



Kenya Private Universities Workers Union v Africa Nazarene University (Employment and Labour Relations Cause E736 of 2022) [2024] KEELRC 2065 (KLR) (26 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 2065 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E736 OF 2022**

**AN MWAURE, J
JULY 26, 2024**

**BETWEEN
KENYA PRIVATE UNIVERSITIES WORKERS UNION CLAIMANT
AND
AFRICA NAZARENE UNIVERSITY RESPONDENT**

RULING

1. The Respondents filed a Notice of Motion dated 15th March 2024 seeking the following orders THAT:
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 1. sent
 2. the Honourable Court do and hereby issue an order transferring MCELRC No. E1792 of 2022 at the Chief Magistrate Court at Nairobi to Employment and Labour Relations Court at Nairobi.
 3. the Honourable Court do and hereby issue an order transferring MCELRC No. E1792 of 2022 at Magistrate Court and ELRC Cause No. E736 of 2023 in this Honourable Court.
 4. the Honourable Court do and hereby issue an order against the Respondent to produce the payrolls from the months of September, October, November, December 2019 and February, March and April 2020.
 5. any other orders the Honourable Court may deem fit to grant.
 6. the cost of this Application be in the cause.



Claimant/Applicant's Case

2. The Claimant/Applicant avers that the two suits were filed by the firm of Rakoro and Company Advocates on its behalf by splitting them into two and filed in different courts yet the cause of action was the same and the same Respondent.
3. The Claimant/Applicant avers that the aforesaid firm has since withdrawn and it wishes to act in person for her members being the Claimants in MCELRC No, 1792 of 2022 yet it cannot be given audience.
4. The Claimant/Applicant avers that the counsel who was on record split the two matters on his own with knowledge that the parties have a duly signed and valid Recognition Agreement. This position was shared to the Applicant in a letter dated 03/006/2023.
5. The Claimant/Applicant avers that the Respondent having declared the grievant and the claimants in ELRC No. E736/2022 and the Claimants in MCELRC No. 1792 of 2022 on ground of financial constrain but soon increased the salaries of the remaining staff and immediately engaged new staff.

Respondent's Case

6. The Respondent vide his replying affidavit dated 8th May 2024 opposed the Claimant's application.
7. The Respondent avers that prayer (4) of the application seeking production of employee payroll is premature as the court is yet to consolidate the cases to enable it appreciate the matters in totality.
8. It's the Respondent's case that the Claimant is yet to demonstrate the redundancy was unfair. The need for production of payroll can only be ascertained at a plenary hearing and not an application stage.
9. The Respondent avers that it will be in breach of its duty of confidentiality and obligations as a data controller if it avails payroll records of its employees, which are personal in nature and do not relate to the Claimants in the present suit or CMCC ELRC No. E736 of 2023. It can only avail payrolls with respect to the Claimant.
10. The Respondent avers that the payroll records sought falls well outside the respective termination dates of the Claimants in the present case and CMCC ELRC No. E736 of 2023. No payment records/ payrolls subsist with respect to the Claimants after their respective termination dates. The Respondent that it is ready and willing to avail the Claimants' own payroll records.

Claimant/Applicant's Submissions

11. The Claimant/ Applicant submitted that the Respondent in its replying affidavit dated 08/05/2024 that it is not opposed to order 2,3,5 and 6 of the Notice of Motion which should be granted as consented.
12. It's the Claimant/Applicant's submission that the payroll records for the period sought does not fall after the grievants termination. The redundancy process was initiated in September 2019 but their employment ended in December 2019, while the new employees were employed in January/February 2020.
13. The Claimant/Applicant submitted that the period they are seeking the documents to be produced is the period that the Respondent issued a notice to declare redundancy but the reason is to confirm that reason for redundancy was not true as the Respondent hired new employees and increased salaries of all employees.



14. It is the Claimant/Applicant's submission that the documents sought are meant for parties to submit on the main suit well informed and which shall assist the court to reach an informed and justified decision.

