



**Walji v Roofings Kenya Limited (Cause E1012 of 2021)  
[2023] KEELRC 2505 (KLR) (3 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2505 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E1012 OF 2021  
NZIOKI WA MAKAU, J  
OCTOBER 3, 2023**

**BETWEEN**

**FAHRANAZ ESMAIL WALJI ..... CLAIMANT**

**AND**

**ROOFINGS KENYA LIMITED ..... RESPONDENT**

**RULING**

1. Before me is the respondent's application dated June 12, 2023 which seeks the following orders:
  - i. Spent.
  - ii. That this Honourable Court be pleased to grant leave to the respondent to adduce additional evidence limited to the production of the respondent's staff attendance report.
  - iii. That the respondent's annexed Further List of Documents be deemed as duly filed upon payment of the requisite court fees.
  - iv. That the costs of this application be in the cause.
2. The application is premised on the grounds that during getting up for this trial, it was noted that the respondent's Staff attendance report was inadvertently left out in the respondent's Bundle of Documents. This error was on account of the respondent's former witness inadvertent mistake of failing to avail this document for filing purposes. It was supported by an affidavit in support sworn by Catherine Gitu on June 12, 2023 and her further affidavit sworn on the July 7, 2023.
3. The application was opposed through a replying affidavit sworn by the claimant on July 4, 2023. In it, the claimant asserts that the application was filed on June 16, 2023 but was only served upon her advocate on June 30, 2023. By this time the claimant had testified on June 19, 2023 and the respondent's first witness testified on 19<sup>th</sup> June 2023. The claimant depones that when the case was heard, neither the Counsel for the respondent nor its witness mentioned the existence of the



application herein and no directions were sought. The claimant depones that contrary to assertions made, the respondent was aware of the existence of the documents in 2022 when leave was sought to file additional documents. She asserts it is more than one year since the matter was up for pre-trial directions and she asserts the delay is inexcusable. The claimant asserts the respondent is trying to amend its defence surreptitiously and that there is prejudice to be occasioned by the introduction of the material at this time. The claimant depones the respondent has not demonstrated good faith in the conduct of the matter and the many attempts to delay the matter disentitle the respondent from any orders.

4. The respondent asserts that the sole issue that arises for this court's determination is whether the respondent/Applicant has satisfied the criteria for this court to allow it to file additional evidence after the bearing of the claimant's case. The respondent/Applicant submits that it would be in the interests of justice if this Court allows the evidence sought to be introduced so as to determine the real issues in controversy and dispense justice to the parties, and any prejudice caused to the claimant (if any) in this regard can be cured by such further orders as may be necessary. The respondent submits that it has been previously held that the court as a shrine of justice, has a mandate to do justice to all parties and not to be too strictly bound by procedural technicalities. The respondent submits that this flows from the provisions of article 159(2)(d) of *the Constitution* and asserts that where any evidence can be adduced without causing undue prejudice to the other party, the court ought to allow the application, so as to allow such party the opportunity to present its case in full. The respondent submits that the court may consider various factors including, but not restricted to, the earlier availability of the witness, the discovery of a new document and the stage of the proceedings at which the additional evidence is sought to be introduced. It submits that if for example, the trial has not started, little prejudice may be caused to either party if one is permitted to introduce additional evidence. The respondent submits that the prejudice to the other party no doubt increases as the trial progresses. The respondent submits that it is however up to each court to weigh the surrounding circumstances of each case and determine whether it will be in the interests of justice to allow such evidence to be tendered outside the timelines provided for in the rules.
5. It was submitted that noteworthy is that when this matter first came up for a Mention to fix a hearing date on June 9, 2022, the respondent had already filed its Response to the claim, Witness Statements and List of Documents. However, the respondent's main witness, Mr. Andrew Fleming had left the organization thereby necessitating the need to substitute his testimony. Thereafter, the other two remaining witnesses also left the organization thereby necessitating their substitution. It is after this transition that upon the new witnesses coming in to testify for the respondent that it was noted that the Staff Attendance Report, which is a crucial document in this case, had not been provided by the former Human Resource Manager. It is the respondent's case that the claimant's termination from employment was on account of chronic absenteeism and that therefore, for this court to fully appreciate this issue, it would be in the interest of justice that the respondent is given an opportunity to adduce this crucial piece of evidence. The respondent cited the case *Joseph Ndungu Kamau v John Njibia* [2017] eKLR where the hearing of that suit had proceeded and both the plaintiffs and the defence cases having been heard and closed, parties agreed to file and exchange written submissions. The court then gave a date for oral highlighting of submissions and on the eve of the highlighting, the plaintiff filed an application seeking leave to file additional evidence which was allowed by the court. The respondent further relied on the cases of *David Muthami v Estate of James Titus Wambua & 4 others* [2022] eKLR and *Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another* [2015] eKLR. The respondent submitted the failure to avail the evidence prior was due to the former Human Resource Manager having not forwarded it. It was submitted that the new Human Resources Manager noted the omission and the respondent beseeched the court to allow the motion. On the



perceived prejudice, the respondent submitted that *the Constitution* enjoins the court to dispense justice without undue regard to technicalities. The respondent submitted that the law allows the recall and re-examination of witnesses who have testified. The respondent thus urges the application be allowed as prayed.

6. As at the time of penning the Ruling, the claimant's submissions were not on record. The provisions of the law cited in aid by the respondent do indeed permit the recall of a witness. The respondent asserts the provisions of the law are geared towards the aspirations to achieve the just, efficient, timely and cost-effective resolution of the real issues in dispute. The respondent asserts no prejudice will be suffered by the claimant as she will be allowed to file any additional statements or documents in rebuttal.
7. Whereas the discretion of the Court is wide and unfettered in an application such as this, the Court is minded of the words of Kiage JA in the case of in the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others* where his Lordship stated thus:

"... I am not in the least persuaded that Article 159 of *the Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned..."

8. The procedural steps taken before the hearing of the suit were not merely cosmetic. The respondent was given 4 different opportunities to file the requisite documents in the case. The first was upon service of the claim and the claimant's documents. The next instance given to the respondent was June 9, 2022 when leave was sought by the respondent to file additional documents. There was no compliance despite leave being granted. The next occasion was September 14, 2022 when similarly, leave was sought and granted for the filing of additional documents. None were filed. On October 31, 2022, the court gave leave to file additional documents and witness statements. The respondent squandered the opportunity to avail the documents. In my considered view, the respondent has been dilatory and was perhaps waiting to hear the claimant's case before the putsch to have the documents admitted into evidence. The fact that the application had been filed before the hearing and clandestinely refused to disclose this to the claimant and the court is tantamount to sharp practice. The respondent is undeserving of the grant of leave to adduce the allegedly 'recently discovered' documents. application is unmerited and is accordingly dismissed with costs to the claimant. Costs to be on the higher scale. Directions on further hearing will follow the delivery of this Ruling.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF OCTOBER 2023**

**NZIOKI WA MAKAU**

**JUDGE**

