



**Musee v International School of Kenya Ltd (Cause 60 of 2020)
[2024] KEELRC 608 (KLR) (18 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 608 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 60 OF 2020
JK GAKERI, J
MARCH 18, 2024**

BETWEEN

KATHERINE AMA MUSEE CLAIMANT

AND

INTERNATIONAL SCHOOL OF KENYA LTD RESPONDENT

JUDGMENT

1. Before the court for determination is the Claimant/Applicant’s Notice of Motion filed under Certificate of Urgency dated 23rd November, 2023 seeking orders that:
 1. Spent.
 2. Leave be granted to the Claimant to adduce and rely upon further additional evidence by way of the Claimant’s Further Supplementary Witness Statement, additional witness statement by Patriciah Newmyer and further supplementary list of documents all dated 23rd November, 2023 and shown as annexure to the Affidavit of the Claimant in support of this application.
 3. The costs of this application be in the cause.
2. The Notice of Motion is expressed under Section 3(1), (3) and 20 of the [Employment and Labour Relations Court Act](#) and Section 1A, 1B, 3A and 22 of the [Civil Procedure Act](#) and Order 50 Rule 6 of the Civil Procedure Rules and Article 50(1) and 159(2) of [the Constitution](#) of Kenya, 2010 and is based on the grounds set forth on its face and the Supporting Affidavit of Katherine Ama Musee sworn on an unidentified date who deposes that after 19th September, 2022, she received materials and evidence to the case which was unavailable at the time of filing the Supplementary Statement.
3. That the Human Resource Manager and the Respondent’s witness communicated in September 2021 to all staff and adjusted their contracts grossing up their salaries to the extent of application of Kenya



income tax law so as to preserve the take home pay of staff at the pre-tax level as confirmed by Patriciah Newmyer, a former colleague.

4. That the Respondent discriminated against the affiant and other Kenyan locally hired teachers by remitting taxes to the Kenya Revenue Authority as overseas hired teachers were excluded in violation of equal pay for equal work.
5. The affiant deposes that she was claiming the difference and loss occasioned by the skewed application of the tax laws.
6. That the Respondent had not disclosed that it was grossing up salaries for staff.
7. That there was no justification for the partisan application of the law by the Respondent and the notice of motion was filed without undue delay and its grant will not be prejudicial to the Respondent.

Response

8. In its Replying Affidavit sworn by Irene Muchunu Chifallu, the Respondent's Human Resource Manager, sworn on 22nd January, 2024, the affiant deposes that the applicant's notice of motion is a delaying tactic, incompetent, non-starter, frivolous, scandalous and an abuse of the court process.
9. That the evidence sought to be introduced relate to the period 2021 – 2022 and had no relevance to the Claimant's claim as the Claimant's suit states and the grossing up was communicated in 2021 which occurred subsequent to the tax dispute determined by the Tax Appeals Tribunal which held that previously disputed taxes were payable which is a different period and grossing up applied to all teachers.
10. The affiant states that the Kenya Revenue Authority (KRA) questioned the exemption of expatriate teachers from PAYE and the Respondent was held liable to pay PAYE for all staff including expatriate staff.
11. That the applicant will suffer no prejudice if the application is declined.

Applicant's submissions

12. As to whether the applicant deserves leave to file the supplementary documents and witness statement, counsel submitted that the evidence of Patriciah Newmyer will show the grossing up of salary and thus the evidence was relevant and material.
13. Counsel cited Section 5 of the *Evidence Act* on relevance of the evidence sought to be adduced.
14. That no law bars a party from obtaining evidence after the suit is filed as the same may come to the party's attention thereafter.
15. That the instant application was filed without delay. Reliance was made on the decision in Pinnacle Projects Ltd V Presbyterian Church of East Africa, Ngong Parish & another (2018) eKLR on Article 50 of *the Constitution* of Kenya, 2010 to urge that procedural technicalities are not allowed to subvert substantive law.
16. Similarly, the sentiments of Aburili J. in Hangover Kaakwacha Hotel Ltd V Philip Adundo & Leonard Adundo t/a Hangover Kaakwacha Hotel (2022) eKLR on the court's discretion to allow additional evidence be adduced or witnesses called even after setting the matter down for hearing to ensure fair hearing were cited.



17. Further, reliance was made on the decisions in *Esther Wambui Njenga V Harrison Mwangi Nyota & 2 others* (2018) eKLR and *Marcus Kiranga Nimrod V Nesity Kuthi Justus & another* (2017) eKLR to underscore the court's discretion to allow parties rely on documents discovered after the suit is filed.
18. On prejudice, counsel submitted that the material was known to the Respondent, it will have ample opportunity to cross-examine the witness on it and Respondent has opportunity to file further additional evidence in rebuttal with leave of the court.

Respondent's submissions

19. Counsel for the Respondent isolated a singular issue for determination; whether the Claimant's additional evidence is relevant and leave should be granted.
20. Counsel submitted that as the proposed evidence relates to grossing up of salary in 2021 – 2022 period and the Claimant's case relates to 2014 – 2019, and the applicant had already filed the instant suit, it was unnecessary and only delays the suit.
21. That the grossing up happened after the tax dispute between the Respondent and the KRA was determined on 8th May, 2021 and the previously disputed taxes were payable.
22. That the grossing up cannot apply retrospectively.
23. Counsel cited the sentiments of the Supreme Court in *Mohamed Abdi Mohamed V Ahmed Abdullahi Mohamed and 3 others* (2018) eKLR on the guidelines applicable in the admission of additional evidence before appellate hearings and itemises the guidelines.
24. Counsel further cited the decision in *Mzee Wanje and 93 others V A.K. Kaikwa* (1982 – 88) KAR 463 to urge that the Claimant was trying to patch up weak areas by relying on irrelevant facts and had not shown that she will suffer irreparable damage if the orders sought are not granted but the Respondent will be prejudiced by its admission.
25. Counsel urged that the court should consider the significance of the evidence and the expedition conduct of the suit and cited *Rafiki Micro-Finance Bank Ltd V John & another* (2023) eKLR to urge that the applicant had not met the threshold for leave.

Determination

26. The singular issue for determination is whether the applicant has made a case for the grant of leave for adduction of additional evidence by way of a Further Supplementary witness statement, additional witness statement by one Patricia Newmyer and further supplementary list of documents.
27. Puzzlingly, this is the third Ruling by the court and the second pursuant to a notice of motion by the Claimant and very similar to the previous one and hopefully the last for the case to proceed to the next stage.
28. It is common ground that the instant suit was filed on 4th February, 2020 more than 4 years ago and was listed before this court on 16th December, 2021 for the hearing of the Claimant's application dated 22nd June, 2021 seeking leave to amend the statement of claim, leave to file a supplementary witness statement and additional documents and the application was granted pursuant to the court's ruling delivered on 24th March, 2022.



29. However, no action was taken by either party to progress the matter until 17th October, 2022 when the court was moved and the Deputy Registrar scheduled a mention on 8th December, 2022 which did not take place until 28th February, 2023.
30. It was not until 23rd March, 2023 when the parties confirmed that the amendments had been made but counsel for the Respondent needed more time to file a witness statement and seek further instructions on a proposed settlement and directions on the final filing of documents and responses were given on 2nd May, 2023.
31. On 30th May, 2023, the Respondent’s counsel reported that the documents had not been filed and had lodged a preliminary objection which was disposed of by a ruling delivered on 19th September, 2023.
32. From the foregoing summary, it is clear that none of the parties to this suit has been anxious to have it concluded.
33. It is trite law that the court has jurisdiction to hear and determine the instant application and make such orders as may be deserving in the circumstances.
34. The pith and substance of the applicant’s application is leave to adduce evidence to prove that the Respondent was grossing staff salaries and taxes in 2021 although she was not an employee then.
35. The evidence is intended to embellish the Claimant’s case of the alleged discrimination.
36. The principles governing adduction of additional evidence in proceedings are well settled and have been articulated and applied in legions of decisions.
37. The court is in agreement with the sentiments of Aburili J. in *Hangover Kaakwacha Hotel Ltd V Philip Adundo & Leonard Adunda t/a Hangover Kaakwacha Hotel Ltd (Supra)* cited by the applicant’s counsel that;

“Under Order 11 of the Civil Procedure Rules, even after the pre-trial conference and the matter is set down for hearing, nothing prevents the court from exercising discretion and allowing parties to call further witnesses or filing of further documents as stipulated in Order 18 Rule 10 of the Civil Procedure Rules and Section 146 of the *Evidence Act* which provisions are intended to ensure that each party is afforded a fair hearing as guaranteed in Article 50 of *the Constitution* and an opportunity to present or defend their cases fairly.”
38. Needless to gainsay, the court’s discretion to grant leave to a litigant to adduce or produce additional evidence is intended to facilitate fair hearing and its exercise ought to be fair to both parties by inter alia according the other party equal opportunity to adduce or avail controverting evidence.
39. As the applicant’s counsel correctly submits, the material the applicant seeks to produce as evidence has been and is within the Respondent’s knowledge and it will have ample opportunity to file controverting evidence and cross examine the applicant and the proposed witness on the evidence to ascertain its veracity.
40. Closely related to the foregoing, other than the delay occasioned by the Claimant’s two notices of motion and the Respondent’s Notice of Preliminary Objection, the Respondent has not demonstrated any other prejudice it stands to suffer.
41. Finally, it is also evident that the applicant could not have obtained the evidence even with the exercise of reasonable diligence earlier, otherwise than through a 3rd party.



42. It is also noteworthy that the elaborate guidelines developed by the Supreme Court in *Mohamed Abdi Mohamed V Ahmed Abdullahi Mohamed & 3 others (Supra)* on the admission of additional evidence cited by the Respondent's counsel relate to evidence on appeals as opposed to the trial court as is the instant case.
43. Flowing from the foregoing, it is the finding of the court that the applicant's Notice of Motion dated 23rd November, 2023 is merited and is accordingly granted with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18TH DAY OF MARCH 2024

DR. JACOB GAKERI

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 *Civil 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.

DR. JACOB GAKERI

JUDGE

