



**Muli v Davis & Shirtliff Limited (Cause 1444 of 2018)
[2024] KEELRC 1131 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1131 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1444 OF 2018**

**L NDOLO, J
MAY 2, 2024**

BETWEEN

JULIET WANJIKU MULI CLAIMANT

AND

DAVIS & SHIRTLIFF LIMITED RESPONDENT

RULING

1. There are two applications falling for determination; the first one dated 15th September 2023, is brought by the Claimant and the second one dated October 6, 2023, is brought by the Respondent.
2. In her application, the Claimant seeks orders that:
 - a. The Respondent’s witness statements dated September 7, 2022 and September 14, 2022, the supplementary list of witnesses and supplementary list and copies of documents all dated September 15, 2022 be expunged from the court record;
 - b. The following documents be declared inadmissible as evidence in this matter:
 - i. Davis & Shirtliff Philosophy-pages 4 & 5 of the Response to the Claim;
 - ii. Davis & Shirtliff Staff Charter-pages 6-13 of the Response to the Claim;
 - iii. Induction program documents-pages 16-29 of the Response to the Claim;
 - iv. Email correspondence dated September 8, 2017-page 42 of the Response to the Claim;
 - v. Employee exit check list dated September 11, 2017-page 45 of the Response to the Claim;
 - vi. Alleged handover notes-page 46 of the Response to Claim;
 - vii. Extract of alleged text messages-page 47 of the Response to the Claim;



- viii. E-statement dated September 15, 2017-page 66 of the Response to the Claim;
 - ix. Sales invoices-pages 67-70 of the Response to the Claim;
 - x. Letter dated September 19, 2017-pages 72 and 73 of the Response to the Claim;
 - xi. Letter dated September 8, 2017-page 75 of the Response to the Claim;
 - xii. Kenya Revenue Authority P9 Form-page 76 of the Response to the Claim;
 - xiii. Members nomination of beneficiary form-page 78 of the Response to the Claim;
 - xiv. Handwritten letter dated September 11, 2017-page 79 of the Response to the Claim;
 - xv. Withdrawal benefits calculation sheet-page 80 of the Response to the Claim;
 - xvi. Staff retirement benefit scheme notice of withdrawal dated September 11, 2017-page 81 of the Response to the Claim;
 - xvii. Final dues computation-page 82 of the Response to the Claim;
 - xviii. Bankers cheque dated September 27, 2017-page 83 of the Response to the Claim.
- c. The application is supported by the Claimant's own affidavit and is based on the following grounds:
- a. The witness statements dated September 7, 2022 and September 14, 2022, the supplementary list of witnesses and supplementary list and copies of documents dated September 15, 2022 were filed out of the prescribed timelines and without leave of the Court;
 - b. The delay of 3 years, 5 months and 29 days in filing the aforementioned documents has not been explained;
 - c. The witnesses listed in the Respondent's supplementary list of witnesses dated September 15, 2022 are incompetent to testify on behalf of the Respondent due to lack of a written resolution authorising them to testify;
 - d. The documents itemised in prayer (b) of the Notice of Motion do not satisfy the evidentiary requirements on admissibility of documents under the [Evidence Act](#) for the following reasons:
 - i. The computer print outs are not supported by the relevant certificates of electronic evidence;
 - ii. The makers and/or custodians of some of the documents are not witnesses in these proceedings and no basis has been laid for reliance on the said documents;
 - iii. Some of the documents do not disclose their authors making it difficult to establish ownership of the said documents.
 - d. If the Court allows the itemised documents to be used as evidence in this matter, then it will facilitate abrogation of the Claimant's right to a fair hearing under Article 50(1) of the [Constitution](#) of Kenya, 2010;
 - e. It is in the interest of fair administrative action that the application is allowed with costs.



3. The Respondent opposes the Claimant's application by a replying affidavit sworn by its Manager-Group Legal & Secretarial, Olive Muasya on October 6, 2023.
4. Muasya depones that following the orders of the Court issued on February 18, 2019, the matter was mentioned on November 5, 2019 before the Deputy Registrar who is said to have directed that a hearing date would be issued by the Court.
5. Muasya assigns the delay by the Respondent in filing its documents within the prescribed time, to disruptions occasioned by the COVID-19 pandemic. She also takes issue with the delay by the Claimant in raising objection to the subject documents.
6. Regarding the issue of admissibility of the documents listed by the Claimant, Muasya sets out a detailed explanation on each document, pointing out that many of these documents are human resource records kept by the Respondent in the ordinary course of business. She also points out that the Claimant, in her testimony before the Court, had admitted the existence of some of the documents.
7. The Respondent's application dated October 6, 2023 seeks the following orders:
 - a. A declaration that the Respondent's supplementary list of witnesses dated September 15, 2022 and witness statements by Mr. Bernard Karimi, Ms. Olive Muasya and Mr. David Gacheru dated September 7, 2022 and 14th September 2022 were filed in accordance with Rule 14(10) of the Employment and Labour Relations Court (Procedure) Rules 2016, and are hence admissible;
 - b. In the alternative, that the Court be pleased to extend time within which the Respondent ought to have complied with the pre-trial directions issued on February 18, 2019 and deem the Respondent's supplementary list of witnesses dated September 15, 2022 and witness statements by Mr. Bernard Karimi, Ms. Olive Muasya and Mr. David Gacheru dated September 7, 2022 and September 14, 2022 as having been properly filed;
 - c. Leave to file a Certificate of Electronic Evidence in accordance with Section 106B of the *Evidence Act* in respect of the email correspondence dated September 8, 2017 at page 42, extract of text messages at page 47, e-statement dated September 15, 2017 at page 66 and Sales invoices at pages 67-70 all in the Respondent's list of documents dated November 19, 2018.
8. The application is supported by an affidavit sworn by Olive Muasya and is based on the following grounds:
 - a. That on February 18, 2019, the Court had directed the Respondent to file its list of documents and witness statements within 30 days;
 - b. That subsequently, the COVID-19 pandemic occurred, disrupting normal operations of the Court in addition to the Respondent minimising its operations with employees working remotely and in the ensuing chaos, this matter was not dealt with;
 - c. That the delay in filing the Respondent's documents was therefore caused by the interruption of normal activities of the Court and the Respondent's operations by the COVID-19 pandemic;
 - d. That the Respondent, in compliance with Rule 14(10) of the *Employment and Labour Relations Court (Procedure) Rules, 2016* filed its documents more than 14 days to the hearing, which commenced on November 14, 2022;



- e. That the Claimant's application seeking to strike out the Respondent's documents was filed on September 18, 2023, which was more than a year after the documents were filed;
 - f. That striking out the Respondent's documents and witness statements will be highly prejudicial to the Respondent who will have been deprived of its right to be heard, contrary to the principal objective set out in Section 3 of the *Employment and Labour Relations Court Act* and Article 50 of the *Constitution* of Kenya, 2010;
 - d. That the Claimant has sought to strike out the email correspondence dated September 8, 2017 at page 42, extract of text messages at page 47, e-statement dated September 15, 2017 at page 66 and Sales invoices at pages 67-70 all in the Respondent's list of documents dated November 19, 2018, for lack of a Certificate of Electronic Evidence;
 - g. That the case is ongoing and the Respondent seeks leave of the Court to file the Certificate of Electronic Evidence pursuant to Section 106B of the *Evidence Act*;
 - h. That the Claimant will not suffer any prejudice as she has been in possession of the documents for more than a year and will be given an opportunity to testify and cross examine the Respondent on the documents.
9. The Claimant opposes the Respondent's application by her replying affidavit sworn on January 24, 2024.
10. She depones that the Respondent's reliance on the COVID-19 pandemic as the reason for the inordinate delay in complying with the pre-trial directions issued by the Court is misleading for the following reasons:
- a. Whereas the 30 days' leave granted by the Court to the Respondent, to file its list of witnesses and witness statements lapsed on March 18, 2019, the Judiciary scaled down court activities throughout the country due to the COVID-19 pandemic from 16th March 2020;
 - b. Therefore, the time between the lapse of the period granted to the Respondent to file its documents and the date when the Judiciary commenced the scaling down of court activities is 11 months and 26 days, which the Respondent has failed to account for, by explaining why it did not comply with the orders of the Court, within this period;
 - c. Furthermore, during the COVID-19 pandemic, the Judiciary developed for the public, a manual titled 'Court Operating Procedures during COVID-19 Pandemic' in which it provided email addresses that parties could use to file pleadings, including time bound pleadings, in the respective courts. Specifically, the manual at page 2 provided for an email address for filing of time bound pleadings in the Employment and Labour Relations Court as elrcnairobipleadings@gmail.com;
 - d. The Respondent did not attempt to utilise measures adopted by the Judiciary during the COVID-19 pandemic to ensure compliance with the order of the Court, by filing its list of witnesses and witness statements, even after the lapse of the time allowed by the Court.
11. The Claimant points out that the Respondent's list of witnesses dated 15th March 2022 and witness statements dated 7th September 2022 and 14th September 2022 were filed 3 years, 5 months and 29 days after the lapse of the leave granted for filing of the said documents, contrary to the provisions of Section 3(3) of the *Employment and Labour Relations Court Act*, which requires parties and their representatives to assist the Court to further the principal objective by, inter alia, complying with the directions and orders of the Court.



12. The parties' rival applications relate to admission of the Respondent's witness statements and supporting documents.
13. As pointed out by Olive Muasya, in her further affidavit sworn on March 18, 2024, the directions by the Court, were that the two applications would be canvassed simultaneously. The issue of which application would take precedence is therefore moot.
14. It is not in dispute that the Respondent's list of witnesses dated September 15, 2022 and witness statements by Mr. Bernard Karimi, Ms. Olive Muasya and Mr. David Gacheru dated September 7, 2022 and September 14, 2022, were filed after close of pleadings, without leave of the Court. It is also evident that there was significant delay on the part of the Respondent in filing the documents in issue and the assignment of the delay to the COVID-19 pandemic is unconvincing.
15. However, the Claimant was also guilty of delay in raising her objection. It was not lost on the Court that the objection was raised by the Claimant's Counsel in the course of the Claimant's cross examination, by Counsel for the Respondent. It would appear that the objection was triggered by the pressure of cross examination and an apparent move to fix the Claimant's case.
16. In light of the foregoing, my finding is that none of the parties can claim to have cleaner hands than the other. I will therefore determine the matter on the basis of the principle of 'greater harm'. If I agree with the Claimant, the Respondent will be stripped of an opportunity to defend the claim and if I agree with the Respondent, the Claimant will still have an opportunity to interrogate the Respondent's evidence.
17. Substantive justice demands that every party to a dispute is afforded full opportunity to ventilate their case. This point was succinctly made in *Attorney General v Torino Enterprises Limited* [2020] eKLR in the following terms:

“Two clear constitutional principles, articulated in Article 159 of the *Constitution*, are always in play in objections like the one raised before us, and calls for pragmatic balance rather than robotic adherence. The first principle, set out in Article 159 (2)(b), demands that justice shall not be delayed, and hence set timelines must be respected. The second principle, in Article 159 (2) (d) demands that justice shall be administered without undue regard to procedural technicalities, meaning that where the interests of justice so demand, the court may excuse non-compliance with the timelines it has set. It is also for that reason that the overriding objective demands of the court, when it is interpreting the law or exercising its powers, to act justly in every situation, to pay regard to the principle of proportionality, to create a level playing ground for all the parties and as much as possible, to dispose of disputes on merit rather than on technicalities.”

18. In the case now before me, I have no doubt in my mind that enduring injustice will be occasioned on the Respondent if its plea for admission of its documents and witness statements is not allowed.
19. With respect to admissibility of the documents listed in prayer (b) of the Claimant's application, the only thing I will say is that the Claimant's objection goes to the probative value of the documents, which is the business of the Court and not the parties.
20. Regarding the documents in the nature of electronic evidence, I see no prejudice to be suffered by the Claimant if the Respondent is allowed to file the requisite certificate.
21. Finally, I make the following orders:
 - a. The Claimant's application dated September 15, 2023 is disallowed;



- b. The Respondent's application dated October 6, 2023 is allowed;
- c. The Respondent's list of witnesses dated September 15, 2022 and witness statements by Mr. Bernard Karimi, Ms. Olive Muasya and Mr. David Gacheru dated 7th September 2022 and September 14, 2022 are admitted;
- e. The Respondent is granted leave to file a Certificate of Electronic Evidence in accordance with Section 106B of the [Evidence Act](#) in respect of all its documents in the nature of electronic evidence;
- f. Subject to compliance with order (e) above, the Respondent's documents as contained in the list dated September 15, 2022 are admitted in evidence;
- g. The costs of both applications will be in the cause.

22. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 2ND DAY OF MAY 2024

LINNET NDOLO

JUDGE

Appearance:

Mr. Oduor B.O for the Claimant

Mr. Kisinga for the Respondent

