



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 838 OF 2015**

*(Before Hon. Justice Dr. Jacob Gakeri)*

**JULIUS NYAGWOKA.....CLAIMANT/APPLICANT**

**VERSUS**

**TATA ARICA HOLDINGS KENYA LIMITED.....RESPONDENT**

**RULING**

1. By a notice of motion application dated 21<sup>st</sup> January 2022 filed under certificate of urgency, the Claimant/Applicant sought the following orders, that:

- (a) Service of the application be dispensed with in the first instance and the same be certified as urgent and heard in the first instance.
- (b) The Court be pleased to grant leave to the Claimant to reopen the Claimant's case limited to calling of an additional witness to wit, one **Stephen Suswa Marwa**, a former employee of the Respondent to produce before the Court evidence by way of a letter dated 15<sup>th</sup> August 2015 showing the normal commission payable by the Respondent to its employees.
- (c) Any other order or relief as the Court maybe pleased to issue in the circumstances.
- (d) Costs be in the cause.

2. The application is expressed under Article 48, 162 of the Constitution of Kenya, 2010, Section 3 of the Employment and Labour Relations Court Act 2011 and all other enabling provisions of the law and is grounded on the annexed affidavit of Julius Nyagwoka dated 21<sup>st</sup> January 2022.

3. The deponent states that the matter was last in Court on 10<sup>th</sup> November 2021 and a further hearing was slated for 3<sup>rd</sup> February 2022.

4. That since the last hearing, the deponent had discovered critical and crucial evidence that will assist the Court to make a just determination on the percentage of commission payable by the Respondent.

5. That his interaction with one Mr. Stephen Suswa, a former employee of the Respondent, the deponent had accessed a letter from the Respondent to Mr. Suswa that the Respondent's commission payable to its employees was always 1% of the sales made by the employees which corroborates the deponent's testimony.

6. That in the letter dated 15<sup>th</sup> August 2015, the Respondent was unequivocally undertakes to give the witness a commission of 1% which is the nominal market rate that persons in the line of business earn.

7. That the testimony of Mr. Suswa would enable the Court ascertain the minimum commission payable in the industry.

8. The additional witness will be limited to introduction of his letter dated 15<sup>th</sup> August 2015 after consideration by the Court.

9. It is deponed that there is need to reopen the Claimant's case to adduce this crucial piece of evidence that was not available during the during and before the Respondent's case may be heard.

10. That the Respondent will not suffer any prejudice or embarrassment if the orders sought herein are granted.
11. The Respondent responded to the notice of motion application by a notice of preliminary objection dated 3<sup>rd</sup> February 2022 stating that:
- (i) *The notice of motion dated 21<sup>st</sup> January 2022 was bad in law and an abuse of the court process.*
  - (ii) *The notice of motion is against public policy good order and fair administration of justice.*
  - (iii) *The Claimant/Applicant had not established or fulfilled any other legal requirements for re-opening of his case and had fatally comprised attempt to do so by seeking to introduce an unknown third party and intended witness after closure of his case on 10<sup>th</sup> November 2021.*
  - (iv) *The notice of motion be dismissed with costs.*
12. On the face of it, the preliminary objection raises no point of law.
13. On 3<sup>rd</sup> February 2022, when the application came up for hearing, the Respondent was accorded ten days to file its response and the parties agreed that the application be disposed of by way of written submissions and compliance was confirmed on 24<sup>th</sup> February 2022 and a ruling date given.
14. The Claimant/Applicant submits that the issues for determination are whether: -
- i) The Court has jurisdiction to allow the Applicant's application dated 21<sup>st</sup> January 2022;
  - ii) The notice of preliminary objection is meritorious and the ramifications of an incompetent preliminary objection.
15. On the first issue, the Applicant submits that the essence of the present application was an invitation to the Court to exercise its discretion justly in the disposal of the suit by allowing the introduction of an additional witness in support of the Claimant's claim before the Respondent responds and gives evidence. Reliance is made on the sentiments of Kasango J. in **Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another [2015] eKLR** on the Court's discretion to allow the re-opening of a case.
16. The Court of Appeal decision in **Shami Deshpal Wadhwa v Habib Abu Mohamed & 4 others [2020] eKLR** is also relied upon to underscore the applicable principles of law when a court is exercising discretion to re-open a case.
17. It is submitted that that Respondent would not be prejudiced in any manner since it is yet to testify and the letter which the new witness would introduce came from the Respondent who will have the opportunity to cross examine the witness on any of the facts in issue. The Court is urged to rely on the Applicant's affidavit as the factual basis of the application.
18. As regards the second issue, the Applicant relies on the decision in **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited (1969) EA. 696** to exemplify the definition of a preliminary objection that it is a point of law. It is submitted that the Respondent's response does not disclose any point of law and had not denied the authenticity of the letter sought to be produced by Mr. Suswa.
19. Reliance is made on the decisions in **Odoyo Osodo v Rael Obara Ojuok & 4 others [2017] eKLR** and **Mogas Kenya Limited v Spin Masters Limited & another [2018] eKLR** to demonstrate the exercise of jurisdiction by courts in such applications.
20. In addition, the Respondent submits that the re-opening of the Claimant's case is intended to facilitate the introduction of a new witness whose identity was unknown and no witness, statement had been filed and served prior to the commencement of the hearing on 10<sup>th</sup> November 2021.
21. That the Claimant's application is a surprise and prejudicial to the Respondent. It is argued that the Claimant had sufficient time from 2015 to prepare for the case with supporting documents but failed to do so thus deliberately withholding evidence to obtain an unfair advantage. That the letter sought to be introduced is addressed to the proposed witness details of employment as a Sales Manager of the Respondent in the Eldoret Branch, including his commission and the details have nothing to do with the Claimant who was employed as a Business Manager in 2012 at a gross salary of Kshs.215,000/-. That the reliance is intended to demonstrate similar fact evidence.
22. Order 18 Rule 10 of the Civil Procedure Rules and Section 146(4) of the Evidence Act are relied upon to demonstrate the law on the recalling of witnesses as opposed to calling a fresh witness.
23. It is submitted that allowing a fresh witness after case management directions would be illegal, abuse of Court process and prejudicial to the Respondent since it is contrary to the right to fair trial under Article 50 of the Constitution.
24. The decisions in **Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another (supra)** and **Hannah Wairimu Ngethe v Francis Mungai Ng'ang'a & another [2016] eKLR** are relied upon to urge that the application is not deserved.

25. The Respondent submits that the Applicant has not demonstrated that evidence sought to be introduced could not have been obtained with reasonable diligence at the hearing

26. It is the Respondent's contention that the evidence is not credible as it relates to another person and contains details of a different contract and job description and cannot be relied upon to urge that all employees of the Respondent were entitled to sales commission of 1%.

27. The Court is urged to allow the preliminary objection and dismiss the application.

### **Analysis and Determination**

28. I have carefully considered the application dated 21<sup>st</sup> January 2022, supporting affidavit, response by the Respondent and submissions by Counsel. The singular issue for determination is whether the Court should exercise its discretion in favour of the Claimant and grant the application.

29. Whereas Article 48 of the Constitution of Kenya, 2010 guarantees access to justice for all persons and fees payable shall be reasonable not to impede access to justice, Article 162 addresses the system of Courts.

30. Section 3 of the Employment and Labour Relations Court Act, 2011 embodies the principal objective of the Act as encapsulated in Section 3(1) as follows:

**(1) The principal objective of this Act is to enable the Court to facilitate the just, expeditious, efficient and proportionate resolution of disputes governed by this Act.**

31. Rule 26(2) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provide that ***"The Court shall not re-open a hearing unless, for sufficient reason it considers it fit to do so."***

32. Since Rule 26(1) addresses the close of hearing of the entire case and the Court has declared the hearing closed. It would appear that the re-opening contemplated by sub-Rule (2) is that of the entire case.

33. Applying similar logic to the closure of the Claimant's case, the Court has jurisdiction to re-open the Claimant's case if there is sufficient reason to do so.

34. The discretion granted to the Court to re-open a case is by and a large to facilitate administration of justice and must be exercised judiciously.

35. In **Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another (supra)**, the Court expressed itself as follows:

*"The Court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion, the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence."*

36. Among the principles enunciated by the Supreme Court in **Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others; Ahmed Ali Muktar (Interested Party) [2019] eKLR** on additional evidence is that –

*"The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful."*

37. Relatedly, in the Australian case of **Smith v New South Water [1992] 176 CLR 256** the Court stated as follows:

*"If an application is made to re-open on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not to call it, ordinarily that will tell decisively against the application..."*

38. Applying the foregoing provisions and principles of law to the instant case, it is clear that the major prayer in the Claimant's suit is the commission he ought to have received. On cross examination, the Claimant stated as follows *"I was entitled to 1% of the total sales as incentive. I called it industry minimum. I have no document on the same."*

39. At the close of the Claimant's case on 10<sup>th</sup> November 2021, the Claimant's Counsel did not indicate to the Court that there was any possibility of recalling the witness or introducing new evidence by a new witness.

40. In his affidavit dated 21<sup>st</sup> January 2022, the Claimant/Applicant states that in his interaction with Mr. Stephen Suswa Marwa, he came across a letter from the Respondent addressed to Mr. Marwa bearing testimony that the Respondent's commission to its employees has always been 1% of the sales.

41. According to the letter dated 15<sup>th</sup> August 2015, Mr. Stephen Suswa Marwa was posted to the Eldoret Branch of the Respondent effective 1<sup>st</sup> March 2015 as Sales Manager at a monthly gross salary of Kshs.225,000/-.

42. The Claimant intends to use the letter to demonstrate that he was also entitled to a commission of 1% of the sales made.
43. The Respondent submits that the letter belongs to a different person whose designation is different from that of the Claimant/Applicant and has nothing to do with him. That it is intended to introduce similar fact evidence.
44. Puzzlingly, none of the provisions of law relied upon by the Claimant/Applicant give this Court jurisdiction to reopen a closed case. Articles 48 and 172 of the Constitution of Kenya, 2010 address other aspects of law as does Section 3 of the Employment and Labour Relations Court.
45. Order 18 Rule 10 of the Civil Procedure Rules and Section 146(4) of the Evidence Act relied upon by the Respondent relate to recalling of witnesses as opposed to re-opening of a case and as thus not relevant to the application before the Court.
46. Rule 26(2) of the Employment and Labour Relations Court (Procedure) Rules 2016 confer upon the Court discretion to reopen a case provided there is sufficient reason to do so.
47. Instructively, the decisions relied upon by the Claimant/Applicant are consistent that a Court should not exercise its discretion to re-open a case if to do so enables the party seeking to re-open the case to fill in gaps in its evidence. See **Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another (supra)** and **Shami Deshpal Wadhwa v Habib Abu Mohamed & 4 others (supra)**.
48. Be that as it may, these decisions relate to the re-opening of a case after the hearing has been closed as opposed to a situation in which the Respondent is yet to testify and adduced further evidence. Though relevant, the decisions are not spot on for the issue before the Court where the hearing is ongoing.
49. Although the Respondent submits that the application by the Claimant/Applicant is prejudicial to it, and that the Claimant was deliberately withholding the evidence so as to obtain an unfair advantage, no material has been provided to substantiate or reinforce the submission.
50. More significantly, the Respondent will not only have the opportunity to cross examine the new witness but shall have the additional opportunity to adduce further evidence to puncture the Claimant/Applicant's evidence. Finally, the evidence sought to be introduced is a mere letter, patently not voluminous.
51. For the foregoing reasons, the Court is satisfied that the interests of justice will be better served if discretion is exercised in favour of the Claimant/Applicant.
52. In the upshot, the notice of motion application dated 21<sup>st</sup> January 2022, is granted in terms of prayer no. 2.
53. The Claimant/Applicant to file and serve witness statement within seven days.
54. Costs shall be in the cause.
55. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20<sup>TH</sup> DAY OF APRIL 2022**

**DR. JACOB GAKERI**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 Civil 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.

**DR. JACOB GAKERI**

**JUDGE**