



**Mwangi v Family Bank Limited (Cause 331 of 2014)  
[2022] KEELRC 1516 (KLR) (16 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1516 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 331 OF 2014  
DN NDERITU, J  
JUNE 16, 2022**

**BETWEEN**

**FLORA NJOKI MWANGI ..... CLAIMANT**

**AND**

**FAMILY BANK LIMITED ..... RESPONDENT**

**RULING**

1. The Claimant commenced the main cause herein by way of a memorandum of claim dated 25<sup>th</sup> July, 2014 filed in court on 28<sup>th</sup> July, 2014 with several prayers as set out in that memorandum.
2. Together with the memorandum of claim, as expected, the Claimant filed her witness statement, list of documents, and copies of the listed documents.
3. On 12<sup>th</sup> October, 2014 the Claimant filed an amended memorandum of claim.
4. The Respondent filed a memorandum of response on 22<sup>nd</sup> October, 2014 and an amended memorandum of response on 26<sup>th</sup> November, 2014.
5. On 22<sup>nd</sup> October, 2014 along with the memorandum of response the Respondent filed a list of 16 documents but from the record the copies of the listed documents were not supplied to court and presumably to the Claimant's Counsel.
6. On 2<sup>nd</sup> March, 2015 the Respondent filed a supplementary list of documents containing 14 documents and copies of the said documents.
7. On 11<sup>th</sup> October, 2019 the Respondent filed another supplementary list of documents consisting of 33 documents with copies of the listed documents annexed.
8. On 21<sup>st</sup> February, 2020 the matter came up for hearing (Mbaru J) and the Claimant (CW1) testified in-chief, was cross-examined, and re-examined. The Claimant closed her case on the said date.



9. After a prolonged period of dormancy this matter came up before this court for hearing on 20<sup>th</sup> September, 2021 when Counsel for both parties agreed that the matter do proceed before this court from where it had reached.
10. The matter came up for defence hearing before this court on 3<sup>rd</sup> November, 2021 when RW1, Stephen Kimani Ngaru, started his testimony but stopped midway when Counsel for the Claimant opposed to production of the documents in the Respondent's supplementary list of 33 documents filed in court on 11<sup>th</sup> October, 2019. The court ordered Counsel for the Respondent, Mr. Murimi, to file and serve a list and copies afresh and mark the documents properly for the benefit of the court and Counsel for the Claimant, Mr. Mwangi. At that juncture RW1 was stood down.
11. On 4<sup>th</sup> November, 2021 Counsel for the Respondent filed a list as directed containing 35 documents and copies of all the documents listed.
12. When the matter came up in court for further defence hearing on 16<sup>th</sup> November, 2021 Counsel for both parties confirmed that the documents had been filed and served and hence the defence hearing continued.
13. During the hearing RW1 relied on the said list of documents and copies of the said documents and produced the same as exhibits 1 to 35. This court specifically asked Counsel for the Claimant, Mr. Mwangi, if he was opposed to production of any of the 35 documents and his response was unequivocal NO. The court then marked the 35 documents as Respondent's exhibits 1 to 35.
14. The defence hearing proceeded on the said date and RW1 was examined in-chief, cross-examined, and partly re-examined.
15. RW1 was further re-examined on 15<sup>th</sup> December, 2021 and the Respondent closed its case.
16. Upon the conclusion of the Respondent's case on 15<sup>th</sup> December, 2021 Counsel for the Claimant made an oral application to the effect that the documents produced as exhibits 10, 11, 12, 13, 15, and 16 by RW1 for the Respondent were new to the Claimant and that the same should be expunged from record.
17. To enable the court and Counsel for the Respondent to fully appreciate the nature, gist, and substance of the application made by counsel for the Claimant the court directed that a formal application be filed on record. That is the application that is now the subject of this ruling.

## **II. The Application**

18. By way of Notice of motion dated 21<sup>st</sup> January, 2022 the Claimant is seeking the following orders:-
  1. That the following documents be and are hereby expunged from the Respondents list and bundle of documents.
    - a) Statement by Susan Wanjiru Mbui
    - b) Bank Statement for Desert Storm Safaris product Limited
    - c) Bank Statement for Daniel James Ngahu Nganja
    - d) Bank Statement for Peter Gitau Muiruri
    - e) Statement by laban musyoka
    - f) Statement by Peter Gitau Muiruri



- g) Incident Report
- h) Disciplinary hearing proceedings
- i) Customer Receipts

2. Costs of this application be provided for.

- 19. The said application is expressed to be brought under Articles 159 and 50 of the Constitution and Rule 16 of the Industrial Court (Procedure) Rules, 2010. It is based on the grounds on the face of it and is supported by the affidavit of Flora Njoki Mwangi, the Claimant, sworn on 21<sup>st</sup> January, 2022.
- 20. In response to the said application, the Respondent filed a replying affidavit sworn by Paul Murimi Kiongo, Advocate for the Respondent, on 3<sup>rd</sup> February, 2022.
- 21. On 31<sup>st</sup> January, 2022 by consent of Counsel for both parties the court directed that the said application be heard by way of written submissions. Counsel for Respondent filed his submissions on 17<sup>th</sup> February, 2022 and Counsel for the Claimant on 21<sup>st</sup> February, 2022.

### III. The Law

- 22. The Claimant has cited Articles 159 and 50 of the Constitution as the main provisions relied upon in filing the said application. Article 159 provides for various aspects of judicial authority and has three sub-articles relating to various aspects of judicial authority. The Claimant has not specifically pointed out which of those aspects relate to this application. However, this court is fully aware and cognizant of the provisions of that entire Article on judicial authority and stands by and for each and every provision therein.
- 23. Article 50 is on fair hearing. This Article has 9 Sub- Articles and again the Claimant has not particularized the specific provision(s) relied on. Article 50(1) provides as follows:-

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 court or if appropriate, another independent and impartial tribunal or body.”
- 24. This court appreciates and stands by the right to fair hearing for all parties and disputes that come before it regardless of status and hence stands by and for the above provisions and indeed the entire Constitution.
- 25. The other provisions of the law relied upon by the Claimant are the Industrial Court (Procedure Rules), 2010. For record, those rules were repealed and revoked through the Employment and Labour Relations Court (Procedure) Rules, 2016 and this fact was brought to the attention of the Counsel for the Claimant by Counsel for the Respondent through the replying affidavit and the written submissions, yet Counsel for Claimant took no action to either amend the application or file further or supplementary affidavit.
- 26. This far the application should be dismissed for lack of proper legal grounding and foundation. However, since this court is called upon by Section 3(1) and (2) of the Employment and Labour Relations Court Act, 2011 and other laws to dispense justice without undue regard to technicalities, this court shall proceed to interrogate the application on merits to render substantial justice.
- 27. As noted in an earlier part of this ruling all the documents produced as exhibits by the Respondent were produced in court in presence of Counsel for the Claimant who raised no objection to their



- production. The court specifically asked Counsel for the Claimant if he was opposed to production of any of the documents listed and contained in the bundle and his answer was an emphatic No.
28. Upon production of the said documents as exhibits the said 35 exhibits became part of the court record and property of the court. The said documents, now exhibits, are in custody of the court to be evaluated on their veracity and value in respect of the facts related thereto. This is the ratio by the Court of Appeal in *Kenneth Nyanga Mwage v Austin Kiguita & 2 Others* (2015) eKLR and Oundo J (Nyahururu ELC) in *Church Commissioners for Kenya & Another v Board of Management Oljoro Orok Primary School* (2019) eKLR.
  29. Admission or production of a document as an exhibit in evidence on record does not mean that its veracity has been proved. The court has to evaluate the same in conjunction with other evidence on record to determine whether the fact that the document was intended to support has been proved.
  30. Counsel for the Claimant was present in court when the contested documents were produced as exhibits and admitted in evidence. He cannot turn around and claim or argue that the said documents should not have been admitted in evidence and that the same should be expunged from record. That is a dangerous afterthought that cannot be entertained in a court of justice.
  31. To be clear, the Claimant is not seeking that she needs to come back to court to testify on the impugned documents. Even if that was the application it would still be an uphill task in terms of the law and procedure applicable.
  32. Expunging the said documents from the court record would be highly prejudicial to the Respondent who relied on and produced the same with full knowledge and consent of Counsel for the Claimant.
  33. This court has carefully gone through the application, the supportive affidavit by the Claimant, and the written submissions by her Counsel. There is no law or decided cases cited that support the prayers sought.
  34. This application is distinguishable from the circumstances obtaining in Meru ELC No. 245 of 2016 – *Yuda Imunya v Atanasio Kibaara and Johana Kipkemboi Too v Hellen Tum* Nairobi ELC No. 975 of 2012. As stated elsewhere in this ruling the documents were served upon Counsel for the Claimant before they were produced in evidence and Counsel for the Claimant informed the court that he was not opposed to their production as exhibits. This position is again distinguishable from the circumstances in *Orbit Holdings Limited v Mariakani Holdings Limited & Another* (2016) eKLR.
  35. In paragraphs 7 to 13 of the replying affidavit, the Respondent has explained and demonstrated that the impugned documents were in full knowledge of the Claimant and her Counsel since 30<sup>th</sup> September, 2014. The Claimant did not file any further or supplementary affidavit to challenge that disposition.
  36. Justice cuts both ways. I have not come across any law or decided cases that provide for recalling of evidence and more so exhibits once they have been marked and produced in evidence.
  37. As stated elsewhere in this ruling, once exhibits are produced in evidence they become part of the judicial record which is the property of the court. Through this application the Claimant is calling upon the court to destroy its property that is supposed to aid the court in deciding the cause. Fortunately, there is no law in support of such a ruthless, unfair, and prejudicial proposition.
  38. There is nothing from the Claimant to illustrate and demonstrate that the said documents were irregularly, unprocedurally, or unlawfully produced as exhibits.



#### **IV. Disposal**

39. This court has carefully gone through all the materials placed before it, including the written submissions by Counsel for both parties.
40. As stated elsewhere in this ruling, the constitutional provisions cited in purported support of the application have not been substantiated and the rules cited are repealed and not applicable. The application is hollow and lacking in merits. It is an afterthought by the Claimant which has had serious consequences in delaying the conclusion of this matter.
41. The said application is found to have no merits and the same is hereby dismissed with costs to the Respondent in any event.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 16<sup>TH</sup> DAY OF JUNE, 2022.**

.....

**DAVID NDERITU**  
**JUDGE**

