



**Nyambu v Consolbase Limited (Cause 62 of 2019)
[2022] KEELRC 13091 (KLR) (3 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13091 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 62 OF 2019
AK NZEI, J
NOVEMBER 3, 2022**

BETWEEN

BALDWIN MWANYALO NYAMBU CLAIMANT

AND

CONSOLBASE LIMITED RESPONDENT

RULING

1. This is a 2019 suit. When the matter came up in Court for mention on July 13, 2021, the Respondent was granted fourteen days to file witness statements and the Court fixed the case for mention on September 28, 2021 for fixing of a hearing date.
2. On September 28, 2021, the Respondent's Counsel told the Court that the Respondent had filed everything, and was ready to take a hearing date for the case. The suit was subsequently fixed for hearing on 1/2/2022, on which date the Claimant testified and was cross-examined by the Respondent's Counsel. The suit was then fixed for defence hearing on May 18, 2022. On May 12, 2022, however, the Respondent filed a Notice of Motion dated even date seeking orders:-
 - a. that the Court be pleased to grant the Respondent/Applicant leave to file additional documents that were inadvertently omitted during filing of the Memorandum of Response.
 - b. that the Claimant's case be re-opened to enable Counsel for the Respondent/Applicant to cross examine the Claimant/Respondent on the basis of the additional documents so filed with leave of the Court.
 - c. that costs of the application be provided for.
3. The application is based on the supporting affidavit of Sauda Said sworn on May 12, 2022. The said affidavit annexes a list of eighteen (18) documents and a bundle of the listed documents. It is deponed in the said supporting affidavit, inter-alia:-



- a. that the Respondent opposed the Claimant’s claim vide a Memorandum of Response dated December 18, 2019 and filed on January 9, 2020 through the Federation of Kenya Employers (FKE).
 - b. that the Respondent provided their Counsel with all the documents to be relied on, but Counsel did not file the documents along with the other documents contained in their list of documents.
 - c. that while the omission by Counsel was inadvertent, it puts the Respondent/Applicant in a disadvantaged position.
 - d. that the Respondent did not establish the omission by the previous Counsel prior to closure of pleadings and that no -pre-trial was conducted.
 - e. that the Respondent/Applicant will suffer prejudice if the documents sought to be filed are not admitted on record.
4. The application is opposed by the Claimant/Respondent *vide* his Replying Affidavit sworn on May 17, 2022 and filed on the same date.
 5. Both parties filed submissions on the application pursuant to the Court’s directions in that regard, which I have considered.
 6. The orders sought by the Respondent/Applicant are discretionary in nature. It should, however, be noted that it is absolutely unjust, and indeed unacceptable, for a defendant to seek to introduce new evidence in a suit after hearing the Claimant’s evidence and even cross-examining the Claimant. The practice by litigants of attempting to build their side of the case as the hearing progresses must stop. The omission alleged by the Respondent/Applicant is one that ought to have been discovered before closure of pleadings, and at the latest, during preparation for the trial. Waiting until the Claimant has testified before deciding what further evidence to introduce cannot be countenanced by this Court; for it is a sure way of visiting injustice on the party who has already testified and gone through cross-examination by the party seeking to introduce new evidence.
 7. The Respondent/Applicant’s attempt to blame its Counsel for failing to list and to file the documents sought to be introduced does not mitigate the situation. The Claimant cited the Court’s decision in *Julius Odhiambo Oduor -vs- The Chairman, Secretary, Auditor & Organisers of Nyikwa Ramogi Welfare* – Mombasa HCCANo. 186 of 2018 Where, In Quoting From *Savings & Loans Limited -vs- Susan Wanjuri Muritu* (Nairobi/Milimani) HCC No. 397 of 2002, the Court stated:-

“ whereas it could constitute a valid excuse for the defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant but not to her advocate. A litigant has a duty to pursue the prosecution of his or her case...It is the duty of a litigant to constantly check with her advocate the progress of her case...”
 8. The Respondent/Applicant ought to have discovered the alleged non-filing of its alleged evidential documents, the latest time to do so being when its witnesses called into their advocates’ chambers for pre-trial briefing before the trial commenced, if at all they did. The Claimant cannot be made to suffer prejudice because of omissions or negligence on the part of the Respondent/Applicant and its



Counsel. The Court in the case of *Omwoyo-vs- African Highlands Produce Co. Limited* [2002] eKLR (Ringera J) had the following to say; and I agree,

“Time has come for legal practitioners to shoulder the consequences of their negligence acts or omissions like other professionals do in their fields of endeavor. The plaintiff should not be made to shoulder the consequences of the negligence of the defendant’s Advocates. This is a proper case where the defendant’s remedy is against its erstwhile Advocates for professional negligence and not setting aside the judgment.”

9. I find no merit in the Notice of Motion dated May 12, 2022, and the same is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 3RD DAY OF
NOVEMBER 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

..... for Claimant/Respondent

..... for Respondent/Applicant

