



**Kenya Union of Commercial and Food Allied Workers v RB Shah Kenya Limited  
(Cause E018 of 2023) [2024] KEELRC 13292 (KLR) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13292 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KITALE  
CAUSE E018 OF 2023  
MA ONYANGO, J  
NOVEMBER 28, 2024**

**BETWEEN**

**KENYA UNION OF COMMERCIAL AND FOOD ALLIED  
WORKERS ..... CLAIMANT**

**AND**

**RB SHAH KENYA LIMITED ..... RESPONDENT**

**RULING**

1. The Claimant, Kenya Union of Commercial, Food and Allied Workers is a Trade Union registered as such within the laws of Kenya to represent the interests of employees in the sectors set out in the membership clause of its constitution.
2. The Respondent is a Limited Liability Company registered under the *Companies Act* carrying on business of wholesale and distribution of goods within Trans-Nzoia County and its environs.
3. The suit herein was set down for hearing 28<sup>th</sup> November, 2023 when the Claimant’s witness testified and the Claimant closed its case. The case was then adjourned at the request of the Respondent’s counsel and was fixed for hearing of the Respondent’s case on 30<sup>th</sup> January, 2024, when the case was not heard at the request of the Respondent’s counsel who informed the court that his witness was out of the country for medical treatment.
4. The case was thereafter adjourned severally until 24<sup>th</sup> June, 2024 when the Respondent’s counsel informed the court that the Respondent had filed an application dated 3<sup>rd</sup> June, 2024 seeking leave to file some documents. The application had by then not been seen by the Claimant’s representative who was in conduct of the suit.
5. In the said application dated 3<sup>rd</sup> June 2024, the Respondent seeks orders as follows:
  1. That the Respondent be granted leave to file further documents.



2. That the Respondent be granted leave to file further witness statement.
3. That costs hereof be in the cause.
6. The grounds in support of the application as set out on the face of the application are:
  - i. That the additional documents are necessary to clarify and complete the information previously submitted.
  - ii. That an oversight occurred during the initial filing, resulting in the advertent misfiling of the documents in another case file, Kitale CMELRC Cause No. 2 of 2022 and which documents are pertinent to the respondent's case.
  - iii. That allowing the filing of additional documents will contribute to the efficient resolution of this matter.
  - iv. That the original witness statement contains inaccuracies and omissions that need to be rectified to ensure the testimony accurately reflects the facts.
  - v. That the original witness statement needs to be amended to maintain consistency with the other evidence
  - vi. That the original witness statement contains factual errors that require correction which errors if adopted in this court, it could distort the witness's testimony and the facts of the case.
  - vii. That allowing the filing of the further witness statement is essential for a fair and just resolution of the case.
  - viii. That the claimant shall not be unduly prejudiced
  - ix. That it is in the interest of justice that the orders sought be granted
7. The application is further supported by the affidavit of SONGOLE K JOSHUA, Counsel for the Respondent in which he reiterates the grounds on the face of the application.
8. The Claimant opposed the application vide the replying affidavit of Rodgers Momanyi Ombati, its Branch Secretary in charge of recruitment and organization in the North Rift.
9. The application was disposed of by way of written submissions.
10. In its submissions the Respondent/Applicant sets out the issues for determination to be:
  - i. Whether the court should grant leave to file further documents and further witness statement
  - ii. Whether the applicant has met the threshold for being allowed to file further documents and witness statement
  - iii. whether the application is competent and has merit
  - iv. Whether the Claimant will suffer prejudice if the application is allowed
11. The Applicant submitted that the court has discretion to allow the filing of further documents and statements where such material is necessary to assist the court in arriving at a just decision, relying on the Supreme Court decision in Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others [2014] eKLR.
12. The Applicant further submitted that Order 11 of the Civil Procedure Rules, 2010 which govern production of documents provides for the guiding principles in the exercise of the court's discretion. That the overriding objective is to ensure that matters are determined justly and efficiently.



13. It is further the submission of the Applicant that section 3 of the *Employment and Labour Relations Court Act* mandates the court to handle disputes in a fair, expeditious and cost effective manner which includes allowing parties to file additional documents and witness statements where necessary.
14. That Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016 allows a party to seek leave of court to file additional documents or witness statements.
15. The Applicant further submits that the court has inherent powers under rule 14(10) to admit any document or statement necessary to determine the issues in dispute.
16. It is the submission of the Applicant that the documents sought to be introduced are vital to resolving key issues in the suit including clarifying certain facts and ensuring that the court has all relevant documents. It further submits that the witness statement on record was ambiguous and inaccurate and needed to be rectified to avoid any potential contradictions.
17. On the second issue the Applicant submits that it has met the threshold for grant of orders sought as it has valid reasons for failing to file the documents and statements within the original timelines. It is submitted that the Applicant inadvertently misfiled the documents in another similar case being Kitale MCELRC No. E002 of 2022. For emphasis the Applicant relied on the decision in *Mwangi S. Kaimenyi v Attorney General & Another* [2014] eKLR.
18. On the third issue the Applicant submitted that the application is filed in good faith and the court is vested with discretion to grant the orders sought.
19. On the fourth and final issue the Applicant submitted that the Claimant is unlikely to suffer prejudice as it will have an opportunity to respond to the further documents and witness statement and that the inconvenience caused can be remedied through the court's discretion to manage the trial process.
20. The Claimant opposed the application through the Replying Affidavit of Rodgers Momanyi Ombati, its Branch Secretary in charge of recruitment and organization in the North Rift, sworn on 20<sup>th</sup> September, 2024. The Claimant further filed submissions dated 28<sup>th</sup> October, 2024.
21. The Claimant submits that the application is an abuse of court process as the Claimant has finalized and closed its case, and will not have an opportunity to reopen its case which is based on the documents already filed.
22. It was further the Claimant's submission that by introducing new documents the Applicant intends to patch up the weaknesses in its case after hearing the Claimant's case and cross examining its witness.
23. It is the Claimant's submission that the Applicant's averment that it inadvertently misfiled the documents cannot be true as the case was subjected to pretrial and several court appearances on 27/7/2023, 26/3/2024, 28/9/2023, 28/11/2023, 30/01/2024, 26/03/2023, 30/05/2024 and 24/06/2024 and the Applicant should have filed the documents before commencing hearing.
24. The Claimant submits that the Applicant does not meet the guidelines for admission of additional evidence set by the Supreme Court in *Hon. Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamed and 3 others* [2018] eKLR as the Applicant at all times had the documents and cannot prove that they could not have obtained the documents with reasonable diligence for use at the trial, or that the documents were not within their knowledge or could not have been produced at the time of hearing the Claimants case.



## Analysis and Determination

25. I have considered the application together with the affidavits in support and opposition thereof. I have further considered the rival submissions of the parties. The issue arising for my determination is in my considered view whether the Applicant meets the threshold for admission of additional evidence after the Claimant had closed its case.
26. Rule 14(6) and 14(10) of the Employment and Labour Relations Court (Procedure) Rules, 2016 which the Applicant has relied on provide as follows:
  - (6) A party may amend pleadings before service or before the close of pleadings: Provided that after the close of pleadings, the party may only amend pleadings with the leave of the Court on oral or formal application, and the other party shall have a corresponding right to amend its pleadings.
  - (10) Where a party intends to rely on a document that has not been filed as part of its pleadings, the party shall make sufficient copies of each document for the Court, file and serve the other party with a copy at least fourteen days before the case is set down for hearing or such shorter period as the Court may order: Provided that after the close of pleadings, the Court may allow the filing of a supplementary bundle of documents.
27. The rules provide for filing of documents at pretrial level, not after the Claimant has presented and closed its case.
28. Order 11 of the Civil Procedure Rules quoted and relied upon by the Applicant does not provide for filing of documents after the Plaintiff has closed its case. The rule provides for pretrial proceedings.
29. The English Court of Appeal in the case of *Ladd v. Marshall* [1954] 1 WLR 1489 established a three-part test, namely, non-availability, relevance and reliability, for the appellate Court to accept fresh evidence in a case on which a judgment has already been delivered. Laying down the definitive rule for the admissibility of new evidence Denning LJ, explained that “In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible”. This criterion is today known as the rule in *Ladd v. Marshall*.
30. The issue of additional documents after close of a case has been the subject for determination by the Supreme Court of Kenya in several decisions.
31. In *Raila Odinga and 5 Others v. Independent Electoral and Boundaries Commission and 3 Others* [2013] eKLR, the Supreme Court cautioned that it will be reluctant to grant leave for the filing of further affidavits and/or admission of additional evidence, if the evidence is such as to make it difficult or impossible for the other party to respond effectively. That the Court must act with abundant caution and care in the exercise of its discretion under this rule.



32. In paragraph 79 of the Supreme Court Ruling in the Mohamed Abdi Mahamud Case (supra), the Court declared the circumstances under which additional evidence may be admitted, expanding the three-part test in *Ladd v. Marshall* as follows;

“We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:

- a. the additional evidence must be directly relevant to the matter before the Court and be in the interest of justice;
- b. it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
- c. it is shown that it would not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
- d. where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
- e. the evidence must be credible in the sense that it is capable of belief;
- f. the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
- g. whether a party would reasonably have been made aware of and procured the further evidence in the course of the trial is an essential consideration to ensure fairness and due process;
- h. where the additional evidence discloses a strong prima facie case of willful deception of the Court;
- i. the Court must be satisfied that the additional evidence is not utilized for the purpose of removing the lacunae and filling gaps in evidence. The Court must find the further evidence needful;
- j. a party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in the appeal, fill up omissions or patch up the weak points in his/her case;
- k. the Court will consider the proportionality and prejudice of allowing the additional evidence. This requires the Court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.”

33. In the instant case the Applicant has stated that the documents were inadvertently filed in a different suit being Kitale CMELRC Cause No. 2 of 2022. That the original witness statement contains inaccuracies and omissions that need to be rectified to ensure the testimony accurately reflects the facts and to maintain consistency with the evidence. That the original witness statements contain factual errors that require correction which if not corrected could distort the witness testimony and the facts of the case.



34. The foregoing begs the question when did the Applicant realize all these? The application to amend pleadings was filed on 19<sup>th</sup> June 2024 while the Claimant's witness testified on 28<sup>th</sup> November, 2023. That is a difference of more than 6 months. As pointed out by the Claimant, there were several court appearances during this period. This can only mean that there was lack of diligence on the part of the Applicant.
35. I have also looked at the documents that are sought to be admitted on record. Some of them are documents dated 2012 which would not be relevant or would not impact this case. The undated letter from the Applicant and the letter dated 31<sup>st</sup> March 2022 from the County Labour Office, Trans-Nzoia would also not impact the decision herein as the contents thereof are subject to proof.
36. The witness statement sought to be filed is a complete departure from the one on record and does not align with the defence as it introduces new matters that were not pleaded.
37. The purpose of filing document and witness statements in advance of hearing suits is to avoid trial by ambush. A party is supposed to prepare for hearing using the evidence that is on record. If new evidence is adduced after one party has closed its case it would mean that the party would be prejudiced, even if it was allowed to recall its witnesses to testify afresh.
38. Further, as was stated by the Supreme Court in Mohamed Abdi Mahamud Case that a party must prove that the new evidence would not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence.
39. This has not been proved by the Applicant. Its reasons for not producing the evidence earlier are contrary to the guidelines in Mohamed Abdi Mahamud Case.
40. It is for the foregoing reasons that I find no merit in the application dated 3<sup>rd</sup> June 2024 and dismiss it with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 28<sup>TH</sup> DAY OF NOVEMBER, 2024**

**MAUREEN ONYANGO**

**JUDGE**

