



**Moturi v Ean Kenya Limited & another (Cause 2081 of 2014)  
[2024] KEELRC 1064 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1064 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2081 OF 2014  
L NDOLO, J  
APRIL 25, 2024**

**BETWEEN**

**SAMUEL ALLOYS MOTURI ..... CLAIMANT**

**AND**

**EAN KENYA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**GS1 KENYA LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This is a very old matter, having been filed first in the High Court as HCCC No 624 of 2004. By an order made by Mabeya J, on 18<sup>th</sup> November 2014, the matter was transferred to this Court on account of jurisdiction.
2. Thereafter, the matter came up many times, before several Judges of this Court and on 15<sup>th</sup> November 2018, the Claimant filed a Re-amended Plaintiff, joining the 2<sup>nd</sup> Respondent, pursuant to an order issued by Onyango J on 12<sup>th</sup> November 2018.
3. By a subsequent Notice of Motion dated 11<sup>th</sup> February 2019, the 2<sup>nd</sup> Respondent sought to have the claim against it struck out. In a ruling delivered on 20<sup>th</sup> December 2019, O.N Makau J declined the 2<sup>nd</sup> Respondent’s plea but preserved the issue of admissibility of the Special Report upon which the 2<sup>nd</sup> Respondent was joined, to be determined either at pre-trial or during the trial itself.
4. On 27<sup>th</sup> February 2023, I began taking the Claimant’s testimony, at which stage, Counsel for the Respondents, Mr. Ratemo objected to production of the documents marked ‘SM1’ and ‘SM4’ in the bundle of documents dated 14<sup>th</sup> November 2018.
5. In his statement from the Bar, Mr. Ratemo averred that the document marked ‘SM1’ was an investigation report arising from allegations of mismanagement at the 2<sup>nd</sup> Respondent. He stated that if the report is to be admitted, he would ask to cross examine its maker. With regard to the document



- marked 'SM4' Counsel stated that it was a presentation by a third party which could not be produced by the Claimant.
6. On his part, Counsel for the Claimant, Mr. S.M Mwenesi told the Court that the impugned documents were part of crucial evidence relied upon to join the 2<sup>nd</sup> Respondent as a party.
  7. Upon hearing Counsel for the parties, I directed Mr. Ratemo to file a formal objection for consideration by the Court. By notice dated 7<sup>th</sup> March 2023, the Respondents object to production of the documents listed below on the grounds that they are not authored by or addressed to the Claimant, they are not the Respondents' documents, they are undated, they do not bear the author's name or copies thereof have not been availed:
    - a. Correspondence between the Claimant and Santury Packaging Solutions at S/n 13 of the list of documents dated 2<sup>nd</sup> May 2006 (a copy has not been availed);
    - b. Medical report at S/n 20 of the list of documents dated 2<sup>nd</sup> May 2006 (it is not authored by the Claimant and a copy has not been availed);
    - c. Letter dated 22<sup>nd</sup> November 2002 and the reply thereto dated 28<sup>th</sup> November 2002 at S/n 21 of the list of documents dated 2<sup>nd</sup> May 2006 (they are not addressed to or authored by the Claimant);
    - d. Medical report from Mater Hospital dated 11<sup>th</sup> November 2004 at S/n 24 of the list of documents dated 2<sup>nd</sup> May 2006 (it is not authored by or addressed to the Claimant);
    - e. Report titled 'Special Report of the Special Committee on the Investigations into Allegations of Mismanagement at GS1 Kenya Limited' and the annexures thereto marked 'SAM 1, 2 and 3' in the Claimant's additional witness statement dated 14<sup>th</sup> November 2018 (the document is not authored by or addressed to the Claimant, they are not the Respondents' documents, they are undated, they do not bear the author's name);
    - f. Presentation at a GS1 Kenya Limited 2010 General Meeting by one Monica Walsh marked as 'SAM 4' in the Claimant's additional witness statement dated 14<sup>th</sup> November 2018 (it is not authored by or addressed to the Claimant, it is not the Respondents' document).
  8. The Claimant's response to the objection is contained in his replying affidavit sworn on 24<sup>th</sup> March 2023. He depones that it was an unfortunate oversight that the correspondence between him and Santury Packaging Limited was not produced.
  9. The Claimant further depones that he believes that he is competent to produce the medical reports issