



REPUBLIC OF KENYA



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**Muchiri v African Agricultural Technology Foundation (AATF) & another
(Cause 663 of 2019) [2025] KEELRC 2418 (KLR) (4 September 2025) (Ruling)**

Neutral citation: [2025] KEELRC 2418 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 663 OF 2019
HS WASILWA, J
SEPTEMBER 4, 2025**

BETWEEN

CAROLINE MUCHIRI CLAIMANT

AND

**AFRICAN AGRICULTURAL TECHNOLOGY FOUNDATION (AATF) 1ST
RESPONDENT**

QUALIBAIC SEED COMPANY (QBS) KENYA 2ND RESPONDENT

RULING

1. The Claimant/Applicant filed a Notice of Motion dated 8th April 2025 seeking orders that: -
 1. Spent
 2. to the intent that the hearing date of 9th May 2025 should not be affected by this application, the Applicant prays that this Honourable Court does give such directions that shall enable the disposal of this Application before the said Hearing date.
 3. the Claimant's case be reopened and the Claimant be allowed to recall her witness and to adduce additional evidence in the matter.
 4. the Claimant be granted leave to file a Supplementary List and Bundle of Documents and a Further Witness Statement
 5. the costs of this application be in the cause.



Claimant/Applicant's Case

2. The Applicant avers that she filed this suit vide a Statement of Claim dated 3rd October 2019. Subsequently, she served the Respondents with Notice to Produce dated 31st November 2020 requesting for documents including books, letters and other records under their possession or control.
3. The Applicant avers that in response to her request, the Respondents filed Grounds of Opposition dated 8th March 2022 contesting the production of item No. 3 on grounds of privilege and item No. 5 on grounds of irrelevance on the dispute.
4. It is the Applicant's case that both parties presented written submissions regarding Grounds of Opposition in 18th August 2022, the court ruled against the Respondents' objections and directed them to produce the requested documents listed in the Notice to Produce. Subsequently, the Respondent complied and produced the documents save for items No. 3 and 5 of the Notice to Produce.
5. The Applicant avers that the Respondent being aggrieved by the orders, filed an appeal vide Notice of Appeal dated 26th August 2022 against the production of the items as well as an application for stay of proceedings pending the hearing and determination of the Appeal vide a Notice of Motion dated 20th September 2022.
6. The Applicant avers that on 16th June 2023, an order was issued staying all proceedings related to the substantive claim until resolution of the appeal.
7. It is the Applicant's case that she eventually withdrew the Notice to Produce owing to the delay it caused. Following the withdrawal, she applied for review and/or setting aside of the stay orders. With pleadings for the substantive claim completed, the court issued directions for its hearing date.
8. The Applicant avers that upon the current firm of advocates taking over conduct of the matter, they identified additional documents that require admission as evidence to allow for proper adjudication of the matter.
9. The Applicant avers that it is imperative for this application to be heard and determined expeditiously and prior to further proceedings in the matter.
10. She further contends that granting of the orders sought will not cause any undue delay in the determination of the matter and the Respondents will not be unduly prejudiced as they will retain the right to cross-examine her.
11. The Applicant avers that the documents are relevant to the instant claim as they speak to her employment and conduct during employment as well as the Respondent's actions prior to dismissing her.
12. It is the Applicant's case that the documents were not available to her at the time of filing of the suit as she recently managed to retrieve the same from an old hard drive of an old and damaged laptop that she had been using over five years ago.

Respondents' Case

13. In opposition to the Application, the Respondents filed Grounds of Opposition dated 22nd April 2025 on the following grounds:



1. The Application seeking to summon additional witnesses and/or produce additional documents this late in the proceedings amounts to trial by ambush as the Respondents based their defence on documents filed from the onset. The prayers sought would be highly prejudicial as they would destabilize the parties' defences that had been formulated based on the documents served at the inception of the Claim.
 2. The Application is a back-door attempt by the Claimant to seal the gaps identified in her case through cross-examination. It is unfair for a party to be allowed to correct its position and/ or make changes to its case after cross-examination and after the close of its case, as this would amount to stage-managing how witnesses testify.
 3. The Plaintiff has not provided any and/ or any justifiable reasons or excuse to explain why the documents could not have been provided prior to the close of her case. She has also not tendered any reasons to explain and/ or demonstrate that the additional documents she seeks to introduce at this stage could not have been procured with reasonable due diligence.
 4. The discretion of the Court should not be invoked to aid a negligent party. The Claimant failed to exercise due diligence in the determination of the preponderance of evidence that she required to satisfy the burden of proof that the termination of her employment was unlawful and/or unprocedural. The Application lodged at this stage following the challenge of her evidence by the Respondents, is an afterthought and should not be sanctioned by this Honourable Court.
 5. The Application is therefore an abuse of the court process and should forthwith be dismissed with costs to the Respondents.
14. The Respondents further filed a replying affidavit dated 14th May 2025, sworn by one Keziah Chomba, the 1st Respondent's Legal Officer.
 15. The Respondents aver that the application is seeking to summon additional witnesses and/or produce additional documents this late in the proceedings amounts to trial by ambush, as the Respondents have already prepared their case and based their defence on documents filed from the onset.
 16. The Respondents aver that the prayers sought would be highly prejudicial as they would destabilize the parties' defences that had been formulated based on the documents served at the inception of the Claim.
 17. The Respondents aver that the Claimant is seeking to seal the gaps identified in her case through cross-examination. It is unfair for a party to be allowed to correct its position and/ or make changes to its case after cross-examination and after the close of its case, as this would amount to stage-managing how witnesses testify.
 18. It is the Respondents' case that the proposed list of additional evidence seeks to attach various documents that were in the Claimant's possession/knowledge while she was employed and which could have been easily produced during the pre-trial stages.
 19. It is the Respondents' argument that the Claimant has not indicated how the said documents are relevant to the instant claim and why they were not produced at the time the claim was filed during the numerous pre-trial conferences provided by the court. The Claimant has not attached the said documents and therefore the Application is defective.
 20. The Respondents aver that the Claimant has not provided any justifiable reasons and/or excuse to explain why the documents could not have been provided before the close of her case. She has also



not tendered any reasons to explain and/or demonstrate that the additional documents she seeks to introduce at this stage could not have been procured with reasonable due diligence.

21. It is the Respondents' case that the proceedings relating to the Notice to Produce cannot form any basis for adducing additional evidence and reopening the Claimant's case, therefore, the explanation relating to the Notice to Produce issue is irrelevant to this application.
22. The Respondents aver that the parties herein have appeared before the Court prior to the hearing date for various pre-trial conferences, where the Claimant did not add any other or seek to file a further list of documents.
23. It is the Respondents' case that the Claimant failed to exercise due diligence in determining what evidence she required to satisfy the burden of proof that the termination of her employment was unlawful and/or unprocedural. Therefore, the application lodged at this stage following the challenge of her evidence by the Respondents is an afterthought and should not be sanctioned by this Court.

Applicant's Submissions

24. The Applicant submitted that the criteria for reopening of the party's case was provided for in *Susan Wavinya Mutavi v Isaac Njoroge & another* [2020] KEELC 8 (KLR) wherein the court noted:

“Over the years, Kenya's superior courts and courts in the Commonwealth have developed principles which guide the exercise of jurisdiction to re-open a case and receive additional evidence in a civil trial court. First, the jurisdiction is a discretionary one and is to be exercised judiciously. In exercising that discretion, the court is duty-bound to ensure that the proposed re-opening of a part's case does not embarrass or prejudice the opposite party. Second, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the court will not grant the plea. Third, the plea for re-opening of a case will be rejected if there is inordinate and unexplained delay on part of the applicant. Fourth, 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. Fifth, 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. Lastly, the evidence must be apparently credible, though it need not be incontrovertible.”

25. On discretion, the Applicant submitted that the evidence sought to be adduced is not foreign to the Respondents as these are documents that are well within their knowledge and possession. If anything, the Respondents are the ones who failed to bring the same to the court's attention. Moreover, should the application be allowed, the Respondent's will have the opportunity to cross-examine the Claimant. Therefore, at no point does that evidence sought to be adduced destabilize the Respondents' defence or expose them to prejudice as they are even yet to present their case.
26. She placed reliance in *Raindrops Limited v County Government of Kilifi* [2020] KEHC 1478 (KLR) where the Court in allowing the Plaintiff to adduce further evidence noted

“In contesting the re-opening of the case at cross-examination stage the defendant has not shown that it would alter the character of the case as presented by the plaintiff or occasion a miscarriage of justice or in that context a mistrial which cannot be remedied by being given an opportunity to recall further evidence limited to the raised additional evidence. Furthermore, the witness to be recalled was already in the list of witnesses as such I find that no prejudice will be suffered by the respondent”



27. The Applicant submitted that the current advocates on record were not present at the time of the hearing, therefore, they would not be aware of gaps in the case if any. The requested documents is relevant as the main issue in contention is whether the Claimant was unfairly terminated; it is only by this Court allowing the application, will it be better placed to comprehensively understand the issues in contention through analyzing the said documents.
28. It is the Applicant's submission that she intended that the matter be determined expeditiously and in accordance with Articles 50 and 159 of *the Constitution*, therefore, any claim by the Respondents to the contrary is misleading.
29. The Applicant submitted that the Respondents' actions have caused continuous delays. Firstly, when they were served with the Notice to Produce dated 13th November 2020, they refused to do yet they themselves relied on the said information whilst determining the termination of the Claimant from employment. Not wanting the matter dragged far too long, the Claimant withdrew the said Notice. Secondly, the Respondents opposed the current advocates on record application to have the Claimant's case be re-opened and the hearing date be maintained, leading to the hearing date being vacated.
30. The Applicant submitted that the documents sought to be introduced are not foreign to either parties as they within the Respondent's possession and both parties refer to some of the documents in their pleadings. Additionally, the documents speak to the Claimant's employment and conduct as well as the Respondents' actions prior to terminating her employment, hence their relevant to the determination of the issues in contention herein.
31. The Applicant submitted that from the application, she is not seeking to have any additional witness testify, rather she is asking the court to allow recall of a witness; and the Respondents have no objection to the same.
32. It is the Applicant's submission that it has been established that the application meets the requirements set out in *Susan Wavinya Mutavi v Isaac Njoroge & another (supra)*, therefore, it is in the interest of justice and in line with the spirit of Article 50 of *the Constitution* that the application should be granted as prayed.

