Wambui v Standard Chartered Bank of Kenya (Employment and Labour Relations Cause 383 of 2019) [2024] KEELRC 13321 (KLR) (3 December 2024) (Ruling)

Neutral citation: [2024] KEELRC 13321 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE 383 OF 2019

AN MWAURE, J

DECEMBER 3, 2024

BETWEEN

ANASTACIA NYAMBURA WAMBUI ..... CLAIMANT

AND

STANDARD CHARTERED BANK OF KENYA ..... RESPONDENT

RULING

1. The Respondent/Applicant filed a Notice of Motion dated 23rd July 2024 under Certificate of Urgency seeking orders that:

    1. Spent

    2. This Honourable Court be pleased to grant the Respondent/Applicant leave to re-open their case so as to adduce additional evidence being a complete copy of the Conflict of Interest policy produced in the Respondent's bundle of documents dated 26th February 2020 and filed on 28th February 2020;

    3. This Honourable Court be pleased to grant leave to the Respondent/Applicant to recall their witness, Morris Mandere, for the purposes of adducing additional evidence being the complete copy of the Conflict of Interest Policy, and any attendant testimony appurtenant thereto;

    4. This Honourable Court be pleased to grant leave to the Claimant/Respondent, if need be, to take the stand and give additional testimony with respect to the additional evidence by the Respondent/Applicant; and

    5. The costs of the Application be in the cause.

2. The application is supported by the affidavit of Morris Mandere, the Respondent/Applicant's human resource business partner.

Claimant/Respondent's replying affidavit

3. In opposition, the Claimant/Respondent filed a replying affidavit dated 16th September 2024.

4. The Claimant/Respondent avers that the Respondent/Applicant on several occasions requested to file additional documents but failed to do so.

5. The Claimant/Respondent avers that the documentary evidence that the Respondent/Applicant is seeking to produce is not new or additional evidence as the same is existing and admitted.

6. The Claimant/Respondent avers that the application is made in bad faith delaying the conclusion of the matter.

7. The Claimant/Respondent avers that the application is also frivolous, vexatious and an abuse of the court process urging the Honourable Court to dismiss with costs.

Respondent/Applicant's submissions

8. The Respondent/Applicant argued that reopening a case and introducing additional evidence is a matter of judicial discretion. This should only be considered in exceptional circumstances, specifically when it serves the broader interest of justice and does not cause undue prejudice to the opposing party.

9. In Samuel Kiti Lewa v Housing Finance Company Limited & Another [2015] eKLR, the court held that it has the discretion to allow a case to be reopened; however, this discretion must be exercised judiciously to avoid causing embarrassment or prejudice to the other party. A case should not be reopened if the purpose is merely to fill gaps in the evidence.

10. The Respondent/Applicant submitted that the judicial discretion to reopen a case and the importance of considering the right to a fair trial as provided under Article 50 of *the Constitution*. The Respondent/Applicant argues that the timing of the application to reopen a case raises critical inquiries and the interest of justice must be considered. In the case of Raindrops Limited V County Government of Kilifi [2020] eKLR the court observed:

> "ambit of that trial, judicial discretion move to re-open the case and introduce additional evidence has also to be recognized under the fair trial rights which are constitutionally protected pursuant to Article 50 of *the Constitution*. Depending at what phrase such an application is made to re-open the case certain interrogatories questions do arise and they are all in the interest of justice to grant or deny re-opening of the case."

11. The Respondent/Applicant stated that it had included the Conflict of Interest policy in the document bundle. However, due to a clerical error, the policy document was printed on one side only, instead of the intended two-sided format. This mistake resulted in the omission of every alternate page in the version submitted to this Honourable Court and served to the Respondent. The Respondent/Applicant states that relying on the complete and accurate version of the Conflict of Interest Policy is crucial, as it forms the basis for the Claimant/Respondent's termination.

12. The Respondent/Applicant submitted that the introduction of missing evidence, even after the case is closed is crucial if it upholds the interest of justice and the courts should prioritize substantive justice over strict adherence to procedural rules.

13. The Respondent/Applicant relied on the case of Microsoft Corporation V Mitsumi Computer Garage Ltd & Another [2001] eKLR, Ringera J emphazied the flexibility of procedural rules to ensure justice is served stating:

> " Rules of procedure are handmaidens and not mistress of justice and should not be elevated to fetish. Theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it."

14. In Attorney General V Torino Enterprises Limited [2020] eKLR Muigai J highlighted the constitutional principles of avoiding delays and undue regard for procedural technicalities stating:

> " Two clear constitutional principles, articulated in Article 159 of *the Constitution*, are always in play in objections like the one raised before us, and calls for pragmatic balance rather than robotic adherence. The first principle, set out in Article 159(2)(b), demands that justice shall not be delayed, hence set timelines must be respected. The second principle, in Article 159(2) (d) demands that justice shall be administered without undue regard to procedural technicalities, meaning that where the interests of justice so demand, the Court may excuse non-compliance with the timelines it has set. It is also for that reason that the overriding objective demands of the Court, when it is interpreting the law or exercising its powers, to act justly in every situation, to pay regard to the principle of proportionality, to create a level playing ground for all the parties and as much as possible, to dispose of disputes on merits rather than on technicalities."

15. The Respondent/Applicant submitted that it is not opposing recalling any of its witnesses following the introduction of evidence relying on Section 146(4) of the *Evidence Act* which vests the court with discretionary authority to recall a witness stating that:

> " The Court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively."

16. Order 18 Rule 10 of the Civil Procedure Rules provides:

> "The court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force; put such questions to him as the court thinks fit."

17. In Techbiz Limited V Royal Media Services [2021] eKLR the court held that no prejudice would be occasioned if the applicant's case were reopened as the respondent would have the opportunity to cross-examine the witnesses and even to recall its witnesses for the purpose of clarification of any issue.

18. In State V Hepple (1977) the Court stated:

> " The Judge must consider whether the party deliberately withheld the evidence proffered in order to have it presented at such time as to obtain an unfair advantage by its impact on the trier of facts."

19. In Cason V State, 140 MD App 379 (2001) the court stated:

> " Whether the good cause is shown, whether the new evidence is significant, whether the jury or Judge would like to give undue emphasis, prejudicing the party against who it is offered,

whether the evidence is controversial in nature, and whether re-opening is at the request of the jury or Judge a party to the claim. Or is the additional evidence new or merely to corroborate and clarify the earlier testimony."

20. The Respondent/Applicant relied on the Canadian Encyclopaedic Digest, Evidence IV. 12(a) provides when a party wants to introduce new evidence late in the process, it must seek to reopen its case. The standards for allowing this are inconsistent, but it can happen before or after judgment. Some judges allow it if justice requires, but typically it's permitted only with great care and two key criteria in mind. While diligence in discovering evidence isn't always required, the importance of the evidence is critical. Procedural diligence should yield to substantial justice to avoid obvious injustice. Reopening is less likely if the evidence was not originally presented for tactical reasons.

21. In Joseph Mumero Wanyama V Jared Wanjala Lyani and another [2019] eKLR the court stated that an application to introduce new evidence and documents will be considered based on several factors, including the potential prejudice to the other party.

22. In conclusion, the Respondent urges the court to allow the application as prayed.

Claimant/Respondent's submissions

23. The Claimant/Respondent submitted that the Honourable Court has discretion to consider application of this nature as it is trite law that parties are bound to their pleadings.

24. The Claimant/Respondent submitted that the application is incurably defective and thus should be dismissed with costs as parties have already filed and served their written submissions.

25. The Claimant/Respondent submitted that the documentary evidence that the Respondent/Applicant is seeking to produce is familiar to both parties.

26. The Claimant/Respondent submitted cited the case of Sarah Lubai Sagala V Bridge International Academies Limited Cause 46 of 2016 where the applicant sought to reopen a case but the Honourable Court stated that the discretion to reopen proceedings cannot be used to cure every form of negligence or ineptitude by parties and proceeded to dismiss the application due to lack of merited.

27. In Japhet C. Kosgei V Board of Management Mindililwo Special School Employment and Labour Relations Cause 44 of 2018 the court declined to exercise its discretion in favour of the applicant in the instant application was dismissed with costs.

Analysis and determination

28. The main issue of determination is whether the application dated 23rd July 2024 is merited.

29. Rule 40(1) of the Employment and Labour Relations Court (Procedure) Rules, 2024 provides as follows:

    1. The parties to a suit shall, within fourteen days after the close of pleadings or such other period as the Court may, on application, direct, move the Court to hold a pre-trial conference to ascertain—

        a. points of agreement and disagreement;

        b. the possibility of alternative dispute resolution or any other form of settlement;

        c. whether evidence is to be oral or by affidavit;

d. the discovery and the exchange of documents, and the preparation of a paginated bundle of documentation in chronological order;

e. whether evidence on affidavit will be admitted with or without the right of any party to cross-examine the deponent;

f. the manner in which documentary evidence is to be dealt with, including any agreement on the status of documents and whether documents, or parts of documents, will serve as evidence of what they purport to be;

g. securing the presence at court of any witness;

h. expert evidence;

i. whether an interpreter is required and if so for which language;

j. whether legal argument shall be written or oral, or both;

k. the estimated length of the hearing; and

l. any other matters the Court may deem necessary.

30. In this instant case, the Respondent/Applicant failed to attend the pre-trial conference on several occasions as per proceedings despite being served with mention notices.

31. The Respondent/Applicant had sufficient time to organize its documents before the hearing was scheduled and should have noted the issue with the printing during the pre-trial conference but failed to address it by not attending the pre-trial conference.

32. The Respondent/Applicant was aware of the pre-trial conference since there is an affidavit of service on record to show that indeed the Claimant/Respondent served the Respondent/Applicant to attend the said pre-trial conference and yet did not attend.

33. The case was heard viva voce on 20th February 2024 and upto 30th April 2024 parties were given directions to file submissions and judgment was to be delivered on 27th September 2024. Then this application dated 25th July 2024.

34. In Whycliffe Bundi V Flame Tree Africa Limited [2018] eKLR this Court stated the following:

> " cases belong to the parties and not their Advocates. The refrain that a party was let down by their Advocate is now a tired one and must be confined where it belongs, that is in the realm of advocate/client relationships."

35. The court is persuaded the conflict of interest policy is produced as part of the Respondent's documents on pages 22 to 56 annexed to the Respondents Responses to the claim dated 26th February 2020.

The Respondents have had ample time to scrutinise their documents and pleadings and even in the course of the hearing it is amazing they cross-examined the claimant's witness and lead their witness in the examination in chief and did not note any omissions.

36. It is a lot of inconvenience to the court and the litigants and this anomaly was only noted after close of pleadings and at filing of the submissions of the main suit. Already a judgment date had been given.

37. The Respondents had been indulged several other times to file their supplementary documents on 26th February 2024 and 21st January 2024. What the court is getting at is that the respondents have had

ample time to file their complete bundle of documents and is indeed a lot of waste of court's time to go through the entire hearing and bring this application after even submissions have been filed and a judgment date taken.

38. Further the court is in concurrence with the claimant that the aforesaid policy document is common to both parties and is not new evidence or additional evidence. The Respondents have not demonstrated the magnitude or the weight of the pages that are omitted from the said document to deserve taking the parties way back to the hearing afresh of a case that is already closed.

39. Even if the Respondent would allege negligence from his counsel and in omitting some pages of their documents the court however cannot grant orders in all circumstances, due to the ineptitude of the parties' counsel. In the case of Wycliffe Bundi -vs Flame Three Africa Limtied (2018) eKLR the court held:-

> " cases belong to the parties and not their Advocates. The refrain that a party was let down by their Advocate is now a tired one and must be confined where it belongs, that is in the realm of advocate/client relationships."

40. The court furthermore cannot be expected to cure every form of negligence in proceedings as to grant orders to re-open a case.

In the case of Sarah Lubai Sagala -vs- Bridge Intrnational Acadamies Limited Case 46 Of 2018. The court stated as follows: -

> "The Applicant sought to reopen the case and the Honourable Court held that the discretion to reopen proceedings cannot be used to cure every form of negligence or ineptitude by parties and proceeded to dismiss the application on the basis that the same lacked merit."

41. The court finds the parties in main suit have been accorded a fair hearing at all stages of the proceedings and so re-opening the suit now and re-calling the witness is both time and resource consuming.

42. The court is not persuaded the Respondent is deserving of the prayers as per the notice of motion dated 23rd July 2024. The same are declined.

43. Costs will be in the cause.

44. Judgment will be delivered on 28th February 2025.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 3RD DAY OF DECEMBER, 2024.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE