



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 1182 of 2010**

**JOHN MWEMA NYAMAI ..... CLAIMANTS**

**VERSUS**

**1. RANJEET SAGOO**  
**2. SPECIALISED AIR CONDITIONING LTD .....RESPONDENTS**

**RULING**

By a Notice of Motion dated 31<sup>st</sup> December 2012 filed under Section 16(4) of the Evidence Act, Section 1A, 1B and 3A of the Civil Procedure Act, Order 18 rule 10 and Order 51 Rule 1 of the Civil Procedure Rules, the Respondent seeks the following orders:-

1. This Honourable Court be pleased to recall the Claimant/Respondent for further cross-examination.
2. That the Claimant's /Respondent's case be reopened and the Respondents'/Applicants' Counsel be allowed to cross-examine the Claimant/Respondent herein.
3. That the costs of this application be in the cause

The application is supported by the Affidavit of **EVANS WACHIRA**, the Respondent Advocates and on the following grounds:-

- a) That this matter came up for hearing on 03/12/2012
- b) That the Respondents'/Applicants' Counsel was represented in the case by M/s Olivia Kang'ethe, Advocate who was holding his brief with instructions to seek an adjournment of the matter as Counsel was engaged before another Court and further to allow for negotiations which were ongoing between the parties directly.
- c) That on 30/11/12 the Claimant/Respondent had through his Cell Phone No.0725881423 called the Respondents'/Applicants' Counsel declaring his desire to have this matter settled out of Court and to jump start some stalled negotiations between the parties directly.
- d) That the Respondents'/Applicants' Counsel accepted to facilitate these talks on 03/12/12 when the Claimant/Respondent stated he would be available in Nairobi from upcountry.
- e) That this Honourable Court however declined the adjournment and ordered the matter to proceed for hearing.

- f) That the Claimant/Respondent herein thus testified in support of his case.
- g) That due to the limited instructions of the Counsel holding brief, she was unable to conduct cross-examination and the Claimant/Respondent ultimately closed his case before he was cross-examined.
- h) That there are numerous documents that the Respondent/Applicant intends to use at the defense hearing and for this Honourable Court to get a clear perspective of this cause, it will be imperative that the same be put across to the Claimant/Respondent during cross-examination to enable a just determination of the matter hereof.
- i) That it will be in the interest of justice that the Respondents'/Applicants' Advocate be allowed to recall the Claimant/Respondent to the witness stand for cross-examination.
- j) That the Claimant/Respondent will not suffer any prejudice if the prayers herein are granted.

The Claimant filed a Replying Affidavit sworn on 1<sup>st</sup> February 2013 in which he opposes the application. The parties were heard on 5<sup>th</sup> February 2013.

Mr Wachira for the Respondent/Applicant submitted that the case came up for hearing on 3<sup>rd</sup> December 2012 when he was not present in Court, that he instructed his associate to attend Court and adjourn the matter, and secondly that the parties were engaged in negotiations. He further submitted that on Claimants request he had offered to broker a meeting to discuss settlement. That the Court declined to allow the adjournment and Claimant proceeded to testify and close its case without being cross examined by the Respondent. He further submitted that it is imperative that the Claimant is cross examined on the numerous documents filed by the Respondent, otherwise the Claimant would have an unfair advantage over the Respondent, that the Claimant will not be prejudiced and that the Respondent should not be punished for mistake of Counsel.

Mr Kandere in reply stated that he had not received any offers for negotiation and that he heard that information for the first time on the material day, that the Claimant confirmed that there was no such offer, and that on the basis of this information the Court directed that hearing proceeds. He submitted further that equity cannot be used as a sword as attempted by the Respondent, that justice cuts both ways and the Respondent had been given an opportunity and cannot ask for a second opportunity, that the Court should consider the plight of the Claimant and reject the application. On documents filed by the Respondent Mr. Kandere submitted that most of them had been filed without leave and further that the Respondent can still table the documents.

I have considered the application, the grounds and affidavit in support thereof and the replying affidavit. I have also considered the submissions of the parties. I note from the record that on 3<sup>rd</sup> December 2012 when the case was first called out there was no appearance by the Respondents advocate. The Respondent was however in Court and informed the Court that his Counsel was at Milimani Commercial Courts and was ready to proceed. It was on this basis that the Court allocated time for the hearing of the case at 10.00 a.m. The Court therefore considered it mischievous for Ms. Kangethe to appear in Court at 10.00 a.m. and apply for adjournment on the grounds that parties were negotiating, a fact that was not known by the Respondent, the Claimants Counsel and was denied by the Claimant itself. The Court considered that no genuine negotiations can take place without the knowledge of the Respondent and the Claimants advocates. It was on this basis that the Court rejected the application by Ms. Kangethe and proceeded with the hearing.

I also note that Mr. Wachira has not explained why he was not available for hearing on that date nor why the Respondent who was in Court informed the Court that he was at Milimani and was ready to proceed.

I however recognize that the interest of justice demand that both parties are given an opportunity to prosecute and defend their case. It is for this reason only that I allow the application to reopen the Claimants case so that the Claimant can be cross examined on documents which are already on Court

record. This does not mean that the Court condones the conduct of Counsel for the Applicant.

The Respondent will however pay the Claimants costs of this application and thrown away costs at Shs.20,000/= before the next hearing date.

Parties are directed to take a date in Court.

Orders accordingly.

Read in open Court and signed on this 5<sup>th</sup> day of April, 2013.

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

No appearance for

In the presence of: \_\_\_\_\_ Claimant

Ms. Kangethe holding brief

for Mr. Wachira

\_\_\_\_\_ Respondent