REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 2406 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

UMURO WARIO.....CLAIMANT

VERSUS

YOUTH ENTERPRISE DEVELOPMENT FUND BOARD....RESPONDENT

RULING

The claim herein was heard on 26th November 2018 when both the claimant and respondent called their witnesses and the hearing concluded. Parties thereafter took directions for filing submissions.

During trial while the respondent's witness was testifying on 26th November 2018, the Claimant attempted to produce a newspaper cutting from the Daily Nation as evidence but the Respondent's Counsel objected to the same and in its ruling on the objection, the court agreed with Counsel for the respondent and sustained the objection to the production of the newspaper cutting as it was not part of the claimant's documents on record.

Further, the Respondent's witness did not adduce any evidence from

the Claimant's Annual Performance Appraisal Forms. The Claimant has filed this Application seeking leave to recall the Respondent's witness to produce the claimant's Annual Appraisal Forms. The claimant further seeks leave to admit in evidence the newspaper cutting of the Daily Nation of 28th October 2009. The claimant further seeks order that the costs of the Application be in the cause.

The grounds in support of the application are set out on the face of the Application and the Applicant's Supporting Affidavit. They are that the Respondent is the sole custodian of the Claimant's appraisal form and ought to have adduced it as evidence. It is the Claimant's position that the Respondent's witness was not present at the Board Meeting purportedly held on 3rd November 2010 hence could not confirm whether the Board had indeed conducted a performance appraisal. Further, the Applicant views the Respondent's failure to produce his personal file as an attempt to conceal material facts.

It is the Claimant's position that Section 86(1)(b) of the Evidence Act requires the court to presume the genuineness of the newspaper cutting.

The Respondent has opposed the Application on the grounds that the Application is frivolous and vexatious hence an abuse of the court process as no proper basis has been disclosed to re-open the case for hearing or re-call of its witness to produce additional documents. The Respondent avers that it filed and adduced all the documents it intended to rely on at the hearing.

It is further the respondent's position that the Court has not set aside its order barring the Applicant from adducing the newspaper cutting as evidence. It is the Respondent's position that the Application defeats the objective of pre-trial processes and this Court's principle objective of facilitating expeditious and efficient disposal of cases. Lastly, that the Application has been lodged after an inordinate and inexcusable delay.

The Application was disposed of by way of written submissions. Only the Applicant filed his submissions. He submitted that the Respondent ought to have produced the Annual Performance Appraisal Forms as evidence of his poor performance. He relied on the case of ***Alex Wainaina Mbugua vs. Kenya Airways [2017] eKLR***. He further submitted that the court should presume the genuineness of the newspaper cutting pursuant to section 86(1)(b) of the Evidence Act as it proves his exceptional performance and dispels the Respondent's allegations. He further submitted that it also demonstrates the unprocedural manner in which the Respondent failed to renew his contract. He relies on ***IEBC vs. The National Super Alliance & Others Civil Appeal No. 224 of 2017***.

Analysis and Determination

After considering the pleadings and analyzing the evidence and submissions presented before this Court, the issues for determination are whether the claimant has met the threshold for reopening of the case and the production of the additional evidence. The other concurrent issue is whether the claimant can reopen the respondent's case and compel the respondent to produce specific evidence.

In the case of ***Joseph Ndungu Kamau -V- John Njihia (2017) eKLR***, where the court was confronted by a similar issue, the court observed as follows –

> *The principles governing an application such as that before the court are that the court needs to find out why the evidence was not adduced prior to the hearing of the case being closed. Reopening will not normally be allowed if failure was deliberate. Needless to state, the decision whether or not to allow such an application is a discretionary one which must be exercised judiciously. While considering a similar application in* ***Samuel Kiti Lewa v Housing Finance Co. Of Kenya Ltd & Another [2015] eKLR*** *Kasango J. stated that Uganda High Court, Commercial Division in the case SIMBA TELECOM –V- KARUHANGA & ANOTHER (2014) UGHC 98 had occasion to consider an application to re-open the case for purpose of submitting fresh evidence. That court referred to an Australian case SMITH –VERSUS- NEW SOUTH WALES [1992] HCA 36; (1992) 176 CLR 256 where it was held:*
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> > *"If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which reasons for the judgment have been delivered. In the latter situations the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised."*
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> *The Ugandan Court in the case of SIMBA TELECOM (supra) held thus:*
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> > *"I agree with the holding in the case of Smith Versus South Wales Bar Association (1992) 176 CLR 256, where it was held that the question of whether additional evidence should be taken at the trial is considered separately from the question of whether the case should be reopened. Consequently even after the case has been reopened, the court retains its discretionary powers whether to admit any piece of evidence or not."*
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> *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 in ordinate and unexplained delay."*

I concur with the principles as stated by the Judge in the said case. Reopening proceedings must be allowed only after the applicant has established justifiable grounds for not submitting the evidence in the first place.

In this case, the claimant testified and closed his case. While the respondent's witness was testifying, the claimant attempted to produce the newspaper cutting that is the subject of prayer (c) of this application but the same was objected to by Counsel for the respondent. The court made a specific ruling upholding the objection and gave its reasons thus –

> *"All documents are supposed to be filed in advance. According to*
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> *the Rules no documents are produced during hearing. The production or reference to any documents not on record can only be done by consent or upon application to be considered and determined by the court. The objection is therefore sustained."*

The present application is thus an attempt at a second bite on the same issue, if I may refer to it as such, it is an attempt to review the ruling of the court sustaining the objection but now camouflaged as a fresh application.

The grounds for review are set out in Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016 being discovery of new and important evidence which could not be produced at the hearing after exercise of due diligence; mistake or error apparent on the face of the record; clarification of judgment or ruling; and other sufficient reason.

In the present case the claimant's reasons as set out on the face of the application and in the affidavit in support thereof are that –

a) That the hearing proceeded in court on 26th November 2018.

b) That the claimant attempted to produce in evidence a cutting of the Daily Nation newspaper. However the respondent's Advocate objected to its production in evidence.

c) That the respondent's witness testified however she did not come to court with the claimant's personal file especially the Annual Performance Appraisal Forms.

d) That it is in the interest of justice that this application be allowed.

These are not valid grounds for review or for reopening of a case that has been heard and closed. The claimant cannot be allowed to patch up loopholes in his case after he has closed his case and the respondent has also closed his case. This would be against the principle of finality as well as the principle objective in the Employment and Labour Relations Court Act that the court facilitates the just, expeditious, efficient and proportionate resolution of disputes governed by the Act.

On prayer (b) that the application that the court recalls the respondent's witness to produce the Annual Appraisal Forms from the claimant, I have two observations. First, the Kenyan Court system is an adversarial system. A party can thus not be compelled by the adversary to produce some specific evidence or to direct that it conducts its case in a particular manner. The evidence to be adduced by a party is entirely in that party's discretion. If a party wishes to produce evidence in the possession of the adversary, the Rules provide for discovery. It is only at that stage that the court can compel a party to avail certain evidence to the adversary or to the court.

The claimant has not shown that he requested for the production of his Annual Appraisal Forms and either the court failed to make the orders or the respondent refused to produce the documents. That window having closed the claimant cannot be allowed to reopen it at this stage of the proceedings when all the evidence is in and parties have filed their final submissions and are awaiting judgment.

For the foregoing reasons I find that, the claimant has not met the threshold for reopening of the case or established sufficient grounds to justify the grant of the orders sought. The result is that the application is unmerited and the same is dismissed.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF SEPTEMBER 2019.

MAUREEN ONYANGO

JUDGE