



**Ondieki v Works Development Agency & 5 others (Employment and Labour Relations  
Petition E014 of 2021) [2022] KEELRC 1637 (KLR) (24 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1637 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS PETITION E014 OF 2021**

**HS WASILWA, J**

**MAY 24, 2022**

**BETWEEN**

**JOEL AKINGA ONDIEKI ..... PETITIONER**

**AND**

**CENTRAL RIFT VALLEY WATER WORKS DEVELOPMENT  
AGENCY ..... 1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF WATER SANITATION AND  
IRRIGATION ..... 2<sup>ND</sup> RESPONDENT**

**STATE CORPORATION ADVISORY COMMITTEE ..... 3<sup>RD</sup> RESPONDENT**

**BONIFACE KAMANGA MUHIA ..... 4<sup>TH</sup> RESPONDENT**

**JULIUS KAMAU MUTHANWA ..... 5<sup>TH</sup> RESPONDENT**

**CYNTHIA JEROTICH KIPCHILAT ..... 6<sup>TH</sup> RESPONDENT**

**RULING**

1. The 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents/ Applicants herein have approached this Court vide their Notice of Motion dated 26<sup>th</sup> November 2021, brought pursuant to sections 12, 20 & 9 of the *Employment and Labour Relations Court Act*, rule 14(1) and 17 of the *Employment and Labour Relations Court (Procedure) Rules* 2016, section 63, 1A,1B and 3A of the *Civil Procedure Act*, article 159 of *the Constitution* and all other enabling Provisions of law seeking for the following Orders; -

a) That the Honourable Court be pleased to grant leave to the Respondents/Applicants herein to file a replying affidavit/further affidavit in response to the Petitioner/Respondent's application dated May 10, 2021 so as to annex and introduce new evidence which has recently been made available to the Respondents/ Applicants and which will greatly assist this Honourable Court in making an informed and fair determination on the matter.



- b) That the Honourable Court be pleased to issue any further Orders and or directions with respect to introduction of the new evidence by the Respondents/Applicants and for the petitioner/Respondent to have corresponding leave and or any other directions to issue in the larger interest of justice and fairness.
  - c) That costs of this application be in cause.
2. The Application is supported by the grounds on the face of the Application and the supporting Affidavit deposed upon on the November 26, 2021 by Julius Kamau Muthanwa, the 5<sup>th</sup> Respondent herein and the director of the 1<sup>st</sup> Respondent and based on the followings grounds; -
- a) That the petitioner instituted this suit on 10<sup>th</sup> May, 2021 together with an accompanying Application, seeking for an array of prayers both in the application and the Petition.
  - b) The Attorney General appeared for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents however the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents were represented by the firm of Mirugi Kariuki and co advocates who filed a memorandum of appearance on the May 21, 2021.
  - c) In response to the Application filed together with the petition, the Respondents raised a preliminary objection dated May 21, 2021, which was dismissed on the July 29, 2021 and parties directed to file submissions in relations to the petitioner application of May 21, 2021. The applicant herein complied and filed their submission on October 7, 2021 and the Court slated the Ruling for November 18, 2021.
  - d) While the matter was pending for ruling, the 1<sup>st</sup> Respondent's directors convened a meeting to discuss the matter among other things and it is at that meeting that it emerged that the 1<sup>st</sup> Respondent had not furnished the Attorney General or the firm of Mirugi Kariuki with documentations in aid of their case.
  - e) It is averred that the documents in question are very important and will aid this Court in just and fair determination of this case. He also stated that the documents were not presented on time due to an honest mistake by counsels who were acting alongside each other and had communication breakdown leading to the oversight in filling of the Affidavit and the documents.
  - f) The Applicants state that as soon as this was realized the directors of the 1<sup>st</sup> Respondent wrote a letter dated November 15, 2021 to this Court seeking for this Court's intervention and leave to file the said application which has the effect of painting a clear picture of the issue at hand and demonstrating the current state of affairs of the 1<sup>st</sup> Respondent/ Applicant.
  - g) It was also stated that the Respondents/Applicants have come across new evidence in the recent past which they intent to introduce before this Court so that this Court does not make its Order in vain.
  - h) It is contended that the Petitioner/ Respondent would not be prejudiced in any way as he will have corresponding leave to respond to the new evidence.
  - i) It is also stated that the issue at hand is of immense importance to the people of central Rift Valley.
3. The Petitioner opposed the application and filed a replying affidavit deposed upon on the 17<sup>th</sup> December, 2021 in which he contends that the application by the Respondent is meant to mislead this Court in the administration of justice.



4. It was stated that the pleadings in this matter had closed as such the Respondents are not allowed to file any further documents and/or introduce new evidence. It was further stated that the new evidence allegedly discovered by the Respondent is in relations to the main suit as captured at paragraph 4 of their letter dated 15<sup>th</sup> November, 2021 therefore that there is no basis of arresting this Court's ruling which was ready for delivery.
5. The Petitioner further took issue with the author of the letter served upon them as it was drawn by Muthanwa and Company advocate, an advocate who was not in conduct of this matter or at all.
6. It was averred that the Respondents are bound by their pleadings and therefore that the Respondents ought to have allowed this Court deliver its ruling and if they were dissatisfied then they have an opportunity to appeal.
7. The Petitioner in conclusion urged this Court to dismiss the Application herein and proceed to render its ruling with regard to its application of May 10, 2021.
8. The Application was canvassed through written submissions with the petitioner filing on the March 9, 2022 and the Respondent on the January 17, 2022.

### **Applicants' Submissions.**

9. The Applicants submitted that they, by inadvertence failed to file a replying affidavit and a further affidavit to include all its evidence in support of its case, a mistake which he attributed to its break down of communication between its advocates in the Attorney General Office and Mirugi Kariuki and co advocates. It was argued that mistake of counsel ought not be visited upon an innocent litigant. In support of its case the Applicants relied on a plethora of case among them being the case of *Bank of Africa Kenya Limited V Put Sarajevo General Engineering and co limited & 2 other* [2018] eklr where the Court held that:-

“The question is whether that failure to file the defence in time was excusable. The Court must weigh the rights of the plaintiff who has judgment in his favour against the rights of the defendant to have his case heard and determined on the merits. Counsel has explained what led to the inadvertent mistake and the failure to file the defence in time. As soon as the suit was filed several applications were filed in quick succession. These required responses by counsel. In other words this was not a case where counsel simply sat back and did nothing. There was activity in the file by counsel on behalf of the defendant. The intention to vigorously oppose the suit was clear. I find that this is not a case where there has indolence on the part of the Respondent or his advocate. The present application has not been brought merely to delay and/or to obstruct justice”

10. The Applicant also cited the case of *Patriotic Guards Limited V James Kipchirchir Sambu* [2018] eklr where the Court held that:-

“Be that as it may, we take the view that the Judge was wrong in failing to exercise his discretion in the appellant's favour. There is nothing on record to infer that failure to attend Court by the appellant's counsel was meant to delay the determination of the claim, or had ulterior motives or was meant to defeat the ends of justice. As was stated in *Mbogo v Shah* (supra),  
“...the discretion to set aside an ex parte judgment is to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not



designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice”.

The reason given by counsel in our view was excusable; he had two matters before two Courts of equal status and considering that his matter was to be mentioned last and after hearing of several applications, it might as well be that he overshot his time past the 10.05 am that the matter had been allocated, a fact conceded to by both parties. That was the reason given and we find it hard to appreciate what the judge meant by saying that “there is nothing remotely suggesting of the failure to attend Court being a mistake, inadvertence, accident or error....”

11. Accordingly, the Applicant submitted that it has given sufficient reason to this Court to warrant its exercise of discretion in their favour and allow the Application.
12. On whether the new evidence should be introduced, the Applicant submitted that the new evidence it intends to introduced, will shed more light on the issue at hand and will have the effect of disposing the issues herein justly. In support of his argument the Applicant relied on the case of *Raindrops Limited V county Government of Kilifi* [2020] eKLR and the case of *Joseph Mumero Wanyama V Jared Wanjala Lyani and another* [2019] eKLR where the Court held that;

“Therefore, while adherence to procedures is important for the orderly conduct of litigation, it should not be elevated to a fetish since such rules are only meant to facilitate the administration of justice in a fair and transparent manner. Pre – trial directions are basically case management tools but I do not think they were meant to block out new evidence that was not available if the Court is satisfied with the reasons advanced by the party seeking to introduce it. In *Raila Odinga & 5 others.V. IEBC & 3 others* Petitions No3, 4, AND 5 OF 2013 [2013 eKLR]... Therefore, whereas after pre – trial the Court expects that the parties will have made full disclosure so that each knows the case of the other, the Court may in appropriate cases allow for the late filing and admission of documents and witness statements at least so that the parties can fully ventilate their grievances in accordance with the provisions of Article 50(1) of *the Constitution* which provides that:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body.”

Guided by the above precedents and the law, I find that an application to introduce new evidence and documents will be considered in light of the following; the state at which the trial has reached, the nature of the evidence sought to be adduced and the reasons why it was not availed at the proper stage, the prejudice that may be caused to the other party among other reasons.”

13. The Applicant then, urged this Court in the interest of justice to exercise its discretion and allow the Application.

#### **Respondent’s Submissions.**

14. The Respondent on the other hand submitted that the evidence that the Applicants have purportedly discovered is in relations to the main Petition and not in relation to the Application of May 10, 2021 that they arrested. It was argued that the Respondent raised a preliminary objection to that application which this Court rightly dismissed therefore that they ought not be allowed to now arrest a ruling on the pretext that they have discovered new evidence. The Respondent then argued that the



Applicants are playing delay tactics to further drag the disposition of this Petition to his detriment. He further argued that the prayers in the application are couched in a way that it seeks to reopen for hearing their application which parties had argued and closed submissions. In this he relied on the case of *Samuel Kiti Lewa v Housing Finance Co. of Kenya limited and another* [2015] eklr where Kasango J held that;-

“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. Also such prayer for re-opening of the case will be defeated by inordinate and unexplained delay.”

15. He also relied on the case of *Coca-Cola central east and west Africa limited v commissioner of domestic taxes* [2020] eklr, the Court held that; -

“The Respondents forceful argue that to reopen the matter for arguments will cause further delay on the matter. That I agree. Should the Court allow the reopening then some further delay is inevitable. He answer to the Respondent’s anxiety is for this Court to impose strict timelines on further submissions so that the reopening does not drag on....25. This Court is also told that to allow the application is to permit the Appellant to re-litigate this matter and to subject the Court and Respondent to unending arguments... But so that the reopening of arguments is not abused, this Court will ring fence the leave it shall shortly be granting”

16. Accordingly, the respondent submitted that order 51 rule 12 provides for when an application is deemed to have been made and that in this case the application had been made response in form of Preliminary objection made and submissions filed, therefore there was no further room to reopen the application without any cogent reason.

17. On that basis the Respondent urged this Court to dismiss the application.

18. I have examined the averments of the parties herein. The application by the applicants is to be granted leave to file further Replying affidavit and introduce some evidence that has recently been availed to them.

19. The Respondents opposed this application saying that the evidence purportedly found is in respect of the main petition and not the application. I have considered the fact that this Court of law and a Court of justice. Being a Court of justice, the Court should well be enabled by the parties to reach a just verdict upon considering any evidence available.

20. This Court retains its inherent discretion to re-open a case which discretion must be exercised judiciously.

21. In this case the reopening of this case would not disadvantage any party as the evidence available will be subjected to the truth and the Respondent will also be allowed to respond to it.

22. I will therefore exercise my discretion and allow this application. I will allow the Respondents to file a further replying affidavit to which the applicant will be given an opportunity.

23. Costs in the cause.

**RULING DELIVERED VIRTUALLY THIS 24<sup>TH</sup> DAY OF MAY, 2022.**

**HON. LADY JUSTICE HELLEN WASILWA**



## **JUDGE**

In the presence of:-

Karanja Mbugua for the Petitioner – present

Respondents – Absent

