



**Ogutu & another v Kenya Power and Lighting Company & 2 others (Petition 189 of 2018)  
[2024] KEHC 2550 (KLR) (Constitutional and Human Rights) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2550 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION 189 OF 2018  
LN MUGAMBI, J  
MARCH 14, 2024**

**BETWEEN**

**CELINA ATIENO OGUTU ..... 1<sup>ST</sup> PETITIONER**

**MUSA ONYANGO ..... 2<sup>ND</sup> PETITIONER**

**AND**

**KENYA POWER AND LIGHTING COMPANY ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 2<sup>ND</sup> RESPONDENT**

**CHIEF MAGISTRATES COURT (KINERA LAW COURTS) .. 3<sup>RD</sup> RESPONDENT**

**RULING**

**Introduction**

1. By a Notice of Motion application dated 30<sup>th</sup> June 2022 supported by an affidavit of even date, the 1<sup>st</sup> respondent and applicant herein seeks orders that:
  - i. The 1<sup>st</sup> respondent be granted leave to substitute their witness Boniface Momanyi.
  - ii. The Costs of this application be provided for.
2. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents' responses and submissions to the application are not in the court file or the online Court Portal.

**The Applicant's Case**

3. The 1<sup>st</sup> respondent's legal Officer, Irene Wanjala depones that the Boniface Momanyi was a former employee who made his witness statement in this matter on 21<sup>st</sup> January 2020. At the time he was



stationed at the Customer Service Department, Revenue Protection Unit Section. He has since ceased being the 1<sup>st</sup> respondent's employee.

4. It is stated that the 1<sup>st</sup> respondent seeks to substitute Boniface Momanyi as a witness in this matter with a witness working in the same Department who is conversant with the matters in question. Furthermore, it is noted that the contents of the witness statement are to remain the same.
5. She avers that the substitution is as a result of the 1<sup>st</sup> respondent's difficulty in securing Boniface Momanyi's attendance in court. Moreover, that they are unable to trace or compel him testify as he is no longer the 1<sup>st</sup> respondent's employee. She argues that the petitioners will not suffer any prejudice if the application is allowed as they will cross examine the substituted witness.

### **The Petitioners' Case**

6. The 1<sup>st</sup> petitioner in the replying affidavit sworn on 5<sup>th</sup> October 2022 opposes the substitution of the witness arguing that the application is defective and an abuse of Court process. To begin with, the petitioners take issue with the 1<sup>st</sup> respondent's failure to name or cite the intended substitute witness so as to access the prejudice they are likely to suffer. According to them, this is the definition of trial by ambush geared towards expanding their scope of defense in this matter.
7. It is further asserted that contrary to the 1<sup>st</sup> respondent's averment, the witness's statements cannot be the same. This is because although persons can be in the same circumstance or location, the two are likely to perceive the events in different ways. In effect these inconsistencies are likely to be made manifest during cross examination.
8. The petitioners as well argue that the 1<sup>st</sup> respondent has not established which prejudice it will suffer if the substitution is not allowed. It is also noted that the 1<sup>st</sup> respondent did not demonstrate its attempt to reach out to Boniface Momanyi and its failure to do so and when exactly he left the company, to justify its claim and prove it is not guilty of laches.
9. It is their case hence that the instant application is an attempt by the 1<sup>st</sup> respondent to delay the expeditious disposal of this suit. For this reason, they urge this Court to dismiss the application with costs.

### **Applicant's Submissions**

10. On 26<sup>th</sup> April 2023, Kerandi Manduku and Company Advocates filed submissions for the 1<sup>st</sup> respondent. Counsel relying on the 1<sup>st</sup> respondent's averments submitted that the Court in *Lucy Momanyi t/a L. N. Momanyi & Company Advocates vs Joel Ombati Nyamweya & another* (2021) eKLR deciding on a similar issue observed as follows:

“The 1<sup>st</sup> defendant has indicated that the statement of the proposed witness is similar to the statement filed by the original witness and that the proposed witness is conversant with the issues before court as a successor in title to the witness it intended to call. That being the case, it means that the character of the case shall not be affected and/or changed since the nature of evidence to be adduced will not change.”

11. Like reliance was also placed in *Meera Umoja Kenya Ltd vs David Gikara & another* (2020) eKLR. Consequently, Counsel stressed that the 1<sup>st</sup> respondent had established its case and further that no prejudice would be occasioned to the petitioners as they will cross examine the substituted witness.



## Petitioners' Submissions

12. Oriri Onyango and Company Advocates for the petitioners filed submissions dated 4<sup>th</sup> May 2023 where Counsel stressed that a witness statement like an affidavit is a personal to the maker and as a consequence cannot be comparable as proposed. Essentially, it was argued that adducing this testimony would be tantamount to admitting hearsay evidence.
13. Further Counsel reiterated that the 1<sup>st</sup> respondent had not adduced the intended witness's statement and so the petitioners are apprehensive that the 1<sup>st</sup> respondent through this witness may introduce new issues not covered in the initial witness statement which is prejudicial to the petitioners. For these reasons, Counsel stated that the application is devoid of merit and so should not be allowed.

## Analysis and Determination

14. The issue that arises for determination is:  
Whether this Court should allow the applicant's application
15. Substitution of witness and witness statements is a matter which the Courts have pronounced themselves in various decisions thereby developing valuable jurisprudence on applicable principles as is discernible from the cases cited herein. These principles are to guide this Court in making its decision.
16. In *Meera Umoja Kenya Ltd (supra)* which was cited by the applicant, the Court observed as follows:
  - “ 14. I however note that hearing of this suit has not commenced. In the hearing, the 1<sup>st</sup> defendant will have opportunity to cross examine the proposed witness to establish whether indeed he is the current Managing Director and whether he has authorization to represent the company. In my view, issues that have been raised would be answered in the hearing.
  15. Further, the plaintiff's advocate has also indicated that the statement of proposed witness is similar to statement filed by the original witness and the proposed witness is conversant with the issues before court. If that be the case, it means the nature of evidence to be adduced will not change.
  16. In addition to the above, the 1<sup>st</sup> respondent/defendant has not demonstrated prejudice that may be occasioned to him if the proposed witness is allowed to testify in place of the original witness.”
17. Similarly, in Lucy *Momanyi t/a L. N. Momanyi & Company Advocates (supra)* also relied upon, the Court stated as follows:
  - “ 22. This Court notes that the 1<sup>st</sup> defendant seeks to substitute its witness and not to introduce a new witness and/or new documents that the plaintiff had no knowledge of at the time the hearing of the case commenced.
  23. This Court in considering whether to grant the 1<sup>st</sup> defendant leave to substitute its witness has to determine whether the plaintiff shall suffer any prejudice. Article 50 (1) of *the Constitution* of Kenya, 2010 provides that every party is guaranteed the right to a fair hearing.
  24. The 1<sup>st</sup> defendant has indicated that the statement of the proposed witness is similar to the statement filed by the original witness and that the proposed



witness is conversant with the issues before court as a successor in title to the witness it intended to call. That being the case, it means that the character of the case shall not be affected and/or changed since the nature of evidence to be adduced will not change....This Court finds that the plaintiff has not demonstrated any prejudice that she is likely to suffer if the proposed witness is allowed to testify in place of the original witness.”

18. Equally, the Court in the case of *Marjory Njeri Njoroge v Joseph Muchiri Njuguna* (2021) eKLR determined as follows:

“26. In answer to issue No 2, it is the understanding of the Court that the Applicant has elected to withdraw the witness, Mburu Mwaura for reasons already disclosed. It is the right of party to call witnesses that in their opinion will best bring forward their case. In this case the party has determined that Mburu Mwaura will not serve him in form of evidence to be adduced.

27. That said the Court is unable to see any prejudice that the Respondent (none was adduced) will suffer because she shall, when the witness is presented in Court, have the opportunity to cross examine the witness, having had the chance to read the witness statement in advance.”

19. Correspondingly in *Kabu Mumba & 11 others vs Pwani Jezozhum Co. Ltd & 6 others* (2020) eKLR it was held that:

“9. ...It was already pointed out that the defendant’s witness was chronically ill and could not testify and thus the defendant needed to substitute him. It is now disclosed that he has died and I have no reason to disbelieve that. How will the defendant defend its case if it is not allowed to substitute the witness who is now deceased? The only way that the defendant can present its case is through a substitution of the deceased witness. If that is not allowed then technically the defendant will be shut out from presenting its case which will lead to an injustice. I see no reason why I should not allow the substitution of the defence witness and this is allowed.

10. There is the other complaint that new documents and/or evidence is being introduced. I have gone through the witness statement of Mr. Onyango and compared it with what Mr. Kiburi had deposed. There is not much difference in the two and the line of defence is the same. The documents Mr. Onyango seeks to rely on are also more or less the same documents that Mr. Kiburi had annexed to his affidavit. If there is a few which were not in the affidavit, I still do not see any prejudice to the plaintiffs because they take the same line of defence and they are not an ambush to the plaintiffs.”

20. In arriving at its decision, the Court must balance the rights of the parties’ vis-à-vis prejudice that a party is likely to suffer if the substitution is allowed or not. This is essentially what guides the Court in exercising its discretion in an application of this nature.

21. Turning now to the present application, the applicant deposed it is unable to secure the attendance of its witness who had recorded the witness statement because he left employment and it has become difficult to trace him and secure his commitment to testify. It however indicated that there is another witness who is well conversant with the matters in dispute who it can avail to testify.



22. The Respondent opposed the introduction of another witness besides the one whose statement was supplied accusing the Respondent of an attempt to aggrandize its defence.
23. The fact that a Party has proposed to call a particular witness does not necessarily mean that the person proposed as its witness is, without any express admission of that fact is the only person who may have witnessed to the matter in dispute. Parties have broad discretion when it comes to calling witnesses in a case and there may have been number of other people who may have witnessed and can be called but are not called to testify to avoid repetitive testimony. In a situation where a witness that a party may have lined up to testify is no longer available, such a Party can apply for the leave of the Court to substitute with another witness who is conversant with the facts in issue. The only precaution that must be taken is to ensure that the opposite party is not ambushed hence the statement of such a witness must be disclosed and be supplied in advance. Serving the statement in advance will cushion the Petitioner from possible prejudice as she will have the opportunity to prepare for cross-examination to confront the testimony.
24. Further, I have also gone through the pleadings and my own assessment of the pleadings is that KPLC has been sued due to violations allegedly committed by its employees in the course of duty. If there is correspondence, reports or documented work carried out by any of the employees; such a report, correspondence or documents when done in the ordinary course of business by such an official can be produced even without calling the maker if it can be shown that the witness is dead, cannot be found or his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears unreasonable. This is permissible under both Section 35 and 38 of the Evidence Act. In the present case, the applicant has stated that the witness it expected to rely on left its employment and it has been difficult to secure his attendance to testify.
25. In my view, the record of work of such an employee, any report made by him or correspondence can be produced by any other official witness duly authorized by the Company. What is not allowed is any attempt to produce the personal statement of a witness made or recorded for specific use in a pending suit or anticipated suit. Section 35 (3) of the Evidence Act provides thus:

“...Nothing in this section shall render admissible any statement made by a person interested at the time when proceedings were pending or anticipated involving a dispute as to any fact in issue which the statement might tend to establish...”
26. Consequently, if the applicant is seeking to produce the record of work of the previous witness or reports made by such a witness as opposed to his personal recorded statement, I see no reason why this application should not be allowed. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF MARCH, 2024.**

.....

**L N MUGAMBI**

**JUDGE**

