



REPUBLIC OF KENYA



Nganga v Africare Ltd (Cause E037 of 2021) [2025] KEELRC 1600 (KLR) (28 May 2025) (Ruling)

Neutral citation: [2025] KEELRC 1600 (KLR)

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

CAUSE E037 OF 2021

S RADIDO, J

MAY 28, 2025

BETWEEN

VICTOR THAIRU NGANGA CLAIMANT

AND

AFRICARE LTD RESPONDENT

RULING

1. The Cause was heard on 21 January 2025, 5 March 2025 and 6 March 2025, and the Court set delivery of judgment for 29 May 2025.
2. On 5 May 2025, the Respondent filed a Motion seeking orders:
 - i. ...
 - ii. THAT this Honourable Court be pleased to:
 - (a) Re-open the Respondent's (Claimant's) case.
 - (b) Allow the new evidence to be produced by the applicant in support of its defence.
 - (c) Allow further cross-examination of the Respondent/Claimant limited to the new evidence.
 - (d) Re-open the applicant's case for production of the new evidence, coupled with an extremely brief narration for adoption to contextualise the evidence and
 - (e) Allow leave to file limited submissions on the new evidence and outcome of further cross-examination.
 - iii. THAT pending determination of this application, the delivery of the judgment be suspended by this Honourable Court.
3. The grounds in support of the Motion were that the Respondent had discovered on 25 January 2025 before the hearing from the Claimant's LinkedIn page that the Claimant was working for



remuneration with Ruiru Njoroge & Associates while still under the employment of the Respondent; Claimant had deliberately misrepresented himself before the Court by failing to disclose evidence within his knowledge; the Claimant had committed perjury by informing the Court that he had not engaged in other work for remuneration while under the Respondent's employment and that the Respondent would be prejudiced if the new evidence was not allowed.

4. When the Motion was placed before the Court on 6 May 2025, it issued certain directions.
5. Consequently, the Respondent filed its submissions on 8 May 2025.
6. The Respondent repeated the assertions in the supporting affidavit and grounds on the face of the Motion in the submissions.
7. In terms of case law, the Respondent cited the Supreme Court decision in *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamed & 3 Ors* (2018) eKLR to contend that the applicable principles were that the Court had a discretion to re-open a case and admit new evidence; the additional evidence must be relevant; the additional evidence must be capable of influencing the outcome of the dispute; the new evidence could not have been obtained by the exercise of due diligence; the evidence can remove any doubt from the mind of the Court and is credible; the new evidence is not voluminous; consider the need for swift conduct of litigation and proportionality, and that prejudice would not be occasioned to the other party and the interests of justice.
8. The Respondent cited other decisions.
9. The Claimant filed a replying affidavit and submissions on 15 May 2025.
10. In the affidavit, the Claimant deponed that the Motion was an abuse of the court process, diversionary and meant to waste the Court's time; that the Respondent asked questions in relation to the new evidence during cross-examination; the Motion was filed nearly 5 months after the purported discovery of the new evidence and that the Respondent's advocate had exhibited disdain towards the Court by his conduct.
11. In his submissions, the Claimant cited the Supreme Court decision in *Petition No 7 of 2017, Patrick Thoithi v Kenya Airports Authority* to assert that a party had an obligation to present the whole of his or its case at once and that the Respondent had failed to do so and should not benefit from an exercise of the Court's discretion.
12. The Court has considered the Motion, affidavits and submissions and can make the following determinations.
13. One, the Respondent's advocate deponed in the supporting affidavit that he had visited the Claimant's LinkedIn page in 2021 to establish his professional status and that the next time he went to the profile was on 21 January 2025, just before the commencement of the hearing.
14. The import of the deposition is that the Respondent was aware of the new evidence being referred to at the commencement of the hearing.
15. Two, the Respondent waited until the conclusion of the hearing with judgment reserved to move the Court to allow it to re-open the hearing and introduce the new evidence.
16. It is clear to the Court that the Respondent did not exhibit due diligence, otherwise, it should have sought the leave of the Court on 21 January 2025 to introduce the new evidence.



17. Three, the Respondent cross-examined the Claimant on whether he took up alternative or parallel employment with the firm of Ruiru Njoroge & Associates Advocates and the Claimant was re-examined on the subject.
18. The Respondent's assertion of discovery of new evidence after the close of the hearing warranting re-opening of the hearing and introducing new evidence is not only an afterthought but an abuse of the court process meant to defeat the principal objective of the Court as expressed in section 3 of the *Employment and Labour Relations Court Act*.
19. Four, in disputes concerning unfair termination of employment, section 43 of the *Employment Act* enjoins the Court to look at the reasons or matters that the employer genuinely believed to exist at the material time to examine the fairness and validity of the decision to terminate the employment.
20. It is factually and legally doubtful whether facts or evidence coming to the attention of the Respondent employer during the hearing would influence the outcome of the challenge to the fairness of the decision to terminate the Claimant's employment in 2020.
21. Lastly, the record indicates that the Respondent did not comply with Court directions issued on 9 June 2022 on the filing and service of substitute witness statement and also caused an adjournment on 28 May 2024 for being inappropriately dressed, thus frustrating the expeditious and proportionate/ swift conduct of the litigation.

Orders.

22. The Court declines to allow the Motion dated 5 May 2025, and it is dismissed.
23. The Motion was an abuse of the Court process and should not have been filed in the first place. The Respondent to pay costs of the Motion to the Claimant.

DELIVERED VIRTUALLY, DATED AND SIGNED IN NAIROBI ON THIS 28TH DAY OF MAY 2025.

RADIDO STEPHEN

JUDGE

Appearances

For Claimant Shako & Co. Advocates

For Respondent Kazi Advocates LLP

Court Assistant Wangu

