Nyakwara v Housing Finance Company of Kenya Limited & another (Cause E953 of 2023) [2025] KEELRC 1171 (KLR) (24 April 2025) (Ruling)

Neutral citation: [2025] KEELRC 1171 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E953 OF 2023

L NDOLO, J

APRIL 24, 2025

BETWEEN

WILLIS KABURA NYAKWARA ..... CLAIMANT

AND

HOUSING FINANCE COMPANY OF KENYA LIMITED ..... 1ST RESPONDENT

HOUSING FINANCE DEVELOPMENT AND INVESTMENT LIMITED ..... 2ND RESPONDENT

RULING

1. The main claim proceeded for hearing inter partes on 4th December 2024 and the parties were directed to file final submissions. Thereafter, the Respondents filed a Notice of Motion dated 31st January 2025, seeking the following orders:

    a. Re-opening of the Respondents' case for purposes of adducing an acknowledgment to letter dated 14th August 2020;

    b. Recalling of the Respondents' witness, Eunice Wairimu Waweru, or any other relevant witness for the purpose of adducing the acknowledgment to the letter dated 14th August 2020, and any attendant testimony appurtenant thereto.

2. The Motion is supported by an affidavit sworn by Regina Anyika and is premised on the grounds that:

    a. On 4th December 2024, at the conclusion of the hearing of the suit, the Court directed parties to file written submissions, and return to court on 12th February 2025, to confirm compliance and take a judgment date;

    b. During the hearing, the Respondents' witness, Eunice Wairimu Waweru confirmed that she was in possession of an acknowledgment to the letter dated 14th August 2020, issued by the

County Labour Office, in support of their position that the said letter was served upon the County Labour Office;

c. The said acknowledgment was inadvertently not produced as evidence in the Respondents' bundle of documents dated 21st May 2024; however, the witness testified that she was able to provide the same in court if given an opportunity;

d. Consequently, the Respondents seek to re-open their case for the purpose of producing additional evidence being, an acknowledgment to letter dated 14th August 2020, by the County Labour Office;

e. The aforesaid acknowledgment is crucial to the Respondents' case and will impact this Court's judgment. However, it was not adduced as evidence, although the Respondents' witness confirmed its existence, during the hearing;

f. It is only fair, just, and in the interest of substantive justice that this Court exercises its discretion by allowing the application as prayed; as the objectives of the Court will best be served if it is provided with all the relevant facts of the suit, which can be achieved by allowing for production of relevant and admissible evidence;

g. The application is made in furtherance of the Respondents' right to a fair hearing, which ought to be upheld by this Court, not to mention that in allowing the application, the Court will ultimately be able to resolve the real issues in controversy between the parties;

h. The Claimant will not suffer any prejudice should the orders sought be granted as he will have an opportunity to cross examine the witness who intends to produce the acknowledgment to the letter dated 14th August 2020, and any attendant testimony appurtenant thereto;

    i. In any event, the acknowledgment to the letter dated 14th August 2020 is evidence that this Court will have an opportunity to review as it is one of the issues canvassed by the parties in their respective written submissions on the main suit;

j. The application has been made timeously without any delay;

k. It is just and equitable to grant the reliefs sought.

3. The Claimant opposes the application by his replying affidavit sworn on 6th February 2025. He terms the application as frivolous and only aimed at delaying the conclusion of the proceedings.

4. The Claimant depones that upon service of his pleadings, the Respondents knew in advance what his case against them was, and therefore had ample time to prepare their defence, the requisite documentation relied on and the evidence produced during the hearing.

5. The Claimant points out that the Respondents were allowed adequate time to file all their supporting documents, and when the matter came up for mention on 27th May 2024, they confirmed having fully complied, prompting the Court to fix the matter for hearing on 4th December 2024.

6. The Claimant adds that the Respondents had every opportunity to produce any additional evidence between 27th May 2024, when the matter was mentioned before the Court, and the hearing date of 4th December 2024, a period of 191 days (6 months and 7 days).

7. The Claimant refers to Rule 38 of the Employment and Labour Relations Court (Procedure) Rules, which prescribes the period within which parties are required to file documents they intend to rely on in support of their case.

8. The Claimant states that he has already filed and served final submissions on the claim, adding that introduction of new evidence at this stage of the proceedings will prejudice him, as he will not have any opportunity to rebut the evidence that the Respondents intend to introduce.

9. The Claimant points out that Respondents' witness was extensively cross examined and re-examined on the letter dated 14th August 2020; he takes the view that the instant application aims to fill gaps in the Respondents' case, already advanced during the hearing.

10. The Claimant counters the Respondents' averment that the application has been brought timeously, noting that it was filed on 31st January 2025, two (2) months after conclusion of the hearing, which took place on 4th December 2024.

11. The Claimant concludes that Rule 66(2) of the Employment and Labour Relations Court (Procedure) Rules does not grant the Respondents unfettered leave to file additional documents and produce evidence after conclusion of the hearing, noting that the evidence the Respondents seek to introduce was always in their possession from 31st August 2020.

12. In its written submissions dated 17th February 2025, the Respondent cites the decision in Johana Kipekmoi Too v Hellen Tum [2014] eKLR where it was held that the Court may in appropriate cases, allow adduction of additional evidence, outside procedural timelines, where no prejudice will be occasioned to the opposite party.

13. In his own written submissions dated 3rd March 2025, the Claimant cites the decision in Raindrops Limited v County Government of Kilifi [2020] eKLR in which the principles upon which a court may allow re-opening of a case were restated 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.

14. A perusal of the court record reveals that the issue of proof of receipt of the Respondent's letter dated 14th August 2020, addressed to the Labour Office, was the subject of cross examination of the Respondent's witness, Eunice Wairimu Waweru. I therefore have no difficulty in reaching the conclusion that the present application, brought after close of viva voce proceedings is aimed at filling emerging gaps in the Respondent's case.

15. In the Johana Kipkemei Case (supra) relied upon by the Respondent, the stage at which the plea for adduction of additional evidence is made was flagged as a significant factor. In this case, the plea was

made close to two months after both parties had closed their respective cases. No credible explanation was offered for this delay, which the Court considers unreasonable in the circumstances.

16. Additionally, the Respondents did not bother to explain any difficulty they had, which prevented them from filing the subject acknowledgement alongside the other documents.

17. On the issue of prejudice, I am satisfied that were the Court to grant the Respondent's plea, conclusion of the dispute between the parties would be delayed, with prejudice to the Claimant. For this reason, coupled with the delay in bringing the application, which has not been explained, the application is declined with costs to the Claimant.

18. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF APRIL 2025

LINNET NDOLO

JUDGE