



**Gikunga v Suhufi Agencies Ltd (Cause 64 of 2019)  
[2024] KEELRC 1531 (KLR) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1531 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 64 OF 2019**

**AK NZEI, J  
JUNE 13, 2024**

**BETWEEN**

**FRANCIS KIARIE GIKUNGA ..... CLAIMANT**

**AND**

**SUHUFU AGENCIES LTD ..... RESPONDENT**

**RULING**

1. The suit herein is a 2019 suit, the Claimant’s memorandum of claim having been filed on 19/9/2019. The Respondent filed response to the Claimant’s claim on 11/10/2019, and the Claimant’s case is substantially heard. The Claimant has already testified in chief, and was cross-examined by the Respondent’s Counsel. Indeed, all that remains of the Claimant’s case is re-examination of the Claimant.
2. On 30/6/2023, the Claimant filed a Notice of Motion dated 21/6/2023 seeking the following orders:-
  - a. that the Claimant be granted leave to file a supplementary list of documents to introduce all (the) pages of the bank statement dated 2/9/2019, marked as “Exhibit2” by the Claimant, which were inadvertently omitted when making photocopies for filing.
  - b. that the Claimant be granted leave to produce the original bank statement dated 2/9/2019.
  - c. that the supplementary list of documents annexed to the application be deemed as properly filed upon payment of the requisite Court filing fees.
  - d. that the application be heard on priority basis before hearing of the main suit is closed.
  - e. that costs of the application be provided for.
  - f. that the Court makes such further or other orders as it may deem just and expedient in the circumstances of the case.



3. The Claimant deponed in his supporting affidavit that in photocopying the 4 page bank statement dated 2/9/2019 and which formed part of the Claimant's bundle of documents filed in this Court on 19/9/2019, the Claimant's Counsel inadvertently made an error and photocopied only two pages of the said bank statement, which is printed on both sides, and photocopied only page 1 of 4 and page 3 of 4. That the photocopied bundle of documents omits "page 2 of 4 and page 4 of 4". That the erroneously photocopied bank statement was filed in Court on 2/9/2019, and has already been produced in evidence by the Claimant, and that the Claimant wishes to avail the whole document (bank statement), whose header clearly shows that it is a 4-page document, to the Court.
4. It is further deponed in the Claimant's supporting affidavit that under Article 159(2) (d), this Court is mandated to ensure that substantive justice is served without undue regard to procedural technicalities. That the Respondent will not be prejudiced as the Claimant is not seeking to introduce a new document, but rather to regularize a document that already went through the discovery process. That the Respondent will have an opportunity to cross-examine the Claimant as he is yet to be re-examined and his case is yet to be closed.
5. The application is opposed by the Respondent vide a replying affidavit of Siyad Isaack Hassan, a director of the Respondent company, sworn on 23/9/2023. The Respondent also filed a Notice of Preliminary Objection dated 29/9/2023. On 27/9/2023, this Court directed that the said notice of preliminary objection be treated as part of the Respondent's opposition to the Claimant's application herein.
6. It is deponed in the Respondent's said replying affidavit, *inter-alia*:
  - a. that the Claimant's supplementary list of documents sought to be filed is an attempt to re-open his case to fill gaps and loopholes in his case to the Respondent's prejudice.
  - b. that the Respondent's case stands to be adversely affected by the orders sought in the Notice of Motion dated 21/6/2023 by calling additional evidence in rebuttal, after cross-examination of the Claimant was concluded.
  - c. that in an adversarial system such as ours, a party is bound by its pleadings and evidence, and that the Claimant's application seeks to violate the adversarial doctrine which is embedded in law.
7. The Respondent's Notice of Preliminary Objection dated 22/9/2023 re-states the averments made in the Respondent's said replying affidavit. Both parties opted not to file written submissions on the application, though the Court had directed them to do so. They invited the Court to rule on the application.
8. I have noted from the Respondent's replying affidavit that the Respondent does not deny that the two pages of a bank statement that the Claimant seeks to bring on record are part of a document (bank statement) that has already been produced in evidence by the Claimant. It has also not been denied by the Respondent that the said bank statement was a 4 page document printed on both sides, and that an error occurred during photocopying of the same for filing in Court, whereby only 2 pages, page 1 of 4 and pages 3 of 4, were photocopied and filed in Court and subsequently produced in evidence by the Claimant as his exhibit No.2.
9. The missing two pages of the bank statement dated 2/9/2019 (Claimant's Exhibit No.2) cannot, in my view, be said to be new/fresh evidence. I have perused the draft supplementary list of documents that the Claimant is seeking leave to file, and I have noted, and do agree with the Claimant, that the said bank statement is a 4 page document, printed on both sides. I have also noted that only pages 1 of



4 and 3 of 4 of the said document were included in the Claimant's bundle of documents filed in Court on 19/9/2019, and which contains photocopied documents.

10. In my view, no prejudice will be suffered by the Respondent if the said missing pages are placed on record. The Claimant is yet to complete giving his evidence in Court, and is, indeed, yet to be re-examined, having been stood down on 20/6/2023. The Respondent will have time to continue with cross examination of the Claimant, and to cross examine him on the said 2 missing pages of the bank statement dated 2/9/2019. The Respondent does not stand to suffer any prejudice if the Claimant is granted leave to file a supplementary list of documents for the sole purpose of placing on record the said two missing pages of the Claimant's bank statement dated 2/9/2019 (Exhibit No. 2).
11. Consequently, I allow the Claimant's Notice of Motion dated 21/6/2023 in the following terms:-
  - a. the Claimant is hereby granted leave to file and to serve a supplementary list of documents placing on record the whole of the 4 page bank statement dated 2/9/2019 and produced in evidence herein by the Claimant and marked as the Claimant's Exhibit No. 2. The supplementary list of documents shall be filed and served within 7 days of this ruling.
  - b. the Respondent shall be at liberty to continue with cross-examination of the Claimant regarding the said bank statement, and on any other relevant issue.
  - c. costs of the application, assessed at kshs. 10,000, shall be paid by the Claimant to the Respondent within 14 days of this Ruling.
12. Orders according

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 13<sup>TH</sup> JUNE 2024**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

.....Claimant

.....Respondent