Respondent's Submissions

15. The Respondent submitted that the present case he is being called upon to produce confidential employee records without being given a fair chance to be heard. The court at this stage does not have the benefit of all material facts before to warrant the issuance of the order sought.
16. The Respondent submitted that allowing the prayer for the production of employee payroll records at this stage would significantly prejudice the Respondent's right to fair administrative action and a fair hearing as provided under Article 47 and 50 of *the Constitution*. The Claimant has however not demonstrated any prejudice it would suffer if the said prayer is not allowed at this stage.
17. The Respondent submitted that the Claimant's application is premature as it falls short of achieving the true purpose of discovery. There is no correlation between the payroll of the Respondent's employees and the redundancy process that affected the grievants represented by the Claimant. The Claimant is therefore estopped from seeking such documents.
18. It is the Respondent's case that the Claimant has already demonstrated in its affidavit that it is capable of obtaining documents which it believes are necessary to aid its case. Therefore, no reasonable basis for allowing the prayer of production of employee payroll records.
19. The Respondent submitted that the payroll records of its employees are private and confidential in nature and are legally protected under the *Data Protection Act, 2019*.
20. It's the Respondent's submission that payroll records contain personal data on the individual salaries of each employee, which information is only accessible by limited personnel within the Respondent's organization. They are not records in the public domain and as such the Respondent as a data controller cannot divulge the same without express consent of each employee, which has not been given in the circumstances.
21. The Respondent submitted that it can only avail payroll records for the grievants to the suit and only with their consent. Any order issued for production of payroll records in respect to other employees would place the Respondent on a collision course with the Data Protection Act.

Analysis and Determination

22. The first prayer is for transfer of case No MCELRE 1792/2022 from Chief Magistrate's Court and consolidated with Case No 736/2022.
23. Both parties to the suit are unopposed to the Claimant's prayer seeking the consolidation of the instant suit and Nairobi CMCC ELRC No. E736 of 2023; Kigali Joseph Christine & 21 Others v Africa Nazarene University; as both suits are premised on the same circumstances and involve similar parties.
24. Therefore, prayers (2) and (3) are hereby granted and case no. CMCC MCELRC No 1792/2022 is transferred from the Chief Magistrate's Court and furthermore is consolidated with case no 736/2022.
25. The main issue for this court's determination is whether the Claimant is entitled to the prayer of production of payroll from September-December 2019 and February-April 2020.
26. It's the Respondent's submission that the payroll records contain personal data on the individual salaries of each employee, which information is only accessible by limited personnel within the



Respondent's organization. The records are not in the public domain and as such the Respondent as a data controller cannot divulge the same without express consent of each employee, which has not been given in the circumstances.

27. The nature of confidential documents was discussed in *Nduati & 26 others v Ernst & Young LLP (Cause E186 of 2021)* [2022] KEELRC 3926 (KLR) (22 September 2022) (Ruling) as: -

“As to what constitutes confidential information, the South African case of Advtech Resourcing (Pty) Ltd v Kuhn 2007(4) ALL SA 1386, C para [51] is instructive. In that case it was held that for information to qualify as confidential the following requirements must be fulfilled:

- a. The information must involve and be capable of application in trade and industry; that is: it must be useful;
- b. The information must not be public knowledge and public property; it must be known to a restricted number of people or to a closed circle;
- c. The information must be of economic value to the person seeking to protect it.

By their nature, the documents which the respondent seeks to protect from disclosure fall within the aforesaid definition. What is more, by disclosing the said documents, the claimants have exposed the respondent, which is a firm of Certified Public Accountants, to the risk of breaching its contractual duty to its clients.”

28. Further, Section 30 of the Data Protection Act reads: -

“(1) A data controller or data processor shall not process personal data, unless—

- (a) the data subject consents to the processing for one or more specified purposes; or
- (b) the processing is necessary—
 - (i) for the performance of a contract to which the data subject is a party or in order to take steps at the request of the data subject before entering into a contract;
 - (ii) for compliance with any legal obligation to which the controller is subject;
 - (iii) in order to protect the vital interests of the data subject or another natural person;
 - (iv) for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
 - (v) the performance of any task carried out by a public authority;
 - (vi) for the exercise, by any person in the public interest, of any other functions of a public nature;



- (vii) for the legitimate interests pursued by the data controller or data processor by a third party to whom the data is disclosed, except if the processing is unwarranted in any particular case having regard to the harm and prejudice to the rights and freedoms or legitimate interests of the data subject; or
- (viii) for the purpose of historical, statistical, journalistic, literature and art or scientific research.

- (2) Further processing of personal data shall be in accordance with the purpose of collection.
- (3) A data controller who contravenes the provisions of subsection (1) commits an offence.”

- 29. Section 30 of the Data Protection Act, and considering the nature of the payroll records being personal data of its employees who are not parties to this suit, the same is classified as privileged information which cannot be produced in court without the said persons’ consent.
- 30. In view of the foregoing and in conclusion, this prayer No 4 of the application dated March 15, 2024 is unmerited and is not granted.
- 31. The respective parties will meet their respective costs of this application.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 26TH DAY OF JULY, 2024.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

