



**Riaga v Kenya Revenue Authority (Cause E869 of 2022)
[2024] KEELRC 2148 (KLR) (30 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2148 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E869 OF 2022**

**JK GAKERI, J
JULY 30, 2024**

BETWEEN

KENNETH OPERE RIAGA CLAIMANT

AND

KENYA REVENUE AUTHORITY RESPONDENT

RULING

1. Before the Court for determination is the Claimant's Notice of Motion dated 21st May, 2024 seeking to re-open the Claimant's case so as to call Salome W. Kanyugo, George Muraguri and Joseph Mwaniki Nderi to testify on his behalf and for the court to issue summons to the 3 named individuals for hearing.
2. The Claimant additionally prays that costs of the application be in the cause.
3. The Notice of Motion is expressed under Article 50(1) and 159(2)(d) of the *Constitution* of Kenya as well as provisions of the *Civil Procedure Act*, *Civil Procedure Rules* and the *Evidence Act* and is premised on the grounds set forth on its face and the Supporting Affidavit sworn by the Claimant on 21st May, 2024.
4. The pith and substance of the Claimant's application is that when further documents and witness statements in Criminal Case No. 614 of 2017 pending at the Milimani Chief Magistrates Court, were supplied by the prosecution, he realized that some employees of the Respondent had recorded statements on the history of the case and how investigations were conducted and some of the allegations levelled against him took place in Nakuru and 3rd Floor of Times Towers in Nairobi yet he is based on 2nd Floor of the building and thus could not be associated with happenings in Nakuru.
5. The Claimant deposes that the statements in the Criminal Case reveal that hacking was taking place at the Kenya Revenue Authority.



6. That the foregoing ought to be brought to court for justice to be done and should not be blocked and the Respondent stands to suffer no prejudice as the witnesses can be cross-examined.
7. That the court has a duty and jurisdiction to call and recall witnesses as necessary on its own motion and the application is merited.
8. The Claimant deposes that copies of the statements attached to the application are the ones the Claimant intends to rely on and as the witness are employees of the Respondent, they can only attend if summoned by the court.
9. That the Claimant had not informed the court that he had closed his case when one of the Respondent's witness testified in court and it is only fair that the instant application be allowed and in any case the Respondent served its witness statement late.

Response

10. By a Replying Affidavit sworn by Jackson Kimeu on 31st May, 2024, the affiant deposes that the Claimant's application is incompetent, misconceived, mischievous, an abuse of court process and waste of judicial time and resources and ought to be dismissed with costs on account that:-
11. The application is filed too late in the day after the horse has bolted and is an afterthought, an attempt to have a second bite at the cherry after the Claimant presented his evidence in court.
12. Second, the Claimant filed pleadings dated 23rd November, 2022 and further statement and list and bundle of documents dated 2nd February, 2024 and directions were given on 9 previous occasions before a hearing date was given and hearing took place on 16th May, 2024 when the Claimant and the Respondent's 1st witness testified and were cross-examined and the Respondent applied for an adjournment to produce the investigator before concluding its case.
13. That the instant application was filed after the Respondent's 1st witness had testified and any new evidence may be prejudicial to the Respondent.
14. The affiant deposes that the witnesses ought to have been summoned before the Claimant closed its case and was trying to steal the match by the instant application and litigating by instalments which offends the principle that litigation must come to an end.
15. That the issue of calling witnesses was determined by the court on 16th May, 2024 vide a ruling which the Claimant has not appealed against nor sought review.
16. That the court is a neutral arbiter and does not determine the witnesses to be called by parties which is their responsibility.
17. That the Claimant was introducing issues in Criminal Case No. 614 of 2017 which is different from the instant case and the application should have been made during pre-trial or before the Claimant closed his case.
18. The affiant deposes that the application is intended to delay the court process and the orders sought are underserved.
19. In his Further Affidavit sworn on 4th June, 2024, the applicant deposes that the witness statements are necessary in the interest of justice and the Claimant's case was still open by the time the Respondent's witness testified. He denies that he is litigating in instalments or that the Respondent will suffer prejudice.



20. That the issues in the two cases are relevant by virtue of the decision in Petition E146 of 2023.
21. The affiant deposes that proper evidence is essential in determination of suits and the Respondent was hiding the truth.

