



REPUBLIC OF KENYA



**Nduru v Avenue Service Station Ltd (Cause 839 of 2018)
[2024] KEELRC 528 (KLR) (6 March 2024) (Ruling)**

Neutral citation: [2024] KEELRC 528 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 839 OF 2018
BOM MANANI, J
MARCH 6, 2024**

BETWEEN

SIMON WANGAI NDURU CLAIMANT

AND

AVENUE SERVICE STATION LTD RESPONDENT

RULING

Background

1. The Respondent/Applicant has filed the application dated 24th October 2023 seeking, inter-alia, the following orders:-
 - a. That the Respondent be granted leave to file a reply to the amended Statement of Claim dated 9th December 2022.
 - b. That the Respondent be granted leave to file a Witness Statement by one John Nyingi in place of the one filed by Diana Kabiru who has since left the Respondent's employment.
 - c. That the Claimant be recalled for further cross examination by the Respondent's newly appointed counsel.
2. The basis for the application is that the Respondent's previous lawyers failed to:-
 - a. File a reply to the amended Statement of Claim.
 - b. File the substituted witness statement by Nyingi John.
 - c. Cross examine the Claimant on pertinent matters relating to the veracity of some documents which the Claimant had produced in evidence and which the Respondent has reason to believe were forged.



3. The application is supported by the affidavit of Raj Shah. In the affidavit, the affiant blames the Respondent's erstwhile lawyers for failure to exercise diligence in handling the brief. He accuses the said lawyers of having failed to notify the Respondent of the developments in the case.
4. The said affiant avers that the Respondent's advocates then on record only notified the Respondent of the trial that was scheduled for 27th September 2023 on 26th September 2023 leaving the Respondent with no time to substitute its witnesses. The affiant further avers that despite several emails from the Respondent to the advocates seeking further information on the matter, the said lawyers remained nonresponsive. As a result, the Respondent was forced to appoint the lawyers currently on record to act for it.
5. The affiant contends that the new lawyers realized that the previous lawyers had not filed a response to the amended Statement of Claim. Further, it was realized that the previous lawyers had not filed a substituted witness statement in addition to having failed to cross examine the Claimant on pertinent matters relating to the authenticity of some documents that he had produced in evidence. Therefore and by this application, the Respondent seeks to have the response to the amended Statement of Claim filed, its substituted witness statement filed and the Claimant recalled for cross examination.
6. The application is vehemently opposed by the Claimant. According to him (the Claimant), the Respondent has conducted itself in a manner that renders it (the Respondent) undeserving of the court's indulgence.
7. The Claimant contends that when the Respondent was served with summons to enter appearance in the cause, it filed its statement of reply to the Claim dated 3rd February 2018 alongside its lists of witnesses, lists of documents and witness statement. Thereafter, the matter was subjected to a pretrial conference and certified as ready for hearing.
8. The Claimant avers that the case was thereafter referred to mediation. However, the Respondent allegedly abandoned the mediation process in favour of a court trial citing alleged bias on the part of the mediator.
9. The Claimant avers that after the cause was remitted back to court, he applied and was granted orders to amend his Statement of Claim. He avers that the amended Statement of Claim was filed and served on the Respondent in November 2022 following a court order in that regard dated 23rd November 2022. However, the Respondent opted not to file a response to the amended Statement of Claim.
10. It is the Claimant's contention that all this while, the Respondent was represented by counsel. Therefore, if there was need to amend its response, counsel should have advised that this be done.
11. According to the Claimant's Advocates, the fact that the Respondent opted not to file a response to his amended Statement of Claim demonstrates that the amendments to the Statement of Claim did not introduce new matters. On the contrary, the said amendments only tidied up the pleadings that had been filed by the Claimant while acting in person.
12. The Claimant's counsel avers that on 27th September 2023 when the matter came up for hearing, the Respondent was represented by counsel who cross examined the Claimant on the matters that the Respondent now raises. As such, the request to re-open the Claimant's case in order to cross examine him further is unwarranted. According to the Claimant's counsel, this is an attempt by the Respondent to find a way to fill the gaps in its case.



13. Counsel for the Claimant further contends that an order allowing the defense to file fresh pleadings after the Claimant has closed his case will greatly prejudice his case. As such, the request should be declined.

Analysis

14. I have scrutinized the court record and note that during cross examination of the Claimant, questions were put to him regarding the authenticity of the contract that he produced in evidence. The Claimant was asked whether he had manipulated or forged the instrument. In response, he asserted that the instrument was not manipulated.
15. In the instant application, the Respondent seeks to reopen the Claimant's case in order to cross examine him on the same issue regarding whether the contract he produced in evidence is forged. With respect, I do not think that it will be helpful to reopen the Claimant's case to cross examine him on matters that the record shows he was cross examined on by the lawyers then on record for the Respondent.
16. For some reason, the Respondent appears to imply that reopening the Claimant's case will result in the trial commencing afresh. Yet, this is not what it (the Respondent) has been sought in the instant application.
17. The contention by the Respondent that it intends to insist that the Claimant produces the original contract once the matter is reopened is unhelpful since there is no request to set aside the proceedings of 27th September 2023 and expunge the documents already produced by the Claimant from the court record. There is no rule that entitles the Respondent to compel the Claimant to produce further documents in addition to those that he produced at the stage of giving his testimony in chief.
18. It is evident from the court record that the order to amend the Statement of Claim was issued on 23rd November 2022 in the presence of counsel for the Respondent. There is no indication that the Respondent's lawyers filed a response to the amended Statement of Claim despite the fact that rule 14(6) of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 granted the Respondent a corresponding right to file an amended response.
19. There is no explanation why this was not done. Counsel for the Claimant hazards a guess why this happened. She suggests that the reaction by the Respondent's lawyers may have been informed by the fact that the amendments to the Statement of Claim did not, as a matter of fact, introduce any new claim. On the contrary, the amendments only sought to tidy up the pleadings that had been filed by the Claimant while acting in person.
20. The record shows that when the matter came up for trial on 27th September 2023, the Respondent's Advocates did not intimate the desire to amend their client's pleadings. As a consequence, the trial commenced with the defense that is currently on record. Subsequently, the Claimant closed his case.
21. The instant application was filed after the Claimant had testified and closed his case. To suggest that a defendant should be permitted to amend his defense after a Claimant has closed his case appears unconscionable. This will certainly prejudice the Claimant's case. It will be tantamount to permitting the defense to mount a defense that was not on record at the time that the Claimant's case was heard.
22. In my view, the Respondent's attempts at: seeking to recall the Claimant for further cross examination; filing further documents; and amending its pleadings at this stage are an attempt at filling gaps in the defense case. This should not be allowed.
23. The contention by the Respondent that it should not be condemned to suffer the consequences of its former counsel's mistakes in my view is not applicable to this case. The failure by counsel to file the



pleadings in contention was evidently not out of mistake. It can only be attributed to negligence, if at all.

24. As regards filing of a substituted witness statement, the court does acknowledge that a witness may be prevented from testifying for cogent reasons. In such case, another witness who is conversant with the matters in dispute may be permitted to testify on them in place of the earlier witness.
25. However, the substituted witness must only speak to the matters that the earlier witness was scheduled to speak to. He cannot utilize the opportunity to testify as a substitute to introduce his own evidence. If he wishes to testify in the cause as a standalone witness, then he should seek permission to testify as an additional and not substituted witness.
26. In the premises, the Respondent's substituted witness can only testify on matters that were raised in the witness statement that was filed by Diana Kabiru. He cannot introduce new evidence in the cause except if he has sought to testify as an additional and distinct witness.

Determination

27. Having regard to the foregoing, I make the following orders:-
 - a. That the Respondent's application dated 24th October 2023 is devoid of merit and is dismissed except to the extent here-below.
 - b. The Respondent is only permitted the window to file a witness statement by one John Nyingi as a substitute for Diana Kabiru.
 - c. However, since the said John Nyingi sought to come into the matter as a substituted witness in place of Diana Kabiru and not as a standalone additional witness, he cannot introduce evidence that goes outside what is contained in the witness statement that was filed by Diana Kabiru. As such, the witness statement by John Nyingi should be reconfigured so as to be in tandem with that of Diana Kabiru.
 - d. Costs of the application are granted to the Claimant.

DATED, SIGNED AND DELIVERED ON THE 6TH DAY OF MARCH, 2024

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Claimant/Respondent

.....for the Respondent/Applicant

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

