

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI

CAUSE NO E 236 OF 2023

DR. ANTHONY FRANCIS MVEYANGE.....
.....CLAIMANT

VERSUS

PARTNERSHIP FOR AFRICAN SOCIAL & GOVERNANCE
RESEARCH LIMITED (PASGR)
.....RESPONDENT

RULING

Background

1. Before the court is the Claimant's application dated 26th February 2025 through which he seeks the following orders:-
 - a) Spent.
 - b) That the court grants him leave to file and place on the court record crucial documents being exhibits 5, 8, 10, 11, 12, 13, 15, 17 and 25 which were produced in court but the same were inadvertently omitted from the supplementary list and bundle of documents dated 21st March 2023.
 - c) That the court be pleased to reopen his (the Claimant's) case to enable him file and produce his supplementary list and bundle of documents dated 14th June 2023 together with all the documents served on the Respondent on 14th June 2023.

- d) That the court makes any other orders which are convenient for justice to prevail.
- e) That the court gives directions regarding costs of the application.
2. The application is anchored on the grounds appearing on the face of it and the affidavit dated 25th February 2025. The Claimant contends that during cross examination of the Respondent's witness, he realized that some of the documents which he expected to have been produced as part of his exhibits were not on the court's record. He avers that when he followed up on the matter with his erstwhile lawyers, he realized that they had not filed the said documents. He further avers that when he scrutinized the court's e-filing portal, he learned that the said lawyers had unsuccessfully tried to file the documents after the close of the trial.
3. The Claimant contends that although the documents in question were not placed on the court file for consideration by the court, they had been served on the Respondent's advocates before trial and the said advocates had acknowledged receipt thereof. As such, he avers that the Respondent is aware of the documents and will not be prejudiced if they are admitted.
4. The Claimant contends that the omitted documents contain crucial information to his case. As such, he prays that they be admitted as part of his exhibits in the suit.

5. The Claimant avers that the failure to place the documents on the court file was a mistake on the part of his previous lawyers. He contends that he should not be punished for this mistake.
6. The Claimant avers that the Respondent will not suffer any injustice if the impugned documents are placed on the court's record since it will be have the opportunity to cross examine him on them. On the contrary, he avers that failure to admit the documents will occasion him injustice as it will lock out part of his evidence. As such, he prays that the application be allowed.
7. The Respondent is opposed to the application. It has filed grounds of opposition dated 17th March 2025 to anchor its objection.
8. The Respondent contends that the application is an afterthought. It contends that the motion was filed after both parties had closed their respective cases and is thus intended to steal a match on it (the Respondent).
9. The Respondent contends that the Claimant has not provided cogent reasons to explain why the impugned documents were not placed on the court file at the appropriate time. It contends that the Claimant had sufficient time both before and during the trial of the case to file the documents but failed to do so.
10. The Respondent further avers that the Claimant has not annexed to the application the documents which he seeks to

tender in evidence to enable both the court and counsel evaluate them and determine their import. It contends that the application is a veiled attempt to engage in trial by instalments.

11. The Respondent contends that the application has been presented too late in the day. As such, it avers that allowing it will highly prejudice it (the Respondent).
12. The Respondent asserts that allowing the application will be tantamount to sanctioning a fresh trial without justifiable cause. It contends that such order will result in the suit remaining pending in court in perpetuity which is highly undesirable. As such, it avers that the application is an abuse of the court process and should be dismissed.

Analysis

13. I have scrutinized the court record and noted that although the Claimant listed 34 documents in his list of documents dated 21st March 2023, he omitted to attach on the bundle copies of documents numbers 10, 11, 12 and 15. As such, these documents were not produced as exhibits.
14. I further note that despite the Claimant asserting that he did not produce documents numbers 5, 8, 13, 17 and 25 in the aforesaid list as exhibits, these documents are contained in the bundle that was tendered in evidence. As such, it is apparent that his averment that these latter documents were not tendered in evidence is inaccurate in this respect.

15. A party has the freedom to list whatever documents he may wish to tender in evidence in his list of documents. However, he is not obligated to tender any of them (the documents in the list) in evidence. It is left to his discretion, subject of course to the rules of admissibility of documentary evidence, to determine which of the documents in the list to produce as exhibits and which ones not to. As such, it is not unusual that whilst a list of documents proposed to be produced as exhibits contains several documents, only some of them are eventually tendered in evidence.
16. In the instant case, whilst the Claimant listed documents numbers 10, 11, 12 and 15 in his list and bundle of documents dated 21st March 2023, copies thereof were not tendered in evidence as exhibits during trial. As such, they do not form part of the court record.
17. The Claimant contends that this development was occasioned by an error on the part of his advocates. He contends that he intended to have all the documents in the list tendered in evidence and in fact alluded to this fact during his testimony. However, he avers that, unknown to him, his lawyer failed to provide copies of the exhibits and have them uploaded on the court's e-filing portal. As such, the documents were inadvertently left out of the court record.
18. The Claimant contends that despite this error by his lawyers, the impugned documents had already been shared with the

Respondent. As such, he avers that their placement on the court record will not prejudice the defense case.

19. The Claimant asserts that his erstwhile lawyer tried to redress the mistake by unsuccessfully attempting to upload the documents onto the court's e-filing platform after the case had been closed and was pending fixing of a judgment date. He contends that he should not be punished because of the lawyer's mistake.
20. As pointed out earlier, the Respondent is opposed to the application on the ground that it has been presented too late in the day after the parties had closed their respective cases. The Respondent avers that the Claimant had the time to make the application before the case was closed but did not do so. The Respondent further avers that introducing the documents at this stage will prejudice its case. It contends that the Claimant is merely intent on repairing the gaps in his case after having analyzed the defense evidence.
21. Rule 66 of *the Employment and Labour Relations Court (Procedure) Rules, 2024* forbids the court from re-opening a case for hearing unless there are sufficient reasons to do so. The rule is couched in mandatory terms.
22. The term "sufficient reason" or "sufficient cause" underscores the reality that the court must not re-open a case unless there are compelling and cogent reasons for doing so.

23. In ***Okiya Omtata Okoiti & Wyclife Gisebe Akina v Attorney General, Kenya Railways Corporation Public Procurement, Oversight Authority , China Road and Bridge Corporation & Society of Kenya [2016] KECA 456 (KLR)***, the Court of Appeal of Kenya, quoting the Court of Appeal of Tanzania's case of ***The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others Civil Appeal No. 147 of 2006*** defined the term "sufficient cause" as follows:-

"It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant."

24. The court went further to quote the Supreme Court of India case of ***Parimal v Veena [2011] 3 SCC 545***, regarding the term in the following terms:-

"Sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the

facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously."

25. From the foregoing, it is apparent that for one to satisfy the parameters of rule 66 (2) of *the Employment and Labour Relations Court Rules*, he must demonstrate that he acted diligently and with bona fides throughout the proceedings he seeks to set aside. He must not have acted negligently.
26. It is generally accepted that a litigant should not be punished because of mistakes of his counsel. It is also trite that proceedings may be re-opened if they have been undertaken without a litigant's full participation owing to a mistake of his counsel (***PIO v BO & another [2021] KEHC 6469 (KLR)*** and ***Kariuki v Wangeci & 7 others [2024] KECA 1692 (KLR)***). In this context, mistake by counsel has sometimes been considered as sufficient reason or cause to warrant either re-opening of proceedings

or enlarging of time to undertake some action which is required in law (***Belinda Murai & 9 others v Amos Wainaina [1978] KECA 23 (KLR)***).

27. The court record shows that Claimant's advocates filed a list and bundle of documents dated 21st March 2023 indicating that it (the bundle) contained 34 documents. On 14th November 2024, the Claimant took to the witness stand and produced the said list together with the attachments. As the record shows, he believed that the bundle had 34 attachments. However, it later turned out that this was not the case.
28. The Claimant blames his lawyers for the failure to attach on the list of 21st March 2023 the entire set of the 34 documents which were to be produced as exhibits. It is his case that at the time he testified orally in court on 14th November 2024, he believed that the list contained the 34 documents as it purported only to later occur to him that his lawyers had omitted to attach all the documents.
29. In my view, the above state of affairs presents a case of mistake by counsel. The lawyer for the Claimant was presented with 34 exhibits. He proceeded to prepare a list containing the 34 exhibits but omitted to attach some of the documents in the bundle that was eventually presented to court.
30. The Claimant trusted that the bundle before court had all the 34 documents only to later learn that his lawyer had omitted

some documents. This mistake should not be visited on the Claimant. It is apparent that he did not contribute to the occurrence of this state of affairs. As such, he should not be driven from the seat of justice by locking out documents which he honestly but mistakenly believed that his lawyer had presented to court.

Determination

31. The upshot is that I allow the application dated 26th February 2025 to the extent of re-opening the case to enable the Claimant to present the exhibits that were listed in the list of documents dated 21st March 2023 but were omitted from the bundle. However, apart from placing the missing documents on the court record, the Claimant shall not be entitled to present further evidence in the cause.
32. Having granted the prayer to re-open the case to enable the Claimant to present the documents which were left out in the bundle dated 21st March 2023, it follows that the Respondent is entitled to cross examine him on the said documents and present additional defense evidence to counter the documents if need be. It is so ordered.
33. The Claimant has also sought to introduce a further list and bundle of documents dated 14th June 2023. He contends that his lawyers failed to present this set of documents to court. However, this particular request is rejected.
34. The record shows that at the time of giving his oral testimony on 14th November 2024, the Claimant did not refer

to the bundle dated 14th June 2023. It can thus be assumed that he either did not intend to produce the said bundle as exhibits or was simply reckless about it.

35. The failure to produce the said bundle demonstrates outright negligence on the part of both the Claimant and his erstwhile counsel. The Claimant cannot solely blame the lawyers for having failed to present the bundle to court when he never signified his intention to rely on it during his oral testimony. As has often been observed in various decisions, a court will not exercise its discretion in favour of a party who has either been indolent or negligent in his conduct. Consequently, the Claimant's plea to introduce the bundle dated 14th June 2023 is rejected (see ***Rafiki Microfinance Bank Ltd v John & another [2023] KEHC 23779 (KLR)***). It is so ordered.
36. The Respondent shall have costs of the application.

**Dated, signed and delivered on the 30th day of October,
2025**

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI