



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT**

**AT MOMBASA**

**CAUSE NO. 434 OF 2013**

**ELVIS ISANGI MWANDEMBO .....CLAIMANT**

**VERSUS**

**STEEL MAKERS LTD .....DEFENDANT**

**RULING**

**INTRODUCTION**

1. The respondent in the suit has brought the Motion dated 10/10/2014 seeking to review this court's decision made on 29/9/2014 and to reopen the suit for hearing. The Motion is supported by the affidavit of Mr. Manases Lubia Alwenya, the defence counsel, sworn on 10/10/2014. The gist of the Motion is that the delay in filing the said documents was not deliberate but due to difficulty experience in retrieving them from the respondent's archives stores. According to the applicant's counsel, unless the proposed documents are filed it will be futile for the defence to call any witnesses.
2. The claimant has opposed the Motion vide his own replying affidavit sworn on 21/10/014. According to him the defence was given enough time within which to file her documents but in vain. That despite leave to file having been extended severally the applicant defaulted to file the proposed documents and did not call her witnesses until 29/9/2014 when the suit came up for defence hearing. In his view, the failure to file the proposed documents was deliberate and in disobedience of court orders to do so in time. Consequently in the claimant's submissions, he stands to suffer prejudice if the motion is allowed because the suit will be delayed.
3. The Motion was disposed of by written submission by which the parties basically expounded on grounds contained in their respective affidavits.

**ANALYSIS AND DETERMINATION**

4. After considering the pleadings, Motion, affidavits and the submissions filed and after going through the court record, it is clear that the respondents did not file any documents or a list of documents she intended to rely on before the close of the pleadings. There is no dispute that the defence did not indicate to the court that she intended to file any documents on 12/5/2014 when the hearing of the suit started. There is no dispute that the defence counsel cross examined the claimant without referring or showing him any documents which the defence intended to produce during the defence in hearing.
5. It is however common knowledge that it is only during re-examination when the claimant sought leave to file further documents when the respondent also sought leave to file her documents and call witnesses. It is also common knowledge that on the said 12/5/2014, counsel for the two

- parties agreed to file the documents by 19/5/2014 and proceed with the hearing on 22/5/2014. It is also clear from the record that the the claimant complied with the leave order but the applicant did not. It is further clear from the records that on 22/5/2014 and 2/7/2014 the suit was adjourned at the instance of the defence by which time she had not filed any documents despite the fact that the claimant had closed her case on 2/7/2014. The record also shows that the defence case was adjourned for the last time to 17/9/2014 and the respondent given leave to file her intended documents by 2/9/2014.
6. Again she did not file any documents until 17/9/2014 when the counsel sought adjournment on ground that his witnesses was sick and not in court. Despite the strong objection that no documents had been filed yet the record shows that the court reviewed the order for last adjournment made during the previous hearing date and granted a fresh order for last adjournment to 29/9/2014. Surprisingly on 29/9/2014, the defence witness attended court but the defence counsel had filed a bundle of documents the same day and sought leave to produce them as evidence.
  7. The record is clear that the request to produce the documents was objected to by the claimant's counsel on ground that they had been filed too late and after the lapse of the court's leave. The defence counsel raised the same explanation for the delay as in the present Motion and the court declined the request to produce the said documents. In response the defence sought stay of proceedings in order to appeal and when leave was denied, the counsel walked out after wishing not to continue with the defence hearing. That record shows that the claimant requested the court to close the defence case and allow him to file written submissions which request was granted hence the present Motion. The issue for determination is whether the threshold for granting review has been met in the present Motion.

### **Threshold for grant of review**

8. The Motion before the court is anchored on Rule 32(1) (e) of the Industrial Court (Procedural) Rules 2010. The said provision allows the court to review its own decision for any other sufficient reasons other than discovery of new and important matter or evidence, or on account of mistake or error apparent on the face of the record, or if the decision is in breach of the law or if the decision requires clarification. The question to answer is whether any sufficient reason for the failure to file the proposed documents has been shown to warrant the exercise of this courts discretion in setting aside the impugned orders.
9. The reason given for the delay is that it was not easy to retrieve the documents from the respondents archives store due to the age of the documents. What is not explained however is the failure to at least file a list of the intended documents prior to the start of the hearing and before the close of the claimant's case. The proposed documents were not seen and identified by the claimants before he closed his case. It appears therefore that the decision to file the proposed documents was an afterthought whether well intended or not. On 17/9/2014 the defence counsel sought adjournment not because he needed to file any documents but because his witness was absent due to illness. He never sought extension of the leave to file the said documents even after the claimant's counsel notified the court of the default to comply with the leave to file the documents. It therefore appeared to the court that the defence did not need to file the proposed documents anymore. Surprisingly however the respondent filed a bundle of documents on the 29/9/2014 and sought leave to produce the same as evidence. Had the claimant not objected to the documents the court would not have denied the leave. However the claimant made objection in which the court found merit and upheld.
10. The basis for the courts decision on the objection was that the documents had been shown to the claimant before and during his testimony and as such he stood to suffer prejudice. Rule 17 of the ICPRs requires any party intending to rely on any documents that had not been filed as part of the pleading, to make sufficient copies for the court and serve the other party before the case is set down for hearing. That mandatory procedural duty was severally breached by the defence despite leave having been granted to enlarge the time. Obviously proceedings have to come to an end and in this court, Kenyans intended to speed up employment and labour disputes when they passed a new constitution in 2010 to establish this court among other institutions. The constitution provides for expeditious disposal of disputes without undue regard to formalities and legal

technicalities. The record herein is evident that in making the impugned decision, the court balanced between the said principles of this courts judicial mandate of expeditious disposal of the dispute and avoiding undue regard to procedural technicalities when it granted the applicant several adjournments and leave to file documents after the hearing had commenced. The court will therefore not grant the review order sought vide prayer 2 and 4 of the Motion because no sufficient reasons for exercising of such discretion has not been proved by the applicant within the meaning of Rule 32(1) (e) of ICPRs or at all. The court however grants prayer 3 of the Motion which is to re-open the defence case to allow her call her witness.

#### DISPOSITION

For the reasons above stated, the respondent's Notice of Motion dated 10/10/2014 is allowed only to the extent that the order closing the defence case is reviewed and set aside and substituted with an order for the reopening of the defence case. The claimant will have costs of the Motion to be agreed or taxed.

Orders accordingly.

**Dated, signed and delivered this 13<sup>th</sup> February 2015.**

**O. N. Makau**

**Judge**