



**Wafula v Postal Corporation of Kenya (Cause E053 of 2023)
[2024] KEELRC 13597 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13597 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E053 OF 2023
DN NDERITU, J
OCTOBER 24, 2024**

BETWEEN

ANDREW JUMA WAFULA CLAIMANT

AND

POSTAL CORPORATION OF KENYA RESPONDENT

RULING

I. Introduction

1. The respondent filed a notice of motion (the application) dated 1st March 2024 under a certificate of urgency seeking for the following orders –
 - i. Spent.
 - ii. That this Honourable court be pleased to reopen the suit for the purpose of allowing the Respondent to tender in evidence and ventilate their defense.
 - iii. That this Honourable Court be pleased to grant the Respondent lea to file and adopt a copy of memorandum of response, a copy of list of witnesses, copies of witness statements and a copy list of documents filed in CM ELRC NO. E266 of 2021.
 - iv. That the costs of this application be provided for.
 - v. That this court be pleased to issue any other orders to meet the ends of justice.
2. The application is expressed to be brought under Article 159 of *the Constitution* of Kenya, 2010, section 1A, 1B and 3A of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya, Order 51 of the Civil Procedure Rules 2010, section 12(3) of the Employment & *Labour Relations Act* and all other enabling provisions of the law.



3. The application is based on the grounds on its face and supported with the affidavit of Johnson Maina Kabugi, the legal officer of the applicant, sworn on even date, with several annexures thereto.
4. In response to the application, the claimant filed his replying affidavit sworn on 26th March, 2024, with several annexures thereto.
5. By consent, the application was canvassed by way of written submissions. The respondent's counsel, Mr. Bosire, filed written submissions on 14th March, 2024 while the claimant's counsel, Mr. Ogola, filed on 1st July, 2024.

II. The Evidence

6. It is deposed in the supporting affidavit that the respondent filed a list of documents, copies of witness statements, a copy of list of witnesses, and a copy of a memorandum of response in Nakuru Chief Magistrate's Court ELR NO. E266 of 2021 (The lower court cause), which are relevant to the facts in issue in the claimant's cause of action and hence all about it intended to defend the cause.
7. Further, it is deposed that the aforesaid documents were in custody of the respondent's counsel's on record in the aforesaid the lower court cause and the same were availed too late after the present suit had been listed for submissions.
8. It is on the basis of the foregoing that the court is urged to issue orders to re-open the suit for the respondent to produce the aforesaid documents in the interests of justice, considering that the claimant will have an opportunity to cross-examine the respondent's witnesses.
9. In the replying affidavit by the claimant in response to the foregoing, it is deposed that the application is res judicata since the court vide an order of 26th February, 2024 declined to allow the respondent's oral application seeking identical orders to those in the present application.
10. It is deposed that in the lower court the respondent was in the interest of justice allowed to file its defence one year late. This demonstrate a continued and persistent intention on the part of the respondent to delay the hearing and determination of this cause.
11. It is deposed that the respondent sought severally adjournments in the lower court cause alleging unavailability of its witnesses, but eventually on 16th October, 2023, the court held that it had no jurisdiction.
12. It is deposed that the claimant filed the instant cause and an application dated 16th October, 2023 under a certificate of urgency which were served upon the respondent, seeking directions for the present cause to be heard on priority basis. The application was allowed on 8th February, 2024 and do cause set down for hearing.
13. The respondent had entered appearance on 4th December, 2023 but failed to file its documents despite reminders by the claimant's counsel that it could file the same documents that it had filed in the lower court cause. It is deposed that the respondent attended court for directions and even attended the hearing, but failed to seek an extension of time to file the defence out of time.
14. It deposed that the claimant testified and was cross-examined by the respondent's counsel on record, only thereafter for the respondent counsel to make an oral application to call witnesses despite having failed to file a response to the claim, witness statements, or documents on record.
15. It is deposed that the court heard from both parties and delivered its ruling closing the respondent's case, as re-opening of the cause would have prejudiced the claimant.



16. It is deposed that the allegation that the respondent's previous counsel delayed in forwarding the lower court file is untenable since the said pleadings were filed in the lower court and nothing stopped the respondent from obtaining them from there.
17. It is deposed that the application is a non-starter, frivolous, vexatious, forlorn, and an abuse of the court process as the same is res judicata.
18. It is deposed that the claimant is ready to take a judgement date for its claim, as re-opening the cause will greatly prejudice him.
19. It is deposed that it is too late in the day for the respondent to seek to be allowed to file documents yet it had the opportunity of doing so all along but remained indolent.

III. Submissions

20. Counsel for the respondent identified two issues for determination -
 - a. Whether the applicant has satisfied the criteria upon which this court can reopen the case and receive evidence.
 - b. Who shall bear the costs of the application.
21. It is submitted for the respondent that the court has the discretion to re-open the cause and receive evidence. The respondent's counsel has cited *Wavinya Mutavi V Isaac Njoroge & Another (2020) eKLR* stating that for a court to allow such an application it has to satisfy itself that there is no prejudice to the opposite party; the re-opening is not meant to fill gaps in an applicant's evidence; there is no inordinate and unexplained delay on the applicant's part; the evidence sought to be introduced could not have been obtained with reasonable diligence before or during the hearing of the cause; the evidence if admitted would have influence on the result of the case though not decisive, and, that the evidence must be credible though not incontrovertible.
22. The respondent's counsel further cited Samoei *v National Housing Corporation & Another (Civil Suit E008 of 2020)*(2023)KEHC 17919((KLR)(23 May 2023) (Ruling), reiterating that the court's exercise of its discretion to either dismiss or allow an application seeking to re-open a suit based on the discovery of new evidence, should consider why the new evidence was not called at the hearing and where no deliberate reason is recorded the application is disallowed, and where the hearing is complete or judgment has been delivered, the court's discretion should be guided by appeal rules.
23. It is further submitted that no prejudice will accrue to the claimant as the aforesaid documents were filed in the lower court and the claimant has had opportunity to go through them and, in any event, it is not intended to fill-in any gaps in the respondent's evidence but only aimed at aiding the court in arriving at a just determination of the application.
24. It is submitted that the respondent sought the lower court's file from its counsel on record to enable it file its response but before it obtained the same the suit had been set down for hearing. It is further submitted that in the interests of justice, the court should re-open the cause to afford the respondent an opportunity to be heard.
25. The court is urged to be guided by section 27 of the *Civil Procedure Act*, (Cap 21) and exercise its discretion in allowing the application with costs.
26. Counsel for the claimant identified the single issue for determination in this matter as - whether the application is merited.



27. It is submitted that the application was filed after the close of cause and hence it is defective. It is submitted that an application to re-open a cause should be based on the filing of additional evidence which could not be reasonably traced during a hearing.
28. It is submitted that there is no application seeking to extend the time to file a response to the claim in violation of Rule 13(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016, and the court should not be asked to grant a blanket prayer which the respondent has not sought.
29. Further, it is submitted that the respondent made a similar application orally on 26th February, 2024 which the court heard and disallowed, yet the respondent did not prefer an appeal, but filed the instant application.
30. It is submitted that the court lacks jurisdiction to determine the application as it will be sitting on appeal of its own finding. Counsel has cited *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* (2015) eKLR wherein the court pronounced itself thus that the rationale for res judicata is that there should be an end to litigation by ensuring the economical use of court's resources and the timely determination of cases by ensuring that courts do not repeat themselves on issues already decided upon.
31. It is submitted that the respondent's application is anchored on Section 12(3) of the *Employment and Labour Relations Court Act* which does not expressly provide for the re-opening of a cause once both parties have closed their respective cases.
32. It is further submitted that Section 146(4) of the *Evidence Act*, and Order 18 Rule 10 of the Civil Procedure Rules only provide for the recalling of witnesses in an ongoing case for cross-examination whereby parties are yet to close their respective cases and should the court be inclined to re-open the case, it should consider the prejudice leveled upon the claimant.
33. It is further submitted that the claimant will suffer great prejudice, as he was cross-examined by the respondent's counsel and no additional evidence is being called from his side.
34. It is further submitted that if the court allows the application it will have to set aside the whole proceedings for the cause to start afresh. It is submitted that that in itself shall cause delay and greatly prejudice the claimant.
35. It is submitted further that the respondent had time from 3rd November, 2023 until 26th February, 2024 to comply by transferring the documents filed in the lower court cause to this court and, in any event, the said documents were in the custody of the respondent's legal counsel and thus the respondent has not provided a reasonable ground the reason as to why it failed to file the appropriate response and documents.
36. It is further submitted that the respondent's failure to comply was deliberate and in contrast to the overriding objective under Sections 1A and 1B of the *Civil Procedure Act*, requiring that justice should be efficient and expeditious.
37. Further, it is submitted that allowing the application shall give the respondent leeway to fill-in evidential gaps in their case. Counsel has urged the court to be guided by *Raila Odinga & 5 others v IEBC & 3 others* (2013) eKLR wherein the court is cautioned to exercise discretion in granting leave for filing further affidavits and additional evidence to eliminate prejudice to the opposing party.
38. The court is urged to dismiss the application with costs.



IV. Issues For Determination

39. Upon reading the application, the supporting affidavit, the replying affidavit, the annexures to the affidavits, and the written submissions by counsel for both sides, the court identifies the following two issues for determination –
- a. Whether the application is res judicata; and,
 - b. Whether the suit should be reopened for hearing and leave granted to the respondent for the filing of defence.

V. Whether The Application Is Res Judicata

40. Res judicata as a principle of the law demands that there should be an end to litigation or conclusiveness of judgment. Hence, where a court has heard and determined an issue then parties should not litigate over the same issue again unless on review or appeal as provided for or permitted by the applicable law.
41. The substantive law on res judicata is found in Section 7 of the *Civil Procedure Act* (Cap 21) which provides that –
- “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”
42. The Black’s Law Dictionary 10th Edition defines “res judicata” as –
1. An issue that has been definitively settled by judicial decision.
 2. An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been but was not raised in the first suit. The three essential elements are (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties.”
43. It is deposed by the claimant that a similar, nay same, application was determined by this court on 26th February, 2024, and thus the present application is res judicata and the court has no jurisdiction over the same.
44. In arriving at the right and just decision the court ought to consider various questions such as –
- i. What issues were really determined in the previous application;
 - ii. Whether they are the same in the subsequent application and were covered by the decision.
 - iii. Whether the parties are the same or are litigating under the same title and that the previous application was determined by a court of competent jurisdiction on merits.
45. From the record, on 26th February, 2024, Mr. Bosire, Advocate for the respondent made an oral application seeking adjournment to call two witnesses. The application was opposed by counsel for the Claimant, Miss Olili, on the grounds that there was no response or witness statements on record and that it would be prejudicial to the claimant, who had testified and closed his case, were the adjournment to be allowed.



46. The court declined to allow the adjournment on the finding that there was no defence or response on record. The court observed that there was no application seeking leave to file a defence or response and witness statements out of time. The court further pointed out that no witness had been identified by the respondent's counsel and in the absence of a formal response on record, the court directed parties to file submissions based on the evidence and documents filed by the claimant on record.
47. The present application, conversely to the previous application which sought for an adjournment, seeks leave to re-open the cause to allow the respondent to file its response and documents and to tender evidence based on its proposed response and documents.
48. The court in the determining the oral application of 26th February, 2024 by the respondent observed that there was no formal application seeking leave to extend time to file a defence and the court declined to grant the application for adjournment on that basis. The present application is distinct from the earlier oral application as the present application seeks leave to re-open the hearing of the cause and for the respondent to file a defence, rather than seeking an adjournment, as was the prayer in the previous oral application.
49. Despite the previous oral application of 26th February, 2024 having involved the same parties, the application was distinct from the present application. The application is clearly and evidently not res judicata and thus the court has jurisdiction to hear and determine this application.

VI. Leave To File Defence

50. The respondent contends that it had filed a memorandum of response, its documents and witness statements in the lower court, and that the said documents were in the custody of their counsel on record in that cause.
51. The respondent asserts that it called for the said documents from its previous counsel and that the delay in obtaining the previously filed documents resulted in the present cause being listed for hearing before it could file the defence and witness statements.
52. The respondent has attached a letter to their external counsel calling for the documents to file its defence by its in-house counsel, in compliance with a presidential directive against use of external counsel by public institutions.
53. I have perused the court record and it is evident that on 22nd November, 2023 the respondent was granted 14 days to file its defence or response to the cause. No defence was filed or documents or witness statements.
54. On 26th February, 2024 the respondent's counsel indicated that the respondent was not ready to proceed with the hearing and sought time to file a response to the claim.
55. The claimant's counsel objected to the adjournment and the hearing proceeded as directed by the court. It is after the close of the claimant's case that the respondent's counsel made an application seeking adjournment, which application was declined and the court closed the hearing of the cause and directed parties to address the court by way of written submissions.
56. It is my considered view that the reason why the respondent could not file its defence or response is explained considering the change of representation, as the former counsel had documents that were intended for use in filing of the defence/response by the respondent and did not surrender them in time. The change of representation is said to have been occasioned by a government policy on legal representation of public bodies.



57. In *Susan Wavinya Mutavi v Isaac Njoroge & Another* (2020) eKLR the court set out principles for allowing or disallowing an application of this nature - “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. Fourth, 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 be apparently credible, though it need not be incontrovertible.”
58. The genesis of this cause is the lower court cause wherein the lower court found it had no jurisdiction due to the pecuniary limits. The respondent had filed a defence in the lower court.
59. The claimant’s case has been closed and the respondent is seeking to file its defence or response as was filed in the lower court. While the cause in the lower court did not proceed to hearing, it is evident that the same concerned the same issues for determination as those before this court.
60. The respondent filed its response and the claimant had an opportunity to peruse the same. The claimant argues that the re-opening of the defence will allow the respondent to fill-in the gaps in its case having heard the claimant’s case.
61. The claimant filed this cause after having seen the respondent’s defence and documents in the lower court. It cannot be said that the claimant is a stranger to the defence or response and the intended response from the respondent.
62. The proposed guidelines in the above cited decision tilt in favour of the court allowing the respondent to file its records and defence to the claim and have the matter heard de novo. The claimant shall have an opportunity to thus file a reply to the response, if need arises, and file any further documents that he may wish to file.
63. The respondent’s application is to adopt its defence and documents as filed in the lower court. The application before the court is to adopt the said documents and the defence without alterations. The delay in obtaining documents from previous counsel is reasonably explained and the respondent’s evidence shall help the court in arriving at a just and fair determination of the cause.
64. However, the court notes that the matter in the lower court was filed in 2021 and the present cause was filed in 2023. The claimant has been waiting for justice since 2021. Justice delayed may occasion injustice and there is need to have this cause quickly resolved. The claimant has also suffered costs along the way.
65. It is not that the court agrees with the respondent that there has not been ineffective and rather indolent participation in these proceedings. It is incumbent upon parties in a cause to ensure that they file and present their pleadings and documents in time. Although the court is mindful not to deny a party the fundamental constitutional right to fair hearing (Articles 27 and 50 of *the Constitution*), the Court is equally not bound to aid an indolent party. The latitude afforded to the respondent in this ruling to defend the cause must now be taken seriously. The court was informed that the claimant is in bad health and he desires to have this matter concluded soonest. He is not asking for too much in that regard and an application to that effect was allowed as alluded to elsewhere in his ruling.



66. While allowing the application by the respondent, therefore, the court shall issue the following orders with a view to ensuring an expeditious hearing and disposal of the cause.

VII. Orders

- i. The proceedings in this cause so far are hereby set aside and the hearing of the cause shall start de novo before a judge at Nakuru.
- ii. The thrown away costs of the trial this far are awarded to the claimant in the sum of Kshs. 100,000/- payable to the claimant within 30 days of the date hereof.
- iii. The costs of this application shall be in the cause.
- iv. The respondent shall within 14 days of the date hereof file and serve its response to the claim and all documents and witness statements upon the claimant.
- v. The claimant shall have 14 days to respond to (iv) above, if need arises.
- vi. Mention before Mwaure J. on 25th November, 2024 to confirm compliance and take a hearing date on priority basis.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 24TH DAY OF OCTOBER, 2024.

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DAVID NDERITU

JUDGE

