



Mutira v Metropolitan National Sacco Ltd & another (Cause E708 of 2022) [2024] KEELRC 479 (KLR) (6 March 2024) (Ruling)

Neutral citation: [2024] KEELRC 479 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E708 OF 2022
JK GAKERI, J
MARCH 6, 2024**

BETWEEN

DENNIS NYAGA MUTIRA CLAIMANT

AND

METROPOLITAN NATIONAL SACCO LTD 1ST RESPONDENT

BENSON MWANGI 2ND RESPONDENT

RULING

1. Before the court for determination is the Respondent's Notice of Motion dated 15th December, 2023 filed under Certificate of Urgency seeking orders that;
 1. Spent.
 2. This Honourable Court be pleased to issue an order to re-open the Respondent's case only for purposes of production of additional evidence being the Claimant's Statement of Account and authorization letters to be produced by the Respondents.
 3. The costs of this application be provided for.
2. The Notice of Motion is expressed under Article 50 of *the Constitution* of Kenya, 2010, Section 1A and 3A of the *Civil Procedure Act* and Section 76 of the *Evidence Act* and is based on the grounds set forth on its face and the Supporting Affidavit by Irene Nyambura Maingi sworn on 15th December, 2023, who deposes that the Claimant's contract of employment with the Respondent had a renewal clause based on performance and/or agreement by the parties.
3. The affiant states that after leaving employment, the Claimant was paid all his dues and participated in their computation and he agreed that his loans be set off against his dues and shares and were thus deducted but filed the instant suit claiming funds already paid to him and used to offset his development loan he had with the Respondent, a fact he did not disclose to the court.



4. That both parties have closed their cases but neither party availed the Claimant's statement of account to show the Claimant's development loans and final payments.
5. The affiant states that the failure to file the documents was unintentional and the Respondents seeks their admission after re-opening of its case as documents will guide the court in arriving at a just and fair decision.
6. That it is in the interest of justice that the prayers sought be granted and no prejudice will be occasioned on the Claimant/Respondent.
7. That the additional evidence is strong, material and crucial to the suit.

Claimant's/Respondents reply

8. On 23rd January, 2024, the court granted the Claimant/Respondent's counsel 2 days to file a response to the Respondents' Notice of Motion and parties were accorded 3 days a piece to file and exchange submissions.
9. The Claimant's counsel filed submissions on 30th January, 2024 but did not file a response to the Notice of Motion as none is traceable on the Judiciary C.T.S.

Applicant's submissions

10. Counsel urged that the additional evidence will neither alter the character of the case nor occasion miscarriage of justice and failure to produce it will occasion injustice to the 1st Respondent.
11. On satisfaction of the criterion, counsel submitted that Order 18 Rule 10 conferred upon the court power to recall any witness who has been examined for further examination.
12. Reliance was also made on the provisions of Section 146 (4) of the [Evidence Act](#).
13. Counsel further urged that the decision as to whether to re-open an ongoing case involve the exercise of judicial discretion exercised judiciously which is based on the facts and circumstances of each case.
14. That the exercise of discretion ought to be recognized under the right to fair trial under Article 50 of [the Constitution](#) of Kenya, 2010.
15. Reliance was made on the decision in Samuel Kiti Lewa V Housing Finance Co. Ltd (2015) eKLR.
16. Counsel submitted that the re-opening ought not to embarrass or prejudice the other party and cited the sentiments of Kasango J. in Samuel Lewi's case (Supra) and the discretion ought not be exercised to fill in gaps in the case or where there has been inordinate delay by the applicant.
17. Counsel urged that the evidence sought to be produced could not have been obtained with reasonable diligence at the time of the hearing of his case and if admitted, the evidence would have an important influence in the outcome of the case and must be credible though not incontrovertible.
18. Counsel submitted that the additional evidence is important and the application herein is prompt and the failure to include it was inadvertent and the witness will be cross-examined by the other side.
19. Reliance was made on the Ugandan High Court decision in Simba Telecom V Karuhanga & another (2014) VGHC 98, on re-opening of a case.



Respondent's submissions

20. Counsel submitted that under Order 2 Rule 13, pleadings close 14 days after service of the reply or defence to counter-claim or 14 days after service of defence.
21. Counsel submitted that the additional evidence was in the custody of the Respondents and delayed its production and delay defeats equity and equity aids the vigilant not the indolent.
22. Reliance was made on the sentiments of the court in *Smith V Clay* 239 Ga.220 (236 S.E. 2d. 346) (1977) on laches, to urge that re-opening of the case would prejudice the Claimant as the hearing was on 4th December, 2023 and the Claimant had already filed his submissions to the main suit and the Notice of Motion was an afterthought.
23. Counsel cited the sentiments of the court in *Wavinya Mutavi V Isaac Njoroge & another* (2020) eKLR on the criteria applied in the exercise of the court's discretion to re-open a case.
24. Counsel urged the court to dismiss the Notice of motion.

Determination

25. The singular issue for determination is whether the Respondents' Notice of Motion is merited.
26. Counsel for the parties have adopted contrasting positions with the Respondents' counsel submitting that the court should not exercise its discretion favourably to the applicant as it had the evidence sought to be introduced, it would be prejudicial to the Claimant and the applicant has slept on its rights for long before making the application.
27. The law on the re-opening of cases is fairly well settled.
28. Section 146 (4) of the *Evidence Act* provides that;

The Court may in all cases permit a witness to be recalled either for further examination in chief or for further cross-examination and if it does so the parties have the right of further cross-examination and re-examination respectively.
29. Similarly, Order 18 Rule 10 of the Civil Procedure Rules, 2010 provides that;

“The Court may at any stage of the suit recall any witness who has been examined and may, subject to the law of evidence for the time being in force; put such questions to him as the Court thinks fit”.
30. Evidently, the court's jurisdiction to re-open a case involves the exercise of discretion which as both counsels have correctly submitted must be exercised judiciously as held in *Samuel Kiti Lewa V Housing Finance Co. of Kenya* (Supra) cited by the applicant's counsel.
31. Granted that judicial discretion must be exercised judiciously, it is elemental to abbreviate the guiding principles in the exercise of discretion to re-open a case.
32. In *Wavinya Mutavi V Isaac Njoroge & another* (2020) eKLR, cited by the Claimant/Respondent's counsel, the court expressed itself as follows;

“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 party'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 the 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.”

33. It is not in contest that the hearing of this case took place on 4th December, 2023 and both sides closed their respective cases and directions on the filing of submissions were given.
34. The instant application was filed on 15th December, 2023, 11 days after closure of the applicant's case.
35. The applicant urges that the failure to include the document was inadvertent and the evidence will not prejudice the Respondent or occasion miscarriage of justice.
36. The evidence is relevant and material to the case and will not alter its character but could change the outcome and the Notice of Motion was filed without inordinate delay.
37. The pith and substance of the application is that the applicant seeks to introduce new evidence to demonstrate that the Claimant/Respondent was paid certain monies he was claiming in this suit as well his agreement that the outstanding loan balance be recovered from his dues, principally gratuity.
38. In the court's view, the evidence is relevant and material to the suit, will probably have a critical influence on the outcome of the case as regards the reliefs sought, the application was filed within a short time after the applicant had closed its case and will neither embarrass nor prejudice the Claimant/Respondent as he will have the opportunity to cross-examine the witness who produces the documents.
39. Although the applicant has not demonstrated that the documents sought to be introduced could not have been obtained with reasonable diligence at the time of hearing of its case and has merely stated that it was inadvertently omitted from its list of documents, the court is persuaded that this is a proper case for the exercise of the court's discretion in favour of the applicant in the interest of justice.
40. In the upshot, the applicant's Notice of Motion dated 15th December, 2023 is merited and is allowed on the terms that the Applicant/Respondents' case be re-opened for purposes of production of the Claimant's Statement of Account and authorization letters on a date agreed upon by the parties and the court.
41. Costs shall abide the outcome of the main suit.
42. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 6TH DAY OF MARCH 2024

DR. JACOB GAKERI

JUDGE

ORDER



In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