Claimant/Applicant's submissions

22. Counsel relied on the sentiments of Omondi J. in *Hassan Hashi Shirwa V Swalabudin Mohamed Ahmed* (2011) eKLR to urge that the court had a duty to find out the truth and reopening of a case must be grounded on cogent reasons.
23. According to counsel, it is the duty of the court to ensure all the evidence is laid bare for a just conclusion and the instant application was not actuated by the Respondent's evidence.
24. That the court cannot block documents being used in another court from being used in it and the author can be secured.
25. That Section 146(4) of the *Evidence Act* permitted the recall of witnesses for examination-in-chief or further cross-examination so do the provisions of Order 18 Rule 10 of the *Civil Procedure Rules, 2010*.
26. That the court has discretion to allow a party re-open its case and recall a witness.
27. Reliance is made on the decisions in *Julius Nyagwoka V Tata Africa Holdings Kenya Ltd* (2022) eKLR, *re Estate of Pietro Rossini (Deceased)* (2020) eKLR as well as *Charles Antony Ondiek & 3 others V Thomas Odhiambo Nyonje & 6 others*, *Dahir Sadik AUSAAD V Modogashe Construction Ltd & 3 others* (2016) eKLR, *Techbiz Limited V Royal Media Services Ltd* (2021) eKLR and the Ugandan decision in *Simba Telecom cited in Umuro Wario V Youth Enterprise Development Fund Board* (2019) eKLR to urge the court to exercise its discretion favourably.

Respondent's submissions

28. Concerning the re-opening of the Claimant's case, counsel submits that the Claimant cannot do so as the operative principles do not allow it.
29. Reliance is made on the sentiments of the court in *Susan Wavinya Mutavi V Isaac Njoroge & another* (2020) eKLR to underscore the applicable principles.
30. The decision in *Samoei V National Housing Corporation & another* (2023) KEHC 17919 was also cited to urge that the court must consider why the evidence sought to be adduced was not called at the hearings. Counsel submits that the Claimant's application does not meet the threshold in the *Susan Wavinya case* (*Supra*) as the statements sought to be relied on are subject to a Criminal Case filed 5 years ago prior to the instant suit and the Claimant who is one of the accused persons had the evidence prior to the filing of this case and had not explained why the evidence was not included in the case or sought the court's leave to introduce the witnesses and was thus abusing the court process.
31. Sentiments of the court in *George Kimotho Ilewe V Joseph Mathuku Ngewa & another* (2022) eKLR were cited to emphasize how the court ought to exercise its discretion.
32. According to counsel, the fact that the Claimant did not inform the court that he had closed his case is of no moment as the ship sailed immediately and the Respondent commenced prosecuting its case.
33. That the witness sought to be called will be used to patch up gaps in the Claimant's case.



34. Counsel, further submits that the Claimant's application was made after inordinate delay as the Criminal Case commenced in 2017 and the Claimant had the documents he seeks to introduce and thus failed to exercise diligence.
35. The decision in *Michael Kiplangat Cheruiyot V Joseph Kipkoech Korir* (2019) eKLR was cited on the need to prove that the evidence was not available to the applicant even after exercise of due diligence, to urge that the Claimant/Applicant has failed to do so.
36. As regards the decision *in re Estate of Kombo Mulinge* (supra) cited by the Claimant, counsel submits that the court declined to allow the application to re-open the applicant's case as the applicant had been afforded ample opportunity to prosecute its case but failed to do as is the case in the instant case.

Analysis and determination

37. The only issue for determination is whether the Claimant's Notice of Motion is merited.
38. As adverted to elsewhere in this ruling, the primary order sought is the re-opening of the Claimant/Applicant's case for purposes of calling three witnesses, namely; Salome W. Kanyugo, George Muraguri and Joseph Mwaniki Nderi to adduce evidence on what they recorded for purposes of Criminal Case No. 614 of 2017.
39. The applicant relies on several grounds to urge his application, salient among them is the contention that it is the duty of the court to ensure that all the evidence is laid bare.
40. This argument lacks persuasion granted that the suit belongs to the parties and behooves them to avail all the evidence they intend to rely on in urging their respective cases and the court has no role in that respect.
41. If a party refuses, fails or neglects to call or adduce evidence necessary to support its case, it suffers the consequences.
42. The court is an impartial arbiter and cannot control the evidence a party or parties may adduce or avail in prosecuting their cases.
43. This is the reason why the *Evidence Act* provides for the burden of proof in civil cases under the provisions of Section 107, 108 and 109 of the *Act*.
44. Courts of law determine disputes on the basis of the evidence produced by the parties.
45. In *Michael Kiplangat Cheruiyot V Joseph Kipkoech Korir* (Supra), the court stated as follows:-

“. . . Parties need to disclose their evidence before trial commences, as it is the duty of a party to ensure that he/she is satisfied with the evidence they wish to present before trial commences . . .”
46. The court is in agreement with these sentiments.
47. Finally, it is not even the duty of the court to ensure that parties disclose to it what they know as the applicant deposes.
48. Secondly, it is trite that a court of law has jurisdiction to call and recall witnesses in a case to shed more light on the evidence adduced or issues before the court for a just determination.
49. Third, the Claimant/Applicant delves into the evidence he seeks to provide through the three proposed witnesses and why he thinks it is important to his case.



50. It is trite law that the court has discretion to re-open a party's case at the instigation of the party as held in *Umuro Wario V Youth Enterprise Development Fund Board* (Supra) and *Hassan Hashi Shirwa V Swalabudin Mohamed Ahmed* (Supra).
51. It is also trite law that a court of law will only order the re-opening of a party's case if it is satisfied that there is a sustainable justification supported by credible evidence.
52. The principles that govern the exercise of discretion to re-open a case are well settled.
53. In *Susan Wavinya Mutavi V Isaac Njoroge & another* (Supra), the court stated 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. Forth, 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 apparently be credible though it need not be incontrovertible. (See (i) *Mohamed Abdi Mahamud V Ahmed Abdullahi Mohamed & others* (2018) eKLR, (ii) *Samuel Kiti Lewa V Housing Finance Corporation of Kenya Ltd & another* (2015) eKLR (iii) *Ladd V Mashall* (1954) 3 All ER 745 (iv) *Reid V Brett* (2005) VSC 18 (v) *Smith V New South Wales Bar Association* (1992) CLR 256 and (vi) *EB V CT*(No. 2) (2008) QSC 306”.
54. Significantly, and as both parties have acknowledged, the pre-trial stage of the instant case took almost one year from 28th March, 2023 and parties were in court on that day, 31st May, 2023, 22nd June, 2023, 10th August, 2023, 26th October, 2023, 1st February, 2024, 20th February, 2024 and 13th March, 2024 and all related to confirmation of compliance before a hearing date was fixed on 13th May, 2024 and hearing commenced on 16th May, 2024, when the Claimant testified, was cross-examined and re-examined as did RWI, Mr. Jackson Kimeu.
55. It is after conclusion of RWI's evidence that Mr. Mulinge who was holding brief for Kithinji applied for an adjournment as his next witness was away.
56. It is at this point that Mr. Were, counsel for the Claimant applied for the re-opening of the Claimant's case to call 3 witness, Salome Kanyugo, George Muraguri and Joseph M. Nderi and Mr. Mulinge objected arguing that it would be prejudicial to the Respondent as the evidence sought to be produced was in a criminal matter pending in court.
57. The court gave directions that a formal application be lodged for determination.
58. Contrary to the Respondent's counsel submissions that the issue was determined on 16th May, 2021, it was not and the directions given on that day are clear and both parties complied.
59. Notably, the timing of the application is suspect as it was made immediately after RWI had concluded his evidence.



60. Could it have been a genuine application or it is intended to fill the gaps in the applicant's evidence on record?
61. The answer to the foregoing question is decipherable from the circumstances in which the application was made and the evidence the applicant intends to call.
62. First, the evidence sought to be introduced in the instant case has already been tendered in a criminal case filed in 2017, more than 5 years before the instant suit was filed on 23rd November, 2022.
63. The applicant deposes in the Supporting Affidavit that he was supplied with Further Documents and witness statements by the prosecution in the Criminal case but by default or design does not disclose the date of receipt of the documents and the witness statements, perhaps because it would substantially weaken his case on that consideration.
64. Relatedly, the Claimant/Applicant participated in the pre-trial stage of the suit and appeared before the Deputy Registrar and the court at least eight times before the hearing took place and did not apply for leave to file additional witness statements and call their makers to testify in the suit.
65. Puzzlingly, the applicant has not provided any reason or justification for making the instant application after the train has left the station.
66. In the court's view, the delay is patently inordinate and unexplained and impacts adversely on the instant application which appear to have been precipitated by the Respondent's evidence.
67. Second, in *Smith V New South Wales* (Supra), cited in *Samoei V National Housing Corporation & another* (Supra), the court held that:-

“If an application is made to re-open on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply . . .”
68. Similarly, in *Michael Kiplangat Cheruiyot V Joseph Kipkoeb Korir* (Supra), the court held *inter alia*:-

“ . . . a trial should not be used as fishing ground for new evidence to fill in the gaps that the opposing party may have created, for this negates the very essence of pre-trial disclosure. It must be clear that the new evidence could not be available to the applicant even after exercise of due diligence. The position should not be for one party, after the other has tabled his evidence, to now start looking for evidence specifically to counter what the other party has said. That would be encouraging parties to go on a fishing expedition and a hearing will never end . . .”
69. From the evidence on record, it is clear that at all material times before filing the instant suit in November 2022, the applicant was in possession of the evidence he intends to produce pursuant to the instant application.
70. To his credit, the applicant has neither alleged nor deposed that the evidence he wishes to produce could not be accessed before the hearing or the trial commenced.
71. For the foregoing reasons, the court is not persuaded that the applicant has placed sufficient material to enable the court exercise discretion in his favour as he knew the Respondent's case at the pre-trial stage and could have embellished his case at that stage.



72. Since the evidence sought to be introduced was available to the Claimant and the instant application is made too late in the day, it is plausible to surmise that it is an afterthought intended to secure additional evidence.
73. Flowing from the foregoing, it is clear that the Applicant's Notice of Motion dated 21st May, 2024 is for dismissal and it is accordingly dismissed.
74. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30TH DAY OF JULY 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.

DR. JACOB GAKERI

JUDGE

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