



**Nduru v Avenue Car Hire and Leasing Limited (Cause 839 of 2017)  
[2024] KEELRC 13256 (KLR) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13256 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 839 OF 2017  
BOM MANANI, J  
NOVEMBER 28, 2024**

**BETWEEN**

**SIMON WANGAI NDURU ..... CLAIMANT**

**AND**

**AVENUE CAR HIRE AND LEASING LIMITED ..... RESPONDENT**

**RULING**

1. On 27<sup>th</sup> September 2023, the Claimant testified in the cause and closed his case. The defense case was thereafter fixed for hearing on 19<sup>th</sup> October 2023.
2. On 19<sup>th</sup> October 2023, the parties attended court when the Respondent's lawyers informed the court that they had just come on record on behalf of their client in place of its previous lawyers. As such, they required an adjournment to enable them do some housekeeping.
3. They indicated that after taking over the matter, they discovered that the previous lawyers for the Respondent had not filed a reply to the amended Statement of Claim. They further indicated that their client's witness had since left employment and they needed to substitute her.
4. The advocates indicated that they had filed a reply to the amended Statement of Claim and a substituted witness statement the previous day. As such, they required the court's leave to regularize the papers.
5. Counsel also informed the court that their client believed that the documents which the Claimant had introduced in evidence were forged. As such, they intended to call a handwriting expert to challenge their authenticity.
6. Counsel also asked for the reopening of the Claimant's case so that the latter could be recalled for further cross-examination. It was felt that the lawyers previously on record for the Respondent had



- not adequately challenged the authenticity of the documents which the Claimant had produced in support of his case.
7. The foregoing requests were vehemently opposed by the Claimant's counsel. It was her view that the cause had been subjected to pre-trial conference and confirmed for trial quite a while back. Yet, the Respondent had not flagged the documents which it required to be subjected to forensic audit.
  8. Counsel argued that the matter had even been taken through mediation. Yet, the Respondent did not raise the issues which its advocates were now alluding to.
  9. Counsel argued that it was improper for the Respondent's counsel to file additional pleadings after the close of her client's case without leave of the court. In her view, such action was prejudicial to her client's case.
  10. After listening to the parties, the court allowed the request for adjournment the matter in order to allow the Respondent's lawyers to familiarize themselves with it. However, it struck out the documents which had been filed by the Respondent without leave.
  11. The court further allowed the Respondent to substitute its witness. Regarding the request to re-open the Claimant's case and call expert evidence, the court directed that such prayer be the subject of a formal application to enable the Claimant substantively respond to it. The court proceeded to list the defense case for 4<sup>th</sup> December 2023.
  12. On 4<sup>th</sup> December 2023, counsel for the Respondent did not attend court. Counsel for the Claimant who was present notified the court that the Respondent had filed an application dated 24<sup>th</sup> October 2023 which the Claimant was opposed to. Since the Respondent's counsel was absent, counsel for the Claimant asked that the said application be dismissed. The court granted this request. However, the defense case was adjourned to 12<sup>th</sup> February 2024.
  13. On 12<sup>th</sup> February 2024, both counsel attended court. Counsel for the Respondent informed the court that he had filed an application dated 18<sup>th</sup> December 2023 seeking to set aside the orders of 4<sup>th</sup> December 2023 and reinstate the application dated 24<sup>th</sup> October 2023 for hearing.
  14. Although the matter was slated for defense trial, both counsel agreed to canvass the application dated 18<sup>th</sup> December 2023 on that day (12<sup>th</sup> February 2024) in order to fast track the suit given its age. The court accommodated this request and heard the application.
  15. On 15<sup>th</sup> February 2024, the court delivered its ruling on the application. It reinstated the Respondent's application dated 24<sup>th</sup> October 2024 and gave timelines for its disposal.
  16. On 6<sup>th</sup> March 2024, the court delivered its ruling on the application dated 24<sup>th</sup> October 2024. The application was disallowed except to the extent that the Respondent was allowed to file a witness statement by one John Nyingi to substitute the witness statement of Diana Kabiru who had left the Respondent's employment. However, the court directed that the statement by John Nyingi shall not introduce any new matters. It was to be confined to matters appearing in the initial statement by Diana Kabiru since the said John Nyingi was coming in as a substitute for Diana Kabiru and not as an additional and independent standalone witness for the defense.
  17. In reaction to this order, the Respondent filed a statement by John Nyingi dated 14<sup>th</sup> May 2024. The statement spans over twelve (12) pages in contrast to that by Diana Kabiru which was only three (3) pages. In addition, the Respondent's witness attached several documents which he had made reference to in the statement. It is noteworthy that there was no express reference to these documents in the statement by Diana Kabiru.



18. Surprised by this turn of events, the Claimant's advocate objected to the new statement. She subsequently lodged the application dated 21<sup>st</sup> June 2024 seeking to strike out the said statement.
19. The Claimant's counsel argues that the said statement disregarded the court's directions which were issued on 6<sup>th</sup> March 2024. Counsel states that the court's directions were to the effect that the witness statement by John Nyingi should be aligned to that of Diana Kabiru since he was coming in as a substitute for Diana Kabiru and not as new witness.
20. The Claimant's counsel argues that the statement by John Nyingi seeks to introduce new matters which were not covered in the statement by Diana Kabiru after the Claimant's case has been closed. According to counsel, if the statement is allowed on record in its current form, it will greatly prejudice her client's case since he will not have the opportunity to address the new matters contained in it.
21. The Claimant's counsel accuses the Respondent of outright defiance of the court order. She contends that the Respondent's conduct throughout the proceedings has been geared towards frustrating the cause of justice.
22. In response to the application, the Respondent filed a replying affidavit dated 22<sup>nd</sup> July 2024. In the affidavit, the Respondent denies introducing new matters through the impugned witness statement. It argues that all that it has done is to elaborate on the content of the initial witness statement by Diana Kabiru. The Respondent asserts that it has been forced to file an elaborate witness statement as opposed to that initially filed by Diana Kabiru because the Claimant did not place all materials before the court at the time he gave evidence. As such, it has become necessary to elaborate on the statement by Diana Kabiru in order to bolster the defense case.
23. The Respondent contends that article 50 of *the Constitution* entitles it to be heard in its own defense. As such, to strike out the witness statement would visit injustice on it.

### **Analysis**

24. I agree with the Respondent's contention that it is entitled to a fair hearing in terms of article 50 of *the Constitution*. However, I do not understand this right to mean that the Respondent has the liberty to introduce evidence in any manner it considers appropriate irrespective of whether this offends the rules of natural justice, evidence and procedure. Indeed, the right to a fair hearing is double edged in the sense that it requires the court to ensure that the trial is balanced in terms of fairness between the parties.
25. The record shows that the court gave directions on 6<sup>th</sup> March 2024 allowing the Respondent to substitute its witness. The reason for this order was that the initial witness had left employment. As such, the substitute was to be introduced not for purposes of introducing new evidence but presenting the evidence which the first witness had been scheduled to present. It is in this context that the court ordered that the witness statement by the substituted witness should not depart from the content of the witness statement by Diana Kabiru.
26. At the time of issuing this order, the court was alive to the fact that the Claimant had closed his case. As such, it would be prejudicial to him to allow the Respondent to bring on board material which had not been drawn to his attention before he closed his case. To do so would deprive the Claimant of the opportunity to answer to such new evidence.
27. The proposed witness statement by John Nyingi is markedly different from that which had been filed by Diana Kabiru. Under the guise of elaborating on the content of the statement by Diana Kabiru, the substitute attempts to introduce new matters and documents long after the Claimant's case has closed. To allow this will certainly prejudice the trial.



28. The Respondent contends that it has a right to present its case. This is correct. However, this cannot be done in a manner that flies in the face of the rules of engagement.
29. It is noteworthy that the Statement of Claim was served on the Respondent at the commencement of the action. Further, the Respondent was served with the amended Statement of Claim before the Claimant's case was set down for trial.
30. The purpose of the foregoing was to provide the Respondent with the opportunity to present its rebuttal to the claim before the trial begun. Nothing stopped it (the Respondent) from amending the witness statement by Diana Kabiru to add meat to it before the trial begun.
31. The Respondent cannot use the window given to it to substitute its witness to introduce new matters after the Claimant has closed his case under the guise of pursuit for a fair trial. Indeed, to permit this kind of action is to occasion an unfair trial.

### **Determination**

32. The upshot is that I allow the Claimant's application dated 21<sup>st</sup> June 2024.
33. I strike out the witness statement by John Nyingi dated 14<sup>th</sup> May 2024 together with all the documents attached to it.
34. The Respondent is granted seven (7) days from the date of this ruling to file and serve a compliant statement by John Nyingi in terms of the directions that were given on 6<sup>th</sup> March 2024.
35. Costs of the application are granted to the Claimant.

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

**B. O. M. MANANI**

**JUDGE**

In the presence of:

..... for the Claimant

.....for the Respondent

Order

In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**B. O. M MANANI**

