



**Kimenyi v Permanent Secretary, Ministry of Planning & another; Kimenyi & another (Claimant) (Legal Representatives of the Claimant - Now Deceased) (Cause 1716 of 2014) [2024] KEELRC 1088 (KLR) (9 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1088 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1716 OF 2014  
NZIOKI WA MAKAU, J  
APRIL 9, 2024**

**BETWEEN**

**PROFFESOR MWANGI S. KIMENYI ..... CLAIMANT**

**AND**

**THE PERMANENT SECRETARY, MINISTRY OF PLANNING .... 1<sup>ST</sup>  
RESPONDENT**

**KENYA INSTITUTE FOR PUBLIC POLICY RESEARCH AND ANALYSIS  
(KIPRA) ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**IRENE WANGUI KIMENYI ..... CLAIMANT**

**FRANCIS WESLEY KIMENYI ..... CLAIMANT**

**LEGAL REPRESENTATIVES OF THE CLAIMANT - NOW DECEASED)**

**RULING**

1. When the matter came up for hearing on 8<sup>th</sup> April 2024, an oral application was made by the 1<sup>st</sup> Respondent to allow a witness appear and testify for it. Mr. Odukenya for the 1<sup>st</sup> Respondent asserts that initially the Ministry being the 1<sup>st</sup> Respondent had not obtained a witness and that as of today facts changed and the 1<sup>st</sup> Respondent managed to get a witness statement dated 5<sup>th</sup> April 2024. Mr. Odukenya indicated that this was served upon Counsel on record. It was his humble submission to be allowed the witness, to bring all material facts before court per Article 50(1) of *the Constitution*. The State Counsel submitted that the documents attached to that witness statement are not new being the termination letter of December 2004 and that is, what the 1<sup>st</sup> Respondent believes, why Claimant is in court. He submitted that it is in Claimant’s list of documents at page 191. Mr. Odukenya submitted



that it was a document that the Claimant is well aware of. The other documents had been attached to the 2<sup>nd</sup> Respondent's initial bundle attached to Reply to Claim of March 2015. He submitted that the 1<sup>st</sup> Respondent had produced the second contract of February 2004 and 2 Gazette notices attached. He asserts the last document is the letter forwarding the investigations report to the 1<sup>st</sup> Respondent. He asserted further that the Claimant would not be prejudiced and they will have an opportunity to cross examine the witness and that is why he sought the witness for the 1<sup>st</sup> Respondent be allowed.

2. Counsel for the 2<sup>nd</sup> Respondent Mr. Ngatia SC submitted that he did not wish to be put to category of opposing or supporting the application by the 1<sup>st</sup> Respondent. He submitted for 2<sup>nd</sup> Respondent and in his words, with a distinct view. He stated that whereas the 1<sup>st</sup> Respondent had indicated they were not going to adduce evidence orally, that cannot be cast in stone. Senior Counsel argued that the position taken by the litigant is superior to what Counsel had indicated in the past. He cited Article 25(c) of *the Constitution* which ordains the right to be heard as a special category of a right that cannot be derogated. He submitted that the 2<sup>nd</sup> Respondent would not wish to have is a Judgment being castigated on the basis that a party who came to court was not heard. He submitted that that would be a difficult position for the parties having expended a lot of time to having a Judgment that is amenable to being set aside for the failure to hear a party. He posed the question, can convenience of the party be allowed to trump that? And answered it in the negative. He submitted that he was of the view that any inconvenience to the 2<sup>nd</sup> Respondent cannot supersede the right of 1<sup>st</sup> Respondent to be heard. He submitted that what is before court is whether to allow or deny the 1<sup>st</sup> Respondent the opportunity to be heard. He pointed out that there is indeed a live witness waiting to be heard. His application if court was to allow the 1<sup>st</sup> Respondent's witness was to let this be sequential so that his client be stood down, we hear the 1<sup>st</sup> Respondent and then hear the 2<sup>nd</sup> Respondent. Mr. Ngatia SC submitted that he would rather bear the inconvenience before the 2<sup>nd</sup> Respondent's witness is heard.
3. Mr. Kihara on record for the Claimant submitted that the plaintiff was opposed to the introduction of a witness for the 1<sup>st</sup> Respondent at this stage of the proceedings. He submitted that the Court was aware that this is the third time we are going through the 2 Rulings by Radido J. He submitted that there is a decision by this court disallowing certain documents that had been at Court of Appeal in previous proceedings and in correspondence between the 1<sup>st</sup> and 2<sup>nd</sup> Respondent during the tenure of the Claimant's employment. Again, in particular to Mr. Odukenya this not the first time he is introducing a witness statement. Mr. Kihara referred the Court to a witness statement of November 2021 and submitted that in the proposed witness statement, when cast against the Judgment of the Court of Appeal, there were factual matters concluded by Court of Appeal on the plea of the 2<sup>nd</sup> Respondent with support of the 1<sup>st</sup> Respondent before the 3 Judge Bench. He posited that the right to fair hearing includes a right of equality of treatment of parties before the court. Further, he submitted the Court should be mindful of the belated introduction of a witness. He submitted that the witness is trying to do cherry picking. He argued that the position is that the witness is annexing documents in the bundles of other parties and refers to the bundle, which Counsel for the Claimant asserts he stands to be corrected, is the bundle that was rejected by Justice Radido. He submitted that he agrees the termination document is a fundamental document and is one that had been adduced. The areas the Claimant objects to are that the service of the witness statement was at 6.14p.m on Friday which is deemed to be Monday morning. He submitted that there has been no occasion to go through the statement and take instructions. He submitted that he would not like to assume the witness statement is not prejudicial. He submitted that indeed there had been service but took exception. He asked a rhetorical question as to what they were expected to ask Mr. Khaemba. He submitted that with due respect for the age of the matter, the twist and timing of the case we need to be able to ascertain if the witness a man of integrity. Counsel submitted there was need to know the issues the witness would



raise as the witness does not mention when he joined the department and also does not disclose where he obtained the documents. He submitted that paragraphs 8 and 9 are statements of fact that need to be interrogated and that these to his knowledge are not able to stand scrutiny as the statements made therein go to the root of the proceedings before court. He submitted that the Claimant was objecting to this as it will cause an embarrassment to the administration of justice as the Court of Appeal has determined the issue. He asserts that is the crux of the case and that the court must be able to stamp its authority in the proceedings as it is easy to say that one needs their client to be fully heard. He submitted that the previous proceedings are not historical in the same proceedings. He asserts the Claimant has no issues with Kenya Gazette notices, and what the 1<sup>st</sup> Respondent had done is cherry picking as these are not the entire Notices. He submitted that if that was the only thing it could be dealt with by way of submissions. He asserted that the other issue is the purport of the alleged investigation report which he argued had not been produced and any references have been to an unsigned report. He wondered why the authors of the alleged report have not been called. He submitted that the question the Claimant will be posing is whether the principles of natural justice were adhered to as we have not been shown if the findings were backed by that report. He submitted that it has been said that the inconvenience of one party should not be allowed to trump the interest of others as the court has to balance the competing interests. He submitted that he would have asked to have the statement struck out for being inadmissible on account of the hearsay rule. He asserted it should not be allowed even under the pretext of ‘let every party be heard.’

4. In brief rejoinder, Mr Odukenya for the 1<sup>st</sup> Respondent submitted that he appreciated the late filing and asserted that the witness is coming to say what the 2<sup>nd</sup> Respondent and Claimant are familiar with. He stated that there is not new document being availed and that the right is entrenched in Article 25. He submitted that the reference to the other matter at the High Court and Court of Appeal relates to public law – Judicial Review matter and that this is a decision on private law remedy. He submitted that the Court will make a determination as to whether the testimony given is admissible or not. He asserted that he had not heard Mr. Kihara in his response assert that there will be prejudice to his client. He submitted that there will be occasion to cross-examine the witness, there would be opportunity to ask anything of the witness. He submitted that nothing has been objected to substantially.
5. The Court having heard the parties deferred the Ruling to the morning of 9<sup>th</sup> April 2024 as the Court did not issue an ex tempore Ruling. I now proceed to render the decision of the Court. Whereas Article 50 and 25 of *the Constitution* indicate certain rights, the rights are within certain parameters. The right to a fair trial does not presuppose a scenario where one waxes hot and cold. The 1<sup>st</sup> Respondent has all along maintained it does not intend to call a witness, seeming to suggest that the 2<sup>nd</sup> Respondent was the responsible entity and therefore the one to avail a witness. Indeed, the Court finds the statement by the proposed witness for the 1<sup>st</sup> Respondent overbroad and to an extent capable of raising suspicion about its provenance. Why did the 1<sup>st</sup> Respondent not deem it fit to present a witness earlier? Why does it spring a surprise on the Claimant and the 2<sup>nd</sup> Respondent on the eve of hearing of the 2<sup>nd</sup> Respondent’s witness? A witness who would in all probability have completed her testimony had the matter not been deferred to unavoidable circumstances the last time the hearing was scheduled? The 1<sup>st</sup> Respondent merely reproduces documents that are easily referenced if need be from the 2<sup>nd</sup> Respondent’s bundle or the Claimant’s bundle. The sudden interest to avail a witness does not accord with the parameters for a fair trial and would lead the parties to unchartered territories where any of them can suddenly on the eve of judgment propose to call an additional witness as ‘it is an inalienable right’. Fair trial does not mean foregoing your chance to present a witness and then after hearing other witnesses testify decide you want to avail a witness. The application by the 1<sup>st</sup> Respondent seeking to introduce a witness is denied. Directions as to hearing will be issued immediately after this Ruling.



It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF APRIL 2024**

**NZIOKI wa MAKAU**

**JUDGE**

