



REPUBLIC OF KENYA



**KENYA LAW**  
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**Murunga v Bandari Savings Cooperative Society (Cause 387 of 2018)  
[2023] KEELRC 2936 (KLR) (16 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2936 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 387 OF 2018  
AK NZEI, J  
NOVEMBER 16, 2023**

**BETWEEN**

**JOSEPH MURUNGA ..... CLAIMANT**

**AND**

**BANDARI SAVINGS COOPERATIVE SOCIETY ..... RESPONDENT**

**RULING**

1. Record herein shows that hearing of the Claimant’s case proceeded ex-parte on 20/2/2019 and that the Court delivered a judgment on 19/9/2019, awarding the Claimant a total of ksh. 1,292,000, costs of the suit and interest.
2. On 5/2/2020, the Respondent filed a Notice of Motion dated 5/2/2020, seeking the following orders:-
  - a. that the Court be pleased to set aside the judgment dated 19/9/2019 and the Respondent be granted leave to adduce its defence evidence in this cause.
  - b. that the cause be mentioned/heard on an earlier date, before 25/3/2020 when a related matter ELRC No. 531 of 2018 (Peter Njuguna Kingori -vs- Bandari Savings & Co-operative Society Limited) is scheduled for defence hearing.
  - c. that costs of the application be provided for.
3. The Court’s record further shows that 24/2/2020, counsel for both parties appeared before the Court and recorded the following consent:-

“By consent, the Respondent’s Notice of Motion dated 5<sup>th</sup> February 2020 is allowed. The Respondent is granted leave to present their witness. Hearing on 25/3/2020 alongside case No. 531 of 2017.”



4. On 21/9/2020, the Respondent filed a further list of documents dated 16/9/2020 and on 12/4/2021 filed a Further further List of Documents dated 30/3/2021. It is to be noted that the aforementioned documents were filed long after closure of pleadings and without the Court's leave.
5. On 21/3/2023, the Claimant filed a Notice of Motion dated 17/3/2023 seeking the following orders:-
  - a. that his Honourable /Court expunge the Respondent's further list of documents dated 16/9/2020 and filed on 21/9/2020, and a further further list of documents dated 30/3/2021 and filed on 12/4/2021, from the Court's record.
  - b. that costs of the application be borne by the Respondents.
6. The application is based on the supporting affidavit of Boniface Otieno Advocate sworn on 17/3/2023, wherein it is deponed that pleadings herein closed on 13/7/2018, whereupon the suit was set down for hearing, and the Claimant's case was heard and judgment was delivered on 19/9/2019. That upon application by the Respondent, the Respondent's case was re-opened to enable the Respondent to call their witnesses to testify.
7. It was further deponed on behalf of the Claimant/Applicant that the Respondent's case was re-opened by consent, and that the consent was conditioned on the Respondent calling its witnesses to present the evidence then on record.
8. I have noted that this is a 2018 matter, and that the Claimant's case is long heard and closed. When the Respondent applied for setting aside of the judgment delivered on 19/9/2019 and re-opening of its case, it did not seek the setting aside of the proceedings leading to that judgment. Those proceedings, and in particular the proceedings taken on 20/2/2021, remain intact. Allowing the Respondent to introduce new evidential documents which were not on record when the Claimant testified and closed his case will be highly prejudicial to the Claimant.
9. The Claimant/Applicant referred to the case of *Johana Kipkemoi Too -vs- Hellen Tum [2014]* eKLR where, in an almost similar case, the Court stated as follows:-

“I have to concur with the submissions of Mr. Wafula that the plaintiff will be greatly prejudiced if am to allow this application by the defendant. The plaintiffs have already closed their case and will not have an opportunity to rebut the new evidence. It will be unfair to the plaintiffs if I am to allow the defendant, at this late stage of the pleadings, to fundamentally alter the character of the case, to one that the plaintiffs never contemplated when tabling their evidence.

In essence, the trial will end up being unfair to the plaintiffs and will violate the provisions of Article 50(1) of *the Constitution*.”
10. I am persuaded that the Claimant's Notice of Motion dated 17/3/2023 is merited, and I allow the same in the following terms:-
  - a. the Respondent's further list of documents dated 16/9/2020 and filed on 29/9/2020; and a further further list of documents dated 30/3/2021 and filed on 12/4/2021, are hereby struck off, and are expunged from the Court's record.
  - b. the suit shall forthwith be set down for defence hearing.
11. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 16<sup>th</sup> NOVEMBER, 2023.**



**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

**This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.**

**AGNES KITIKU NZEI**

**JUDGE**

**Appearance:**

..... for Applicant

.....Respondent

