



**Mulusa v Co-operative Bank of Kenya Limited (Employment and Labour Relations Cause E706 of 2022) [2024] KEELRC 1943 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1943 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E706 OF 2022**

**AN MWAURE, J**

**JULY 26, 2024**

**BETWEEN**

**SYLVIA KADENYEKA MULUSA ..... CLAIMANT**

**AND**

**THE CO-OPERATIVE BANK OF KENYA LIMITED ..... RESPONDENT**

**RULING**

1. The Respondent/Applicant filed a Notice of Motion dated 15<sup>th</sup> March 2024 seeking the following orders That: -
  1. the Honourable Court be pleased to issue witness summons to Mr. Harrison Mwendo of the Banking Fraud Investigation Unit or any other designated investigating officer therein to attend court on a date to be fixed by the Court for purposes of producing documents and testifying on the findings of the Unit's investigations on the reported fraudulent dealings by Sylvia Kadenyeka Mulusa, the Claimant herein.
  2. Mr. Harrison Mwendo of the Banking Fraud Investigation Unit or any other designated Investigating Officer therein, be compelled to produce within 30 days from the date of this order, certified copies of all relevant documents relating to the Unit's investigations and findings on the reported fraudulent dealings by Slyvia Kadenyeka Mulusa, the Claimant herein.
  3. the Honourable Court be pleased to make such other consequential orders as are necessary to secure the attendance of the Banking Fraud Investigation Unit Officer to testify before court and produce any documents that will be needful in the determination of the matter.
  4. the cost of this Application be in the cause.



## **Respondent/Applicant's Case**

2. The Respondent/Applicant avers that Claimant filed a Memorandum of Claim dated 5/8/2022 as against it claiming unfair and unlawful termination.
3. In its response, the Respondent/Applicant disputed the allegations and averred that the Claimant was summarily dismissed on account of gross misconduct and breach of the Respondent Bank's Staff Manual and Business Code of Conduct & Ethics as she had applied for a fraudulent staff loan towards her purchase of a piece of land, L.R No. Kajiado/Kitengela/107016.
4. The Respondent/Applicant avers that this fraudulent staff loan involved a well calculated scheme in which at the stage of valuation of the piece of land prior to the approval of the loan application, she and other employees of the Respondent Bank colluded with Musit Investment Limited being the vendor and Savannah Consulting Ltd being the valuer, to overvalue the property market value with the sole intent of diverting funds.
5. The Respondent/Applicant avers that its preliminary investigations revealed that there could have been fraudulent scheme between the valuers, vendor and the employees including the Claimant to which it lodged a criminal complaint at the Banking Fraud Investigations Unit (BFIU).
6. The Respondent/Applicant avers that the investigations revealed that the Claimant colluded with the vendor and valuer to the extent that: -
  - i. the Claimant and vendor have agreed on the actual purchase price and value of the piece of land;
  - ii. the valuer inflated the actual market value of the property by a sizeable amount;
  - iii. inflated valuation report was presented to the Respondent to disburse the loan at the inflated sum;
  - iv. that once the loan proceeds towards the purchase of the piece of land was disbursed by the Respondent on behalf of the Claimant. The vendor would retain the actual purchase price and remit the balance to the claimant.
7. The Respondent/Applicant avers that to prove this, the police at BFIU have in their possession and custody, Statement of Account and other supporting documents which demonstrate the remittances and diversion of funds from the vendor to the Claimant.
8. It's the Respondent/Applicant's case that since the documents are in possession and custody of BFIU, its unable to produce them as part of its evidence.
9. The Respondent/Applicant avers that its list of witnesses dated 7/11/2023 listed Harrison Mwendo an Investigating Officer at BFIU, who investigated the complaint on the fraudulent action by the Claimant to testify and give evidence. However, due to the nature of his work, he has advised that he can only attend and testify if summoned by the court.
10. The Respondent/Applicant avers that the investigating officer's testimony is relevant as he is seized of material facts that will elucidate fraudulent conduct of the Claimant that warranted the Claimant's dismissal.
11. The Respondent/Applicant avers that Harrison Mwendo or any investigating officer with the knowledge of the matter at the BFIU have custody of material that will go towards answering this integral issue.



12. The Respondent/Applicant avers that no prejudice will be occasioned on the Claimant as the list of witnesses dated 7/11/2023 disclosed that Harrison Mwendo of BFIU would appear as a witness once summons are issued; and the Claimant will have a right to cross examine the witness.

### **Analysis and Determination**

13. The issue for this court's determination is whether the court should issue summons to Harrison Mwendo of BFIU or any other designated investigating officer therein to attend court on a date to be fixed by the Court for purposes of producing documents and testifying on the findings of the Unit's investigations on the reported fraudulent dealings by the Claimant and orders to compel BFIU to produce certified copies of the documents within 30 days.
14. Witness summons has been adequately dealt with under Rule 20 of the [Employment and Labour Relations Court \(Procedure\) Rules](#) as follows: -

“Witness summons

- (1) The Court may, either on its own motion or at the request of a party, summon for examination any person who has information relevant to any of the issues before it.
- (2) The Court may direct a party applying for witness summons to be responsible for service and to pay such money as is sufficient to cater for the expenses of the witness including travel and subsistence allowances at a reasonable rate determined by it.
- (3) The summons for examination shall be signed by the Registrar and shall-
  - (a) require the person named in the summons to appear before the Court;
  - (b) state the date, time and place at which the person is required to attend;
  - (c) specify whether attendance is required for the purpose of giving evidence or to produce a document or both; and
  - (d) sufficiently identify any book, document or object required to be produced by that person.
- (4) The Court shall administer an oath or accept an affirmation from a person summoned to give evidence before it.
- (5) Where a person to whom summons is issued fails to attend Court and an affidavit of service is filed, the Court may issue a warrant of arrest, summon the person and if that person fails to provide a good reason to the satisfaction of the Court, it may impose any other penalty it deems fit.
- (6) Witness summons shall be in Form 5 set out in the First Schedule.”



15. Further, in *Tatu City Limited & another v Taijbee Bhalla Advocates LLP* (Civil Case E702 of 2021) [2022] KEHC 11916 (KLR) (Commercial and Tax) (21 July 2022) (Ruling) the court held that:-

“.....Reference was made to Section 22(b) of the Civil Procedure Act, as read together with Order 16 of the Civil Procedure Rules and the case of *Manchester Outfitters Ltd v Pravin Galot & others* [2021] eKLR where the Court expressed itself as follows:-

“From the foregoing provisions, it is clear that a court suo moto, can summon any person it deems is a necessary witness either for purposes of giving a testimony or for producing a document(s). An application in this regard can also be made by a necessary party. What this implies is that notwithstanding our finding that no basis has been laid for the summoning of Ms. Latita Galot, the court on its own motion, may summon any person it deems fit as a necessary witness to aid it in arriving at the determination. A witness summoned by the court may also be intended to fill any void identified in the course of the proceedings and which void, if not filled, may undermine a just, objective and concise determination.”

The defendant averred that the persons in respect of whom Witness Summons are sought, were at the center of the transactions and are seized of material facts which will assist the Court to reach a fair and just determination.

.....

.....

My finding is that there is no mandatory requirement that an application to summon witnesses must be served on the intended witness before the same can be considered. Indeed, as can be seen from the decision in *Manchester Outfitters* case (supra) the court can, suo moto, summon any person it deems is a necessary witness either for purposes of giving a testimony or for producing a document(s).

I also note that the defendant enumerated the facts in respect of the participation of summoned witnesses in the transactions that are the subject of the suit. The defendant argued that the said witnesses were at the center of the transactions and are seized of material facts which will assist this Court reach a fair and just determination of the case. The defendant therefore maintained that the said persons are competent and compellable witnesses within the meaning of section 125 and 128 of the Evidence Act.”

16. In view of the foregoing, the Respondent has proved that Harrison Mwendo of the Banking Fraud Investigation Unit or any other designated investigating officer evidence/testimony is necessary in this case.
17. The Respondent has clearly laid down that it surrendered all relevant documents to BFIU and that BFIU investigated the allegations against the Claimant which led to her dismissal and so his testimony is relevant to render justice herein and furthermore the banking fraud investigating unit witness aver he is not in a position to appear in court to testify without the court summons. The court finds there is no prejudice that will be suffered by the claimant if the witness is given audience to testify in court. The claimant will have an opportunity to cross examine the witness.
18. The court holds the respondent/applicant is entitled to the prayers in its application dated 17<sup>th</sup> April 2024 and so orders issuance of witness summons to Harrison Mwendo or any other designated BFIU officer to testify in court in this suit on the hearing date and produce any other relevant documents.



Costs will be in the cause.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 26<sup>TH</sup> DAY OF JULY, 2024.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

