



Gichuhi v Tropikal Brands (Africa) Ltd & another (Cause E226 of 2021) [2025] KEELRC 1210 (KLR) (30 April 2025) (Ruling)

Neutral citation: [2025] KEELRC 1210 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E226 OF 2021
CN BAARI, J
APRIL 30, 2025**

BETWEEN

PAULINE WAMBUI GICHUHI CLAIMANT

AND

TROPIKAL BRANDS (AFRICA) LTD 1ST RESPONDENT

DANONE NUTICIA AFRICA 2ND RESPONDENT

RULING

1. Before Court are two Motion applications; one dated 1st March, 2024 by the Claimant, and another dated 22nd June, 2024 by the 2nd Respondent. In the first application, the Claimant seeks leave to file a further list of documents, and that her list of documents No.6 filed herewith, be admitted post conclusion of the pre-trial procedures.
2. The crux of the motion is that the Claimant had filed a list of documents No.5 relating to a compact disk recording of the disciplinary proceedings of 22nd September 2020, and that the filing of a Certificate under Section 106B of the *Evidence Act* was allowed by Consent on 22nd March 2023.
3. The Applicant avers that she has realized that for ease of both parties as well as the court, there is an absolute need for a transcript of the discussion captured of the aforesaid Compact disc, and that the said transcript is thus material, relevant and key to the issues in question, and it is important for the court and all the parties to refer to them to enable the court reach decision informed by a complete set of relevant materials.
4. She avers further, that though the hearing commenced, the Claimant is yet to conclude her testimony, thus no great prejudice shall be occasioned on the parties.
5. This motion was not opposed by any of the Respondents.
6. In the second application, the 2nd Respondent seeks the following orders: -



- a. That the name of the 2nd Respondent/Applicant herein, be struck off from this claim for misjoinder.
 - b. That the Honourable Court be pleased to strike out and dismiss the suit as against the 2nd Responden/Applicant.
 - c. That in the alternative to prayer (a) and (b) above, and in the event that the court do find the 2nd Applicant's participation in this suit necessary, the 2nd Respondent be granted leave to amend the "Statemen of Defence" dated 15th July 2021, and to file the same together with a list of Witnesses, Witness Statements and a Supplementary Bundle of Documents.
 - d. That in the alternative to prayer (a) and (b) above, and in the event that the court do grant prayer (c) above, the court be pleased to reopen the Claimant's case and to recall the Plaintiff for examination in chief.
 - e. That That the costs of this application be borne by the Claimant.
7. The 2nd Respondent's application is supported by the grounds on the face of the motion and the affidavit of Hendrix Kazungu. The Applicant avers that the Memorandum of Claim discloses no cause of action against the 2nd Respondent/Applicant as the Claimant was neither an employee of the 2nd Respondent nor was she paid any wages by the 2nd Respondent.
 8. The 2nd Respondent/Applicant avers further that the Claimant does not seek any orders against it, hence there is misjoinder of parties, and the 2nd Respondent is an unnecessary party to this suit.
 9. The 1st Respondent opposed the 2nd Respondent's Motion vide grounds of opposition dated 7th October, 2024, arguing that the relationship between the Respondents was that of independent contractors and that in the circumstances, each party is liable for its agents action. It further avers that the Claimant's cause of action is in respect of actions of the 2nd Respondent's employee.
 10. The Claimant similarly opposed the motion by what she refers as a supporting affidavit, but which should essentially be a replying affidavit, and arguing that in her employment, she was a Medical Representative employed by the Respondent, but operating under/or seconded to the 2nd Respondent, which then created a nexus between herself and the 2nd Respondent.
 11. It is the Claimant's position that the tribulations she suffered leading to the filing of this employment cause, were substantially occasioned by the 2nd Respondent through its Country Manager – George Kiongo, and in light of which, the 2nd Respondent cannot purport to dissociate itself from the dispute as it is tied to the 1st Respondent at the hip.
 12. The Motions were canvassed by way of written submissions. All parties filed submissions, and which have been duly considered.

Determination

13. I have considered the applications, the grounds and affidavits in support, the grounds of opposition, the Replying affidavit in opposition to the motion of 22nd June, 2024, and the rival submissions. The issue for determination is whether the applications have merit.
14. The Motion of 1st March, 2024, is not opposed and the same is allowed with costs in the cause.



15. On the application of 22nd June, 2024, the Applicant's position is that the Memorandum of Claim does not disclose a cause of action against it for the sole reason that the Claimant was neither an employee of the 2nd Respondent, nor was she paid any wages by the 2nd Respondent.
16. The 2nd Respondent/Applicant further asserts that the Claimant does not seek any orders against it, hence there is misjoinder of parties, and the 2nd Respondent is an unnecessary party to this suit.
17. The 1st Respondent in its opposition to the motion argues that the Claimant's cause of action is in respect of the actions of the 2nd Respondent's employee.
18. On her part, the Claimant also opposes the motion, contending that in her employment that is the subject of the suit herein, she was a Medical Representative employed by the 1st Respondent, but operating under/or seconded to the 2nd Respondent, which then created a nexus between herself and the 2nd Respondent.
19. The Claimant further contends that the tribulations she suffered leading to the filing of this cause, were substantially occasioned by the 2nd Respondent.
20. On whether the 2nd Respondent should be struck out from the suit or the suit in whole should be struck out as against the 2nd Respondent, I note the 1st Respondent's and the Claimant's assertion on why the 2nd Respondent was joined in the suit in the very first place.
21. The Claimant having worked for the 2nd Respondent albeit on secondment, means that its presence is necessary so as to enable the Court effectively and completely adjudicate upon, and settle all the questions in dispute in the suit.
22. This suit was filed way back in 2021, yet it took the 2nd Respondent 3 years to seek the prayers it now does through the instant motion. The Court of Appeal in the case of Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR had this to say on delay: -

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

23. Further, and as correctly submitted by the Claimant, the 2nd Respondent has not satisfactorily explained the delay in seeking the reliefs it now does. Although the Court notes that the Advocates now on record for the 2nd Respondent came in later, this in itself does not sufficiently explain the delay. Cases belong to parties and not their advocates.
24. It is also not lost on this court that the 2nd Respondent has not attached a draft of the amended defence to enable the court clearly see the changes that are being proposed and whether the changes are prejudicial to the opposing parties. (Mumwanjesyi Development Ltd v Ali (Environment & Land Case 60 of 2016) [2022] KEELC 13816 (KLR)).
25. To allow reopening of a case, is purely a matter of judicial discretion. In Shah V. Mbogo & Another (1967) EA 116, the Court of Appeal of East Africa stated: -

“This discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or



error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

26. The Court is alive to the fact that though the hearing commenced, the Claimant is yet to conclude her testimony, and further that the 2nd Respondent was being represented by a different firm of advocates when the hearing commenced.
27. In the premise, I hold that the parties herein, will not be prejudiced by a reopening of the Claimant's case.
28. In the end, I grant orders as follows: -
 - a. That the motion dated 1st March, 2024 is allowed with costs in the cause.
 - b. That prayers numbers 1, 2 and 3 of the Motion dated 22nd June, 2024, are devoid of merit, and are declined.
 - c. That the Claimant's case be and is hereby re-opened, and the Claimant be recalled for examination in chief.
 - d. That in the interest of justice, the 2nd Respondent to file a list of witnesses, witness statements and a supplementary bundle of documents within 14 days of this order.
 - e. Costs shall abide the cause.
29. Orders accordingly.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF APRIL, 2025

C. N. BAARI

JUDGE

Appearance:

Mr. Thuita present for the Claimant

Ms. Ithondeka present for the 1st Respondent

Ms. Alosa h/b for Mr. Makori for the 2nd Respondent

Ms. Esther S - Court Assistant

