



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1251 OF 2017

ABIGAELE JANE AYAKO.....CLAIMANT

VERSUS

MASAI MARA SOPA LODGE LIMITED....RESPONDENT

RULING

1. The Respondent/Applicant filed a Notice of Motion Application dated 29th July 2021 seeking Orders that:

i. Spent

ii. The email dated 26th March 2015 from the Claimant to the Respondent's management team be admitted into evidence by way of a supplementary bundle of documents to be filed by the Respondent.

iii. The Claimant be recalled to testify or comment on the email if necessary

iv. Costs of the application be provided for.

2. The Application is premised on the grounds that whereas the Claimant's case was heard and closed on 21st July 2021, the Respondent has come across evidence in form of an email written by the Claimant to the Respondent's management team, which ought to be brought before the court for the just and conclusive determination of the matter. The Respondent asserts that the Claimant's case is that she was not personally consulted by the Respondent in effecting a salary cut programme to mitigate the effects of a harsh economic climate while it the Respondent's case that the Claimant being the HR Manager at the time, was involved in the salary cut programme. The Applicant asserts that the introduction of the email into evidence will not alter the character of the Claimant's case and that this Court ought to determine the case based on all available material facts. The Respondent asserts that it is just and fair that the said evidence is admitted and if necessary, the Claimant be recalled to testify or comment on the email by a virtual session which will not take more than 10 minutes. The Application is supported by the affidavit of the Respondent/Applicant's Andreas Vogt who depones that the email dated 26th March 2015 is a communication by the Claimant of the Respondent's management's decision to issue salary cuts to cushion it through the harsh economic climate it was facing then. He avers that the said email was not availed to their advocates at the time of discovery due to an oversight and believes the same will assist this Court to comprehensively determine the matter. He annexed the exhibit marked "AV1" comprising of the email.

3. The Claimant/Respondent is opposed to the grant of the motion and her opposition was vide a replying affidavit. In her Replying Affidavit sworn on 16th August 2021 she depones that the application is without merit and only intended to delay the conclusion of the proceedings. She deponed that being the employer, the Respondent had a statutory duty to keep all records pertaining to the terms of her engagement as well as records of earnings, leave days and changes in contract. The Claimant avers that the Respondent filed its Memorandum of Response, Counter-claim, List and Bundle of Documents, and Supplementary List of Documents in support of its case and that it therefore had a chance to file all documents from her employment file. The Claimant asserts that the Respondent/Applicant has not explained to the Court why it never filed the said email together with the other emails filed in Court considering it has been 4 years since the suit was filed. The Claimant deponed that the excuse given by the Respondent is not a legal basis for it to file additional documents after her testimony and it has also not demonstrated that no amount of diligence would have brought the said email within their knowledge before the matter was fixed for hearing. The Claimant/Respondent further avers that the intended placement of the email on record will greatly prejudice her and jeopardize her right to fair hearing as she did not have a chance to prepare for and address its contents when she testified. That admitting the email as evidence will set bad precedence as defendants will be waiting until after the grievant has given evidence to add more documents in the hope of covering their wrongs and that the Respondent/Applicant is simply seeking to fill the gaps she exposed in their defence. She asserts that the email is of no probative value as it only shows communication of a decision with respect to other employees' remuneration and does not show that she was personally consulted and accepted to take a pay cut. Further, the application does not meet the threshold for recalling a witness which is to demonstrate there is an exceptional circumstance for recalling the witness and that there is a good reason why such

evidence was not given in the first instance. She depones that this Court has a duty to ensure expeditious disposal of matters and must not condone the Applicant's time wasting schemes.

4. In response, the Respondent/Applicant filed a Further Affidavit sworn on 21st September 2021 by Andreas Vogt who avers that documents including emails that relate to general personnel or human resource matters are filed in a general personnel file at the Respondent's offices and not the employee's human resource (personal file). He deponed that the Respondent's then HR Assistant, Mr. Cosmas Tialal was tasked with obtaining documents in relation to this matter and sending them to the Respondent's advocates and that his failure to obtain and present the said email to form part of the Respondent's bundle of documents is regrettable. He prays this Court excuses the oversight and admits the said email.

5. The Respondent/Applicant filed its submissions after it had sight of the Claimant's submissions. It submits that the case of **Victoria Naiyanoi Kiminta v Gladys Prinsloo** (*infra*) relied upon by the Claimant, supports the position that the court ought to exercise its discretion to allow production of additional evidence if the Claimant will suffer no prejudice. The Respondent submits that if the Claimant/Respondent considers that the email has no probative value then the same is a confirmation that she will suffer no prejudice if the email is produced. It submits that it has explained in the affidavits sworn by Andreas Vogt that the failure to produce the email before the start of the case was not deliberate as the email was filed in the Claimant's human resource (personal) file as opposed to the general personnel file. The Respondent averred that it indeed exercised diligence in getting documents to support its defence in the case and that there is no indication that the Respondent's official checked only one file and waited to check the other after the Claimant had testified. The Respondent submits that there is further no evidence that it deliberately withheld the production of the email and only sought to produce it now to gain an advantage over the Claimant. It is the Applicant's submission that the Court should be slow to punish a litigant who inadvertently failed to produce a document in court and who upon finding the document, has applied to court at the earliest opportunity to have it presented to court so as to assist the Court reach a conclusive determination of the matter. It relies on the principles enunciated in the case of **Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & Another [2019] eKLR** and where the Court held that Section 146 of the Evidence Act provides for inherent power of the court to allow witnesses to be recalled and evidence obtained in accordance with the provisions to either conduct examination in chief, further cross-examination and re-examination respectively. The Respondent submits that in the present case, the Court has the power to recall the Claimant to testify once it has admitted the email as part of the Respondent's bundle of documents and that this includes the cross-examination and re-examination of the Claimant on the email. It is submitted by the Applicant that the Claimant has not showed what prejudice she will suffer and it urges the Court to allow the application by relying on the principles set out in the case of **Talewa Road Contractors Limited v Kenya National Highways Authority [2019] eKLR** that disputes should be heard on their own merit where possible and errors should not necessarily deter a litigant from the pursuits of his right.

6. The Claimant/Respondent submits that the primary principles governing an application for adducing new evidence are enunciated in the case of **State v Hepple, 279 Md. 265, 368 A.2d 445 (Md. 1977)** cited in **Raindrops Limited v County Government of Kilifi [2020] eKLR** where the court stated that "*the Judge must consider whether the party deliberately withheld the evidence proffered in order to have it presented at such time as to obtain an unfair advantage by its impact on the trier of facts.*" It is her submission that the application herein does not meet the threshold for adducing new evidence and recalling of a witness and that the application will only prejudice her as it is only seeking to fill gaps in the Respondent's case. She further cites the case of **Victoria Naiyanoi Kiminta v Gladys Prinsloo [2019] eKLR** where the Court elaborated the principles guiding the court in such an application and stated that:

"Over the years, courts in the Commonwealth have developed principles which guide the jurisdiction to re-open a case and receive additional evidence in a trial court. First, the jurisdiction is a discretionary one and is to be exercised judiciously. In exercising that discretion, the court is duty-bound to ensure that the proposed re-opening of a part's case does not embarrass or prejudice the opposite party. Second, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the court will not grant the plea. Third, the plea for re-opening of a case will be rejected if there is inordinate and unexplained delay on part of the applicant. Fourth, the applicant is required to demonstrate that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of his case..." (emphasis theirs)

The Claimant urged the disallowance of the motion.

7. The application is for denial. The Respondent has the burden to prove that the evidence it now wishes to introduce in the case could not have been obtained with reasonable diligence at the time of hearing of her case. The Respondent has not convinced the Court that there was no way it could access the email as emails are ordinarily not filed in physical files but exist online through the server the email service provider holds. As there is no basis for the grant of the Respondent's motion the same is dismissed with costs to the Claimant and the annexure AV1 expunged from the Court record as it is of doubtful provenance.

8. The Court will give directions as to the further hearing of the matter immediately upon the delivery of this Ruling as the case is part heard.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER 2021

NZIOKI WA MAKAU

JUDGE