



**Kimenyi v Attorney General & another (Cause 1716 of 2014)
[2025] KEELRC 1401 (KLR) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1401 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1716 OF 2014
S RADIDO, J
MAY 15, 2025**

BETWEEN

PROFESOR MWANGI KIMENYI CLAIMANT

AND

THE HON ATTORNEY GENERAL 1ST RESPONDENT

**KENYA INSTITUTE FOR PUBLIC POLICY RESEARCH AND ANALYSIS
(KIPPRA) 2ND RESPONDENT**

RULING

1. On 4 February 2025, the Kenya Institute for Public Policy Research and Analysis (KIPPRA) made an application seeking leave to file a substitute witness statement.
2. The Honourable Attorney General did not object to the introduction of a substitute witness statement, but the Claimant objected.
3. The Court granted KIPPRA leave to file and serve the substitute witness statement before 14 February 2025 and fixed the taking of the Respondents' case for 18 March 2025.
4. KIPPRA did not file the substitute witness statement within the agreed timelines (it was filed on 14 March 2025), and on 18 March 2025, it requested the Court to admit it.
5. The Claimant made an oral objection to the introduction on record of the substitute witness statement because it exhibited new evidence or documents. The Court directed her to file a formal application.
6. The Claimant filed the Motion on 31 March 2025, seeking orders:
 - i. That the Honourable Court be pleased to strike out the 2nd Defendant's annexure 1 of the witness statement of Dr Eldah Onsomu dated 14th March 2025, (pages 16 – 17) Board Resolution passed on 10th February 2025.



- ii. That the costs of this application be provided for.
7. The main grounds in support of the Motion were that the minutes introduced or contained new evidence that had not been disclosed during pre-trial; the new evidence was being introduced late in the proceedings after the Claimant had closed her case and would thus be contrary to the principles of fair trial and procedural justice; the Court had on 6 February 2019 declined the Claimant's application for leave to introduce 2 new witnesses and allowing the minutes would constitute unequal treatment of the parties by the Court; the minutes were inadmissible; the minutes would prejudice the Claimant's case herein as well as in Judicial Review No. 1769 of 2004 and Civil Appeal No. 160 of 2008 as she was not the initial Claimant; the Court had on 8 June 2021 declined to allow the Claimant to introduce new evidence; the Court had on numerous occasions declined to allow the introduction of new evidence after commencement of the hearing and that leave had not been granted to allow the new evidence.
8. KIPPRA caused its Executive Director to file a replying affidavit in opposition to the Motion on 10 April 2025 deponing that the Board Minutes only showed that she had been appointed the Executive Director after the term of the previous Executive Director who had been lined up as a witness had lapsed; there was no new evidence sought to be introduced; the witness statement merely referred to documents already before the Court; the admission of the statement would not lead to any unequal treatment of the parties and that expunging the witness statement from the record would deny KIPPRA the right to a fair hearing.
9. The Claimant filed her submissions on 9 May 2025 (should have been filed and served before the end of 22 April 2025), and KIPPRA on 2 May 2025.
10. In the submissions the Claimant cited *Kanda v Government of Malaya* (1962) AC 322 to contend that the right to a fair hearing embodied the right of the other side to know the case against it in advance and be granted an opportunity to contradict the case.
11. The Claimant further assailed the Board minutes as raising issues that had been the subject of adjudication by the Court of Appeal and that a replying affidavit by KIPPRA as being argumentative thus offending the rule of affidavits.
12. In its submissions, KIPPRA mirrored the assertions it had made in the replying affidavit and further contended that the Board minutes evincing the appointment of an acting Executive Director and authorising her to testify in these proceedings did not introduce any new evidence nor prejudice the Claimant's case. Case law was cited.
13. The Court has given due attention to the record, Motion, affidavits and submissions.
14. It is not in dispute that KIPPRA had lined up its Executive Officer, Dr Rose Ngugi, to testify and in that regard had caused her to prepare and file a witness statement. It is also uncontroverted that the said Dr Ngugi's term as Executive Director expired, and Dr Eldah Onsomu was appointed the new Executive Director.
15. Based on these circumstances, the Court admitted a substitute witness statement made by Dr Onsomu on 18 March 2025. The witness statement exhibited the Board minutes now under challenge and several decisions previously made by the Courts.
16. Apart from narrating the history of the case by the management of KIPPRA, the only relevant and material part of the Minutes is the resolution by the Board allowing the new Executive Director to be a replacement witness in place of the previous Executive Director.



17. The path a document takes or goes through before it can be considered as evidence was well explained by the Court of Appeal in *Kenneth Nyaga Mwigie v Austin Kiguta & 2 Ors (2015) KECA 334 (KLR)*.
18. The Court of Appeal stated therein:

How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.
19. The Board minutes the Claimant wants to expunge from the record are not yet part of the judicial record. The Minutes do not talk to the substance of the parties' respective cases as set out in the pleadings and the evidence so far placed on the record.
20. Declining to allow the substitute witness statement and/or Board minutes authorising the Executive Director to act on behalf of KIPPRRA in the Cause would shut it out from prosecuting/defending its case contrary to the tenets of fair hearing and the principle of equality of arms.
21. The Court is therefore unable at this stage to determine whether the admission or contents of the Board minutes would be prejudicial to the Claimant.
22. The Court cannot also determine the evidentiary weight of the Minutes on the parties' respective cases.
23. The Claimant raised the Objection prematurely. She ought to have waited for KIPPRRA to attempt to introduce the Board minutes into evidence/record.

Orders

24. In light of the above, the Motion dated 27 March 2025 is dismissed with costs to the 2nd Respondent.

DELIVERED VIRTUALLY, DATED AND SIGNED IN NAIROBI ON THIS 15TH DAY OF MAY 2025.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimant Mr Kihara instructed by C.N. Kihara & Co. Advocates

For 1st Respondent Ms Mbilo instructed by the Office of the Honourable Attorney General

For 2nd Respondent Ngatia & Co

Court Assistant Wangu

