



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
CAUSE NO. 557 OF 2019

WASHINGTON ADEDE NGARE.....
.....CLAIMANT

-VERSUS-

GOODLIFE PHARMACY
LIMITED.....RESPONDENT

RULING

Introduction

1. By a Notice of Motion dated 6th March 2025, the Respondent in the main suit (herein called the Applicant) sought the following orders:-

a) That, pending the hearing and determination of this application, this Honourable Court be pleased to grant leave to the Respondent to adduce additional documentary evidence

discovered after taking over conduct of the matter and, if deemed necessary, to recall the Respondent's witnesses for the adoption of the said evidence.

b) That, pending the hearing and determination of this application, this Honourable court be pleased to grant leave to the Respondent to adduce additional documentary evidence discovered after taking over conduct of the matter and, if deemed necessary, to recall the Respondent's witnesses for the adoption of the said evidence.

c) That, pending the hearing and determination of the main suit, this Honourable court be pleased to grant leave to the Respondent to adduce additional documentary evidence discovered after taking over conduct of the matter and, if deemed necessary, to recall the Respondent's witnesses for the adoption of the said evidence.

d) That, this Honourable court be pleased to grant leave to the Respondent to adduce additional documentary evidence discovered after taking over conduct of the matter and, if deemed necessary, to recall the Respondent's witnesses for the adoption of the said

evidence, pending the hearing and determination of the main suit.

e) That, this Honourable court be pleased to grant any further orders as it may deem fit and just in the circumstances.

2. The Motion was supported by Affidavit sworn on even date by the Applicant's Head of IT one Joel Nderitu and it is opposed by a Replying Affidavit sworn by the Claimant on 24th October 2025.

Factual Background.

3. The Respondent employed the Claimant under an open ended contract in October 2015 for a basic monthly salary of Kshs. 99,419/-. He worked until June 2019 when his services were terminated and his terminal dues withheld. He then brought this suit on 23rd August 2019 and the Respondent filed defence on 22nd November 2019. Pretrial directions were given on 11th October 2022. Parties attempted to negotiate settlement but without success and the suit proceeded to hearing.
4. The Claimant testified on 20th May 2024 and 26th November 2024 and closed his case. The Respondent called two witnesses on the same day but the second witness was stood down during re-examination. The defence was adjourned to continue on 8th May 2025 but it never proceeded due to the

instant Motion. The Motion was disposed of by written submissions.

5. Having considered the Motion, Affidavits, submissions and the Court record, the following issues fell for determination:-

- a) Whether the leave to adduce additional evidence and recall witnesses should be granted at this stage.
- b) Whether the Claimant will suffer prejudice if the leave is granted.

Additional Evidence and Recall of witnesses

6. Rule 66(2) of the Employment and Labour Relations Court procedure Rules 2024, provides for re-opening of a hearing after it has been closed but the Rules are silent about leave to adduce additional evidence or recalling of witnesses. The Court is therefore at liberty to fill that lacuna by referring to the Evidence Act and the Civil Procedure Rules. Order 18 Rule 10 of the Civil Procedure Rules provides that:-

“ The Court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force, put such questions to him as the Court thinks fit.”

7. Section 146 (4) of the Evidence Act provides that:-

“ The Court may in all cases permit a witness to be recalled either for further examination in chief or for further cross examination, and if it does

so, the parties have the right of further cross examination and re-examination respectively.”

8. The legal principle emerging from the above provisions is that additional evidence can be adduced with the leave of the Court. The said evidence must however meet certain threshold for it to be allowed. In the **English case of Ledd v. Marshall (1954) 3 ALLER 745, 748**, lord Denning held:-

“ In order to justify the reception of fresh evidence or new trial, these conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial, second, the evidence must be such that if given, it would probably have an important influence on the result of the case, although it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.”

9. In **Raindrops Limited v. County Government of Kilifi [2020] eKLR** the court held as follows:-

" a) The Court's jurisdiction to re-open the case and admit

further evidence is a discretionary one and is to be

exercised judiciously and in exercising that discretion, the

Court is duty-bound to ensure that the proposed re-opening

of a party's case does not embarrass or prejudice the

opposite party;

b) Where the proposed re-opening is intended to fill gaps in

the evidence of the applicant, the Court will not grant the

plea;

c) The plea for re-opening of a case will be rejected if there is an inordinate and unexplained delay on the part of the applicant;

d) The applicant is required to demonstrate that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of his case and lastly, the evidence must be such that, if admitted, it would probably have an important influence on the result of the case, though it need not be decisive; and

e) The evidence must be apparently credible, though it need not be incontrovertible."

10. In **Muchi v. Total Kenya Plc [2025] KEELRC 22 (KLR)**
Abuodha J held:-

“ from the foregoing decisions including the decision in Ongeris’s case relied on by the Respondent, this Court must consider reasons for the Claimant not filing the documents in time, the relevance of the documents and the prejudice to be suffered by the Respondent.”

11. The legal principles arising from the foregoing decision are that for the Court to allow adduction of additional evidence and recalling of witnesses, are:-
- a) The evidence could not have been obtained after due diligence before or during the pretrial stage.
 - b) The evidence is material and relevant to the case and is likely to influence the results of the case, though need not be decisive.
 - c) The opposing party would not suffer undue prejudice that cannot be remedied.
 - d) The new evidence was inadvertently omitted and it is not being used to fill in gaps in evidence.
12. The burden of establishing the above grounds is on the party seeking the court’s discretion. In this case the Applicant explained that it provided the former counsel with the documents but he failed to file the same. It further explained that the documents are material to the issues in contention and they would significantly affect the outcome of the case, as they challenge the Claimant’s claims.

13. The Court accepts the explanation by the Applicant that the failure to file the new documents was not to blame on it as it had furnished the same to its former counsel. A mistake of counsel should not be visited on an innocent client in the circumstances of this case.
14. On the face value, the new evidence is credible and may, have an influence on the outcome of the case. It does not appear to be intended to fill in gaps in the Respondents evidence.
15. The Applicant did not respond to the alleged prejudice by the Claimant but contended in its submissions that there will be no prejudice since the Claimant will have a chance to cross-examine the witness to be recalled. I agree with that submission and add that the Claimant's right to fair hearing will not be prejudiced because he will have the right to consider the documents and cross examine the witness concerned. He will also be at liberty to adduce further evidence to respond to the new evidence. Besides, any inconvenience suffered can be remedied by costs.
16. In conclusion I find and hold that the Applicant has demonstrated sufficient cause to warrant granting of the leave sought. Consequently the Notice of Motion dated 6th March 2025 is allowed in the following terms:-

- a) The Respondent/Applicant is granted leave to adduce additional documentary evidence marked “JN 1” in the Application.
- b) The Respondent’s witnesses may be recalled if necessary for adoption of the documents and for further cross-examination on the new documents by the Claimant.
- c) The Respondent to pay the Claimant throw away costs of Kshs. 10,000/- within 14 days of this Ruling.

DATED, SIGNED AND DELIVERED VIRTUALLY IN OPEN COURT AT NAIROBI THIS 16TH DAY OF DECEMBER 2025.

**ONESMUS MAKAU
JUDGE**

Appearance:

Mwangi for Muriithi for the Claimant

Eguuza for Kounah for the Respondent