



**Muthoka v Kiri Consult Limited (Cause E873 of 2022)
[2024] KEELRC 1309 (KLR) (30 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1309 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E873 OF 2022**

L NDOLO, J

MAY 30, 2024

BETWEEN

WILLIAM KYALO MUTHOKA CLAIMANT

AND

KIRI CONSULT LIMITED RESPONDENT

RULING

1. The main claim proceeded for hearing on 28th November 2023, when the Claimant testified and closed his case. Defence hearing was scheduled for 17th April 2024. In the intervening period however, the Claimant filed an interlocutory application, seeking leave to re-open his case so as to produce the Respondent's letter dated 16th November 2022. In the alternative, the Claimant asks that the Respondent be compelled to produce the said letter.
2. The Claimant's application dated 22nd March 2024, is supported by an affidavit sworn by the Claimant's Counsel, Leonard Anyonje and is based on the grounds that:
 - a. While the Claimant's Advocates were preparing for the defence hearing, it became evident that the Respondent had not filed the letter dated 16th November 2022, in response to the demand notice dated 9th November 2022;
 - b. The letter is necessary as it informs that the Respondent was not aware of any outstanding dues as at 16th November 2022; the redundancy cheque, though allegedly drawn on 14th November 2022, is not captured in the said letter; therefore, the cheque must have been backdated and is meant to mislead the Court;
 - c. It is in the interest of justice to allow the application to prove that the cheque was an afterthought and the Respondent had no intention of paying severance pay at the time of termination;



- d. No prejudice will be occasioned upon the Respondent as it is the author of the letter dated 16th November 2022;
 - e. It is in the interest of justice that the application be allowed.
3. The Respondent filed Grounds of Opposition dated 6th May 2024, stating that:
- a. The Claimant's Advocate's discovery and subsequent attempt at adduction of the letter in evidence is a fundamental breach of Rule 9 of the *Advocates (Practice) Rules*;
 - b. The grounds relied on by the Claimant to adduce the new evidence do not meet the threshold laid out by Lord Denning in the case of *Ladd v Marshall* (1945) 1 WLR 1489 and adopted in the case of *Mohammed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others* [2018] eKLR;
 - c. The Respondent will suffer great prejudice if the letter is admitted as it would be contrary to Article 50 of the *Constitution of Kenya*, 2010;
 - d. The application is an ambush and a flagrant abuse of the court process.
4. In its written submissions dated 20th May 2024, the Respondent cites the decision in *Wavinya Mutavi v Isaac Njoroge & another* [2020] eKLR where guiding principles in considering applications for re-opening of a case to receive additional evidence were laid out as follows:
- a. That the jurisdiction to re-open a case for admission of additional evidence is a discretionary one to be exercised judiciously;
 - b. That the re-opening of the case should not prejudice the opposite party;
 - c. That the re-opening should not be aimed at filling gaps in the evidence of the applicant;
 - d. That there should not be inordinate and unexplained delay on the part of the applicant;
 - e. That the applicant should demonstrate that the additional evidence could not have been obtained with reasonable diligence at the time of hearing of the applicant's case;
 - f. That the evidence would probably have an important influence on the result of the case, though it need not be decisive;
 - g. That the evidence is apparently credible, though it need not be incontrovertible.
5. In the present case, the authenticity and evidential value of the letter the Claimant's seeks to introduce is not in controversy.
6. Further, the explanation by the Claimant's Counsel that it was in the course of his preparation for the Respondent's case that he realised that the Respondent had not filed the subject letter, is credible. In addition, I see no prejudice to be suffered by the Respondent if the letter is admitted.
7. For the foregoing reasons, the Claimant's application dated 22nd March 2024 is allowed and the letter dated 16th November 2022 is admitted in evidence.
8. The costs of the application will be in the cause.

DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY MAY 2024

LINNET NDOLO

JUDGE



Appearance:

Mr. Anyonje for the Claimant

Ms. Kitur for the Respondent

