



**Adhiambo v Barclays Bank of Kenya Limited (Cause 871 of 2019)
[2024] KEELRC 622 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEELRC 622 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 871 OF 2019
L NDOLO, J
MARCH 14, 2024**

BETWEEN

LILLIAN RHODA ADHIAMBO CLAIMANT

AND

BARCLAYS BANK OF KENYA LIMITED RESPONDENT

RULING

1. By its Notice of Motion dated 28th November 2023, the Respondent seeks leave to call a second witness to testify during the hearing of the defence case. In this regard, the Respondent asks the Court to admit the witness statement of Michael Ngobo dated 25th October 2023.
2. The Motion is supported by an affidavit sworn by the Respondent's Head of Employee Relations and Wellness Function, Vaslas Odhiambo and is based on the following grounds:
 - a. That prior to the firm of Mohammed Muigai LLP taking over the conduct of this matter, the Respondent was represented by the Federation of Kenya Employers (FKE) who filed the Respondent's Memorandum of Response, witness statement and list and bundle of documents;
 - b. That at the close of pleadings, the Respondent had filed only one witness statement. In the course of preparation for hearing, it has become apparent that it would be necessary to call one of the investigators to testify because one of the documents relied on is a forensic investigation report which is already part of the documents filed on behalf of the Respondent;
 - c. That the testimony of the investigator in respect of the contents of the forensic investigation report is essential to these proceedings as both the investigator and the report have been referred to severally in the Claimant's pleadings;



- d. That the testimony of the investigator is therefore integral for the fair hearing of the dispute before this Court as it would aid the Court in ascertaining the facts before it in the determination of the dispute;
 - e. That the present application will not prejudice the Claimant as it is made prior to the commencement of the Claimant's case and does not introduce new evidence as the forensic investigation report was filed before close of pleadings. Furthermore, the Claimant will have an opportunity of cross examining the additional witness on the contents of the statement;
 - f. That it would be in the interest of justice that the application is allowed as prayed.
3. The Claimant opposes the Motion by her replying affidavit sworn on 18th December 2023.
 4. The Claimant states that the application has not been brought in good faith because while the Respondent seeks leave to bring in a second witness, it had already filed the relevant witness statement before filing the application.
 5. According to the Claimant, the witness statement of the intended second witness raises new issues. She states that admission of the witness statement will lead to re-opening of pleadings because she will need to respond to the issues raised.
 6. The Claimant terms the application as an afterthought brought three and a half years after filing of the Respondent's pleadings. She states that the Respondent has not given a valid reason why it was unable to file the intended witness statement at the time it filed its Response to Claim.
 7. The Claimant asserts that admission of the witness statement will cause her prejudice that cannot be cured by an opportunity for cross examination of the intended second witness. She states that she would need to call an expert to challenge the testimony of the second witness.
 8. Finally, the Claimant asks that in the event the Court allows the Motion, she be granted an opportunity to:
 - a. Cross examine each of the staff members interviewed by the Respondent's forensic team in respect of the investigations carried out at the Respondent's Karen Branch concerning this case;
 - b. Access all the documents relied on by the Respondent in preparing the forensic investigation report. The Claimant puts the condition that unless the Respondent grants access to the said documents and staff members for interview within 30 days of the directions of the Court, the instant application be dismissed;
 - c. Prepare and file an expert report in respect of the investigations carried out at the Respondent's Karen Branch concerning this case; and
 - d. Be granted leave by the Court to call an expert witness and produce the expert report and testify on the investigations carried out at the Respondent's Karen Branch concerning this case.
 9. The application was argued before me on 13th February 2024. Counsel for the Respondent, Biko Angwenyi asked the Court to balance the parties' rights and interests.
 10. Mr. Angwenyi further asked the Court to consider the time at which the application has been made, the necessity of the additional witness and any prejudice that the Claimant may suffer.
 11. Conceding that pleadings had closed, Counsel pointed out that the Claimant was yet to close her case. He asserted that the Claimant would not suffer any prejudice since the Court had not yet formed an opinion about her case.



12. According to Counsel, the Court ought to have the benefit of the additional witness, who was involved in the investigations culminating with the forensic investigation report already on record.
13. Counsel for the Respondent faults paragraph 14 of the Claimant's replying affidavit by which she seeks substantive orders from the Court.
14. Counsel for the Claimant, Mathew Muoki reiterated the contents of the replying affidavit sworn by the Claimant, pointing out that pleadings had closed more than three years ago and that the Claimant had opened her case.
15. Counsel for the Claimant submits that the proposed additional witness is an expert whose testimony can only be countered by another expert witness.
16. Counsel defends the contents of paragraph 14 of the Claimant's replying affidavit, by which specific requests have been made in the event the Court is minded to allow the Respondent's application.
17. In advancing her opposition to the Respondent's application, the Claimant relied on the decisions in *Alfred Baya Msanzu v Kenya Ports Authority* [2022] eKLR and *Preview Property Agency & another v Terrie Wanjiku Miano* [2021] eKLR) where attempts to introduce documents in the course of trial were restrained on the ground that the opposite party would be prejudiced.
18. The present case is however distinguishable on two fronts; first, what the Respondent seeks to introduce is a witness statement and not a document and second, the Claimant is yet to present her case to the Court. In the result, there is no discernible prejudice that she will suffer if the additional witness statement is admitted.
19. Conversely, if the application is disallowed, the Respondent will be highly prejudiced as a critical part of its evidence will have been locked out.
20. Regarding paragraph 14 of the Claimant's replying affidavit I will say two things; first, the Claimant cannot lawfully put conditions upon which the Court exercises its discretion one way or other and second, the Claimant's requests, which are in the nature of substantive prayers, cannot be made in a replying affidavit.
21. Ultimately, I will allow the Respondent's Notice of Motion dated 28th November 2023, with the result that the witness statement of Michael Ngobo dated 25th October 2023 is admitted as duly filed.
22. The costs of the application will be in the cause.

DELIVERED VIRTUALLY AT NAIROBI THIS 14TH DAY OF MARCH 2024

LINNET NDOLO

JUDGE

Appearance:

Mr. Mathew Muoki for the Claimant

Mr. Biko Angwenyi for the Respondent