Respondents' Submissions

33. The Respondents submitted that Rule 66(2) of the Employment and Labour Relations Court Rules (2024) provides that the Court shall not re-open a hearing unless, for sufficient reason, it considers it fit to do so. Therefore, discretion must be exercised judiciously and the Court must ensure that reopening of the case does not prejudice the opposite party. They further relied in the Supreme Court case of *Mahamud v Mohamad & 3 others [2018] KESC 62 (KLR)*, where the Court stated as follows:

“...we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing principles on allowing additional evidence in appellate Courts in Kenya as follows;

- (a) the additional evidence must be directly relevant to the matter before the Court and be in the interest of justice;
- (b) it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;



- (c) it is shown that it would not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
- (d) where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
- (e) the evidence must be credible in the sense that it is capable of belief;
- (f) the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
- (g) whether a party would reasonably have been made aware of and procured the further evidence in the course of the trial is an essential consideration to ensure fairness and due process;
- (h) where the additional evidence discloses a strong prima facie case of willful deception of the Court;
- (i) the Court must be satisfied that the additional evidence is not utilized for the purpose of removing the lacunae and filling gaps in evidence. The Court must find the further evidence needful;
- (j) a party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in the appeal, fill up omissions or patch up the weak points in his/her case;
- (k) additional evidence. This requires the Court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that, might arise from the additional evidence on the other."

(Emphasis added).

34. The Respondents submitted that for the entire period leading up to the close of her case, the Claimant never alluded to the existence of further and/ or other travel documents which she believed were necessary to prove her claims. Moreover, no reasons have been provided to justify the admission of documents that were never alluded to at any point of the trial process.
35. It is the Respondents' submissions that the proceedings relating to the Notice to Produce cannot form any basis for adducing additional evidence and reopening the Claimant's case. The explanation the delay in filing her application for additional documents was brought about by the proceedings in Civil Appeal E730 of 2022 relating to the Notice to Produce dated 13th November 2020 is irrelevant to this Application.
36. The Respondents submitted that it is trite law that a party who desires to introduce additional evidence must show that the evidence could not have been obtained with reasonable diligence. The Claimant could have presented her alleged additional travel documents/schedule prior to the institution of the suit which sufficient diligence, however, she has not demonstrated any impediment and/or challenges that may have prevented her from doing so. The Respondents contend that the Claimant had ample opportunity in the 4 years that she took to present her case, to seek the production of the said documents.



37. It is the Respondents' submissions that the issues raised in the Claimant's application are not new to substantiate the late request for additional documents. It is apparent that the Claimant had a sudden realization, not of the issues in question, but of the fact that the evidence she provided did not support her claim. In the circumstances, the re-opening of the case in an attempt to seal the loopholes in her case and would amount to a gross abuse of the court process.
38. The Respondents submitted that the Claimant has not elaborated how the additional evidence would aid the just determination of the issues before this court. Therefore, allowing the re-opening of the case will only defeat the interests of justice, as the mere fact that the Respondents will have an opportunity to cross-examine could not overcome the prejudice caused by allowing the Claimant to produce documents which were never alluded to.
39. The Respondents submitted that the Claimant should bear the costs for the application under Section 28(1)(e) of the Employment and Labour Relations Court (Procedure) Rules, 2016. The Claimant has not provided any justifiable reasons to explain why the documents could not have been provided before the close of her case.
40. I have examined all the averments and submissions of the parties herein. It is indeed true that the orders being sought by the applicant to allow the reopening of her case and call fresh evidence is discretionary. It is also true that there has been inordinate delay in the prosecution of this case which delay has been occasioned partly by the respondents who failed to produce documents the applicant sought to rely upon until they were compelled by this court.
41. That notwithstanding, the respondents are opposed to this application which they state will amount to trial by ambush. It is indeed the duty of this court to resolve cases based on all the likelihood evidence needed. The evidence if it would aid the court in resolving a dispute in a fair manner, then the court should not close out the party with such evidence. What would be prudent in the circumstances is to allow the respondent to also present any additional evidence if available to avoid any prejudice.
42. It is my finding that there is indeed no prejudice the respondent will suffer in allowing this application so long as they have an opportunity to present any further evidence and also cross examine the witnesses who may be recalled. I therefore find the application is merited and is hereby allowed. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 4TH DAY OF SEPTEMBER 2025.

HELLEN WASILWA
JUDGE

