



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1716 OF 2015

PROFESSOR MWANGI S. KIMENYI.....CLAIMANT

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

KENYA INSTITUTE FOR PUBLIC POLICY

RESEARCH AND ANALYSIS (KIPPRA).....2ND RESPONDENT

AND

1. IRENE WANGUI KIMENYI

2. FRANCIS WESLEY KIMENYI.....APPLICANTS

RULING

1. The Claimant herein seeks the introduction into evidence the record of Appeal No. 1 of 2008 in Civil Appeal No. 160 of 2008, which is asserted may be the only document not adduced or produced in the list of the Claimant's documents No. 1-8 or the list dated 16th May 2018. The list was filed on 17th May 2018. Mr. Kihara for the Claimant seeks the document to be adduced and granted that the Claimant's witness is based in the United States there is no way of putting the document to the witness and requiring her to respond.

2. The Motion is opposed by Miss Nyaga for the 2nd Respondent and Mr. Odukenya cedes in favour of the response of the 2nd Respondent. She submits that the Court should note that this is the third attempt to introduce the evidence now being deferred to. She argues that the application being made now was made formally before my brother Radido J. who declined to grant the Motion and the said Ruling was subject of a review application and that the Learned Judge declined to grant the orders sought on review and dismissed the Motion seeking review. Miss Nyaga argues this therefore is the third attempt at this and urges this Court not to sit in appeal or review of the orders of Radido J. as the Court is not clothed with the jurisdiction to do so.

3. Mr. Kihara for the Claimant argues that the position as articulated by Miss Nyaga is not the correct position and asserts that from the list of documents such as the confirmation of grant letters was introduced in evidence and that the list was not struck out. He states the Motion was for documents in addition to and not to take away from the documents already produced by the Claimant's witness. He argued that it is neither here nor there who produces the evidence on record. He submitted as the witness has not been cross-examined, she cannot be shut out from this.

4. The Ruling by Radido J. on 20th September 2019 is instructive. The Learned Judge stated this in paragraph 17-19 of the Ruling –

17. Although not denying that the Response and Counter Claim were served in 2015, the Claimant did not disclose to the Court the time that she came across the documents she had intended/attempted to introduce some 4 years later, through the review application.

18. In the circumstances, the principal reason advanced by the Claimant cannot be valid or genuine.

19. If the reason was genuine, the Claimant should have disclosed when she came upon the documents and also explained why she did not take advantage of the window opened to her on 15th April 2018 to file and serve further documents before 18th May 2019.

5. I have laboriously produced my brother Radido J.'s Ruling to ventilate the issue clearly. As noted by my colleague, the Motion before him in September 2019 was a review that of necessity presupposes a prior Motion the result of which the Claimant sought review. As such, granted that I have now heard the prayer by the Claimant's advocate, it seems to be another attempt to take a further bite of the cherry. As correctly pointed out by Miss Nyaga, I do not have the authority to sit on appeal over a decision of my brother Radido J. as we are Courts of the same status. As such, the attempt to seek a further review or consideration of matters already dealt with by Radido J. suggest that the Claimant is unwilling to let go of a matter already determined by the Court.

6. The foregoing is ample proof that I cannot accede to the request to introduce into evidence documents that were rejected prior to the testimony of the Claimant's witness being adduced before Radido J. The oral application by the Claimant's advocate is declined and dismissed albeit with no order as to costs. As the time allocated for hearing has lapsed, the suit will be heard before me on a date to be issued immediately after this Ruling.

So ordered

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JUNE 2021

NZIOKI WA MAKAU

JUDGE