



Kisuli v Kilimani Junior School (Employment and Labour Relations Cause E206 of 2021) [2025] KEELRC 304 (KLR) (5 February 2025) (Ruling)

Neutral citation: [2025] KEELRC 304 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E206 OF 2021**

**JW KELI, J
FEBRUARY 5, 2025**

BETWEEN

BERNICE NDIKU KISULI CLAIMANT

AND

KILIMANI JUNIOR SCHOOL RESPONDENT

(Under Section 22 Civil Procedure Act, Cap 21, Order 11 Rule 3 (2)(d) of the Civil Procedure Rules, 2010, and Sections 67 and 69 of the Evidence Act, Cap 80 Laws of Kenya)

RULING

(On Request For Production Of Documents And Notice To Produce)

1. The Claimant filed Request for production of documents and notice to produce directed against the Director, Kilimani Junior Academy (Respondent). It stated as follows:-

“Take Notice that you are requested to produce the documents indicated below for inspection and copying by the Plaintiff herein within seven (7) days from the date of this request.

You are further requested to produce these documents at any deposition, mediation session, hearing or trial in this case.

1. Holiday Teachers Duty Books for the period between 29th November 2018 to 29th September 2020.
2. Clock in Books at the gate for the period between 29th November 2018 to 29th September 2020.
3. Class Registers for the period between 29th November 2018 to 29th September 2020.



4. Teachers Lesson Books for the period between 29th November 2018 to 29th September 2020.”
2. The claimant submitted that the documents sought were relevant to prove the claimant's presence at work at the school at the material time, particularly on a claim of unpaid dues and establishing her workload and duties as a teacher which affected the sums claimed. She relied on the decision in Oracle Productions Ltd v Decapture Limited & 3 others (2014)e KLR where the purpose of discovery was stated as follows:- “The true purpose of discovery is to level the litigation field, to expedite hearing, reduce costs and allow parties to gauge the case they will face at the trial. This is aptly captured in Halsbury’s Laws of England Vol 13 paragraph 1: “The function of the discovery of documents is to provide the parties with the relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases, and thus to provide the basis for the fair disposal of the proceedings before or at the trial. Each party is thereby enabled to see before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation”. That position was aptly captured by Havelock J in Concord Insurance Co Limited Vs Nic Bank Limited Nairobi, High Court case 175 of 2011 [2013] eKLR. Pre-trial discovery is so central to litigation that the entire order 11 of the Civil Procedure Rules 2010 has been substantially devoted to it, including sanctions for non-compliance. Orders 4 and 7 now require parties to file and serve documentary evidence with their pleadings. Order 14 empowers the court to order for production, impounding and return of documents. I agree with the holding of Havelock J in the Concord Insurance case (supra) that discovery should be limited solely to the matters in contention. Relevance can only be gauged or tested by the pleadings or particulars provided. Halsbury’s Laws of England (supra) paragraph 38. See also Kahumbu Vs National Bank of Kenya Limited [2003] 2 E.A 475, Oluoch Vs Charagu [2003] 2 E.A 649”
3. The claimant in the instant case resigned from work and was seeking dues of salary for September 2020, a refund of salary deductions which she stated were not authorized, leave earned but not taken, unpaid fuel reimbursements.
4. The Respondent in opposition to the Notice to Produce relied on the Replying Affidavits of Samuel Muriithi Kamau and Heidv Jane Judy Bird, both sworn and filed in Court on 27th November 2023. The Respondent reiterated the following facts in opposition to the request for Production of Documents and Notice to Produce dated 12th September 2023; a. The Holiday Teachers Duty Books do not exist. The Respondent has never required its teaching staff to prepare, keep, or maintain any such documents or books. Therefore, it would be prejudicial for the Respondent to expect it to produce a document that has never existed at any material time to these proceedings;
 - b. With respect to the Clock-In Books, the same was confiscated by the Claimant sometimes around March/April 2020, at the beginning of the COVID-19 pandemic outbreak where the Claimant took it from the Respondent's gatehouse and never returned the said Clock-In Book to the Respondent upon her resignation from employment and that she is still in possession of it until today. The Respondent stated that the Claimant was acting in bad faith in requesting a document that is and has been in her possession at all material times to these proceedings; During the period between from March/April 2020 to September 2020, there was a restriction in place on a physical learning and the Respondent had moved to online/ virtual learning during the same period. As such, the Clock in Book for this period would be irrelevant to any issues in dispute in these proceedings;



- c. The Claimant had directed the Respondent's security guards at the time, that as a Principal of the School, she was not required to sign into the Clock In Book and that signing in was a preserve of the other teachers. As such, the Clock in Books would not have featured the Claimant's name and or her timings for the period in question;
 - d. The Class registers comprise of a record of the attendance of pupils in the Respondent's streams of classes, which information is of a personal and private nature to the Respondent comprising of its business information. Therefore, the Class registers would be irrelevant to these suits. In addition, the Class Registers are quite sensitive in nature since they contain the names of children at the school given by the Respondent's customers;
 - e. On the Teachers Lesson Books , at any material time to these proceedings, the school never required any of its teaching staff to prepare, keep, or maintain any such document and or book, such that the same would comprise documents or records that belong to the Respondent and
 - f. The Respondent's policy is to require its teaching staff to have a Lesson Plan, which document is prepared by and belongs to the respective teaching staff as part of their professional documents. The Respondent's sole requirement is that the Lesson Plan is approval by the Head Teacher and returned to the individual teacher. As such, the individual Teacher's Lesson Plan belongs to them as their personal and or professional documents, and are not in the possession of the Respondent.
5. The Respondent submitted that following an application for discovery of documents, the applicant has to satisfy the honorable Court that the documents being sought are necessary to the cause of action pending before the court. Discovery is therefore limited solely to the matter in contention and the court in exercising its discretion in issuing such orders as to discovery, will be guided by the relevance of the documents that the applicant seeks, in relation to the pleadings. The Respondent relied on Halsbury's Laws of England, (supra) at paragraph 38 states as follows, concerning the matter of relevance: "Relevance must be tested by the pleadings and particulars ... then the discovery on that issue is limited to the matter raised in the particulars" . The Respondent submitted that a keen perusal of the Request for Production of Documents and Notice to Produce will show that the Applicant has prayed for the production of Holiday Teachers Duty Books, Clock in Books, Class Registers, and Teachers Lesson Books. The Respondent submitted that the said documents were in no way relevant to the issues before this court. The Applicant's claim as seen from the Memorandum of Claim is for payment of Kes.1,557,323.22 being her alleged unpaid terminal dues for unpaid salaries, salary deductions, unpaid leave days, and unpaid fuel reimbursements. The Claimant voluntarily tendered her resignation vide a resignation letter in June 2020 and was paid her terminal dues as clearly evidenced by the documents produced by the Respondent. That the Respondent herein has produced all the documents in line with the Claimant's issues for determination herein such as the Employment Contract dated 29th November 2018, a bundle of Claimant's pays slips, Bundle of Cheques issued to the Claimant, Bundle of letters by the Claimant requesting for leave days, etc. The Respondent submitted consequently that the Notice was a pure fishing expedition for the Claimant to request documents that are not in anyway relevant to its case.

Decision

6. The legal basis for the discovery of evidence is found in Section 22 of the *Civil Procedure Act*, Cap. 21 of the Laws of Kenya, which provides as follows: "22, Power to order discovery and the like. subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party - (a) make such orders as may be necessary or reasonable



in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence; (b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid; (c) order any fact to be proved by affidavit."

7. The purpose of discovery is captured in Halsbury's Laws of England, Vol. 13, at paragraph 1 :- Halsbury's Laws of England Vol 13 paragraph 1: "The function of the discovery of documents is to provide the parties with the relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases, and thus to provide the basis for the fair disposal of the proceedings before or at the trial. Each party is thereby enabled to see before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation". In Oracle Productions Ltd vs, Decapture Limited & 3 Others [201a] eKLR cited with approval in Ramji Meghji v Kisii University [2016] eKLR, the court observed as follows: "The true purpose of discovery is to level the litigation field, to expedite the hearing, reduce costs, and allow parties to gauge the case they will face at the trial"
8. Havelock J in Concord Insurance Co Limited Vs Nic Bank Limited [2013] e KLR stated:- "Pre-trial discovery is so central to litigation that the entire order 11 of the Civil Procedure Rules 2010 has been substantially devoted to it, including sanctions for non-compliance. Orders 4 and 7 now require parties to file and serve documentary evidence with their pleadings. Order 14 empowers the court to order for production, impounding and return of documents. "I agree with the holding of Havelock J in the Concord Insurance case (supra) that discovery should be limited solely to the matters in contention. Relevance can only be gauged or tested by the pleadings or particulars provided.
9. The court evaluated the submissions by the parties' and case law held that the claimant did not justify why she wanted access to all other documents in the notice to produce save for clock-in books which would be relevant on the disputed untaken leave days. The respondent produced extracts of the said clock in books as HJJB -1 and such it has no reason not to comply with the notice as concerns the clock in books.
10. In the result, the respondent shall make discovery on oath and deliver to the claimant at least 14 days before the pre-trial date copies of the clock in books for the period 29th November 2018 to 29th September 2020.
11. Costs of the application in the cause.
12. Pre-trial on 3rd March 2025
13. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 5TH DAY OF FEBRUARY , 2025.

J.W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Applicant- Absent

Respondent –Mwaniki

