



REPUBLIC OF KENYA



KENYA LAW
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**Mulu v Total Kenya PLC (Cause E629 of 2021)
[2025] KEELRC 22 (KLR) (17 January 2025) (Ruling)**

Neutral citation: [2025] KEELRC 22 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E629 OF 2021
NJ ABUODHA, J
JANUARY 17, 2025**

BETWEEN

HILLARY KYALO MULU CLAIMANT

AND

TOTAL KENYA PLC RESPONDENT

RULING

1. The Claimant herein filed application dated June 7, 2024 brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 51 Rules 1 of the Civil Procedure Rules 2010, seeking for orders of leave to file additional evidence in support of his and thereafter the Respondent be at liberty to file a supplementary memorandum of response and/or a replying affidavit to this application as they deem fit with costs being in the course.
2. The application is supported by grounds on the face of the Application herein and the Affidavit of Hillary Kyalo Mulu the Claimant herein sworn on 7th June,2024.
3. The Claimant averred that the additional documents which includes but not limited to Mpesa statements for 01/01/2018-31/05/2019, Form P9-2019, call log between Respondent's Governance, Risk and Compliance Manager, Mr. Charles Wambugu and the Claimant's witness and cousin M/s Miriam Syombua Mwikali, Audio conversation between the above persons and the email screenshot from the Respondent confirming appointment of another employee to vacant position of Network Regional Manager, a position he was a potential candidate.
4. The Claimant averred that he had shared the above documents with his former advocates between 7th June,2021 and 22nd February,2022 but the advocate negligently failed to include the evidence in the Claimant's list of documents. That he had full trust in his former advocate's representation and he did not suspect the possibility of an error or omission during and after filing of the Memorandum of Claim.



5. The Claimant averred that he came to learn about the omission of the evidence above on 14th May, 2024 when the matter was scheduled to come up in court and after his former advocates shared the filed documents. That the additional evidence is directly relevant to the matter before court and it was presented in the interest of achieving justice. That the additional evidence will influence and impact upon the result of this court's verdict and discharge the burden of proof demanded of him by the Respondent.
6. The Claimant averred that all the additional evidence to be adduced is credible, capable of belief and was not voluminous to make it difficult for the Respondent to respond to it.
7. In response the Respondent filed its grounds of opposition dated 31st July, 2024 and averred that the application was intended to derail the course of justice and was an afterthought. That Order 11 of the Civil Procedure Rules requires filing of documents parties wish to rely on trial. That the Claimant ought to have complied with Order 3 Rule 2 regarding filing of all documents he intended to rely on trial.
8. The Respondent averred that the matter went through pre-trial directions in which both parties indicated to the court that they were ready for hearing when the matter was mentioned on October, 2023 and November, 2023 for purposes of certifying the matter ready for hearing and to take a hearing date. That the Claimant failed to utilize those two opportunities to seek leave to file any further documents alleged to be in his possession.
9. The Respondent averred that the application should be struck out with costs as the Respondent stands to be greatly prejudiced should the orders sought be granted.
10. In support of the application, Mr. Mulu submitted that the mistake of counsel ought not to be visited upon a litigant and relied on the case of Joseph Wekesa Tulula v. Hilda Wanjiru Kitale ELC Case No. 52 of 2013 and further in the case of Sheikh t/a Hasa Hauliers v. Highway Carriers Ltd [1988]eKLR. According to the applicant, he came to learn about the omission of the evidence on 14th May, 2024 when the matter was scheduled for hearing. The omission of the evidence by his former advocate together with other advocate-client relationship factors forced him to temporarily resort to acting in person and file the present application.
11. It was his submission that the evidence was credible and was adduced in the interest of justice and since the case had not started. According to him, the Court had power under article 159(2)(d) of *the Constitution* to allow the application. Mr. Mulu further submitted that the respondent will have opportunity to respond to the evidence hence no prejudice will be occasioned. He further relied on the case of Hangover Kaakwacha Hotel Ltd vs. Philip Adundo & Another [2022] eKLR.
12. The respondent through Mr. Wetangula submitted that it was the mandate of the Court to ensure a fair trial hence has power to disallow a party from tabling evidence that was not provided to the other party as contemplated by the rules. In this regard counsel relied on the case of Raila Odinga & 5 others vs. IEBC & 3 others SCOK [2013]eKLR. According to Counsel, the applicant was bound by rule 14(100) of ELRC Procedure Rules, 2016 which requires a party to file and serve the other party with a copy of a document which had not been filed as part of its pleadings, at least fourteen days before the case is set down for hearing or such shorter period as the Court may order.
13. In looking at the rule, Counsel urged the Court to rely on the three part approach in the case of Ongeru vs. Skytop Technologies Ltd[2019]eKLR where it was held that:

“This rule empowers the Court to permit the introduction of additional documents onto the Court record even after the pre-trial conference stage. In exercising this power at this



preliminary stage, the Court is not, in my humble view, concerned with the evidential value of the documents that are sought to be introduced. This is a matter that is best left to the trial process. All that the court needs to consider at this stage is the relevance of the documents to the dispute, the reason for the delayed filing of the documents and the possible prejudice that the opponent may suffer as a result of an order permitting introduction of the documents and whether the prejudice can be remedied in some way.”

14. Mr. Wetangula submitted that the applicant had not demonstrated how each of the documents sought to be introduced directly impacts on the key issues raised in the pleadings. Counsel further submitted that the application was brought inordinately late and that the omission by counsel should not be an excuse as the suit belongs to the litigant and the applicant had an obligation to follow up his advocate to ensure he was carrying instructions as given. Counsel relied on the case of *Duale Mary Anne Gurre vs. Amina Mohammed Mahamood & Anor* [2014] eKLR. On the issue of prejudice, counsel submitted that the application is prejudicial to the extent that it is intended to frustrate the expeditious hearing and determination of the matter due to its timing and circumstances surrounding the application. There has not only been considerable time lapse but delay is likely to hinder the respondent’s ability to trace and file necessary documentation in response.

Determination.

15. Rule 14(10) of the Employment and Labour Relations Court Procedure Rules (2016) provides that;

Where a party intends to rely on a document that has not been filed as part of its pleadings, the party shall make sufficient copies of each document for the Court, file and serve the other party with a copy at least fourteen days before the case is set down for hearing or such shorter period as the Court may order:

Provided that after the close of pleadings, the Court may allow the filing of a supplementary bundle of documents.

16. The proviso to the above section allows for filing of supplementary bundle of documents after close of pleadings. It is not in dispute that pleadings in this matter had closed by November, 2023 when the matter was certified ready for hearing. The matter was scheduled for hearing on 14th May, 2024 when the Claimant alleged that he discovered that his former advocates did not file the crucial additional evidence upon being served with the Memorandum of claim and documents in readiness for the hearing.
17. Whereas Order 3 Rule 2 of the Civil Procedure Rules requires parties to file documents they wish to rely on trial 15 days before trial conference under Order 11, this court notes that after close of pleadings a party may only file additional documents with the leave of the court. This is also with discretion of the court which should be applied judiciously.
18. In *Kennedy Nyamwaya Bundi v Insta Products (EPZ) Limited* [2017] eKLR Lady Justice Linnet Ndolo observed that:-

The rationale behind the requirement for parties to file all their documents prior to commencement of trial is clear and straightforward; that by the time a party takes the witness stand, they ought to know the exact case of their opponent. This is the whole essence of Rule 14(10) of the Employment and Labour Relations Court (Procedure) Rules, 2016.



19. The Court went on to state that:-

Instructively, the succeeding rule is Rule 15, which sets out the pre-trial procedure. It would appear therefore that after the pre-trial conference is held, no more documents are expected to be filed. However, the litigation chain does not always operate smoothly and in some cases, a party may seek to file additional documents on the day of trial. If the trial has not commenced, the Court may exercise its discretion and admit new documents, if it is in the interest of justice.

20. Finally, in *Aluodo v Cisco Systems Management B. V (Cause 1382 of 2018) [2023] KEELRC 825 (KLR) (13 April 2023) (Ruling)* the court stated as follows: -

In deciding whether to grant a request to introduce and or produce additional records after the pretrial conference, the court has to consider: the reasons for not filing the records before the pretrial conference; the nexus and or relevance of the records to the matters in dispute; and the prejudice that the Respondent is likely to suffer as a result of granting the request and whether such prejudice can be remedied in some way.

21. From the foregoing decisions including the decision in *Ongeri's* case relied on by the respondent, this court must consider the reasons for the Claimant not filing the documents in time, the relevance of the documents and the prejudice to be suffered by the Respondent. The Claimant explained that it was a mistake by his former advocates who negligently failed to file the documents despite furnishing the same to them in time. Whilst its admitted that litigation belongs to the party, the court appreciates that mistakes of counsel should not be met upon litigants and agrees with the Claimant's explanation for delay.

22. On the issue for relevance of the documents this court is of the opinion that they are prima facie relevant in determining the dispute before the Court and in any event their evidentiary value will depend on the rebuttal filed by the respondent if any, and whether they will withstand cross-examination

23. In conclusion the Claimant's Application dated June 7, 2024 is found merited and is hereby allowed with costs abiding in the course. The Claimant to file the supplementary list of documents in 14 days and the Respondent be at liberty to file a response within similar period.

24. It is so ordered.

DATED AT NAIROBI THIS 17TH DAY OF JANUARY, 2025

DELIVERED VIRTUALLY THIS 17TH DAY OF JANUARY, 2025

Abuodha Nelson Jorum

Presiding Judge-Appeals Division

