 2013 eKLR** as follows:

“In the exercise of its ordinary jurisdiction, the High Court is vested with the discretionary power to allow the cross examination of a deponent upon an application for such an order. However, the power will only be exercised after a proper basis has been laid. If the facts of the deponent are not disputed, cross examination will not be ordered.

In Hudso Enterprises Ltd. Vs. Kenya Cold Storage (goods) & 14 others [2001] Eklr Azangalala J. held;

“the right to cross examine a deponent on his affidavit is discretionary. Like all judicial discretions it has to be exercised judicially and not whimsically or capriciously. In the case at hand the circumstances are such that I had to decline the application. All the complains made by the plaintiff can be established by means other than cross examination.”

17. Determination

In the present case, the issues in dispute are:

- i. whether the “*Notice of Early Retirement*” given by the Claimant to the 1st Respondent on 11th November 2013 is valid?
- ii. whether the 1st Respondent is entitled in law to refuse to accept, to vary and / or impose conditions and / or in any manner whatsoever to stultify and / or frustrate the efficacy of the said Notice?
- iii. if the answer to issue (ii) is in the affirmative, are the Respondents entitled to withhold the Claimant’s salary emoluments, pension and other dues connected there with or otherwise impede the payment thereof?
- iv. did the Claimant freely give the said Notice?
- v. is the Claimant entitled to the Reliefs / Remedies claimed?

18. The case by the Claimant stands or falls upon the statement of claim and documentary evidence presented to the Court.

The Claimant has a right to refuse to testify in both Civil and Criminal cases. In fact, in criminal cases, the right of an accused to refuse to give oral testimony cannot be impeached by an order of the Court.

19. In the circumstances of this case, the Respondent / Applicant has not laid a sound basis for the Court to exercise its discretion to compel the Claimant to be cross examined on his deposition in the Verifying Affidavit.

20. Indeed, the Claimant only confirms in the verifying Affidavit the contents of the memorandum of claim and the documentary evidence presented constitutes the basis of his entire suit. I do not see the prejudice to be suffered by the Respondents in presenting the defence case, including calling their own witnesses by fact of the failure by the Claimant to testify in chief or be cross examined.

21. The Court declines to compel, the Claimant, who has not testified in chief to be cross examined by the Respondent.

Costs in the cause.

Dated and Delivered at Nairobi this 29th day of January, 2015

MATHEWS N. NDUMA

PRINCIPAL JUDGE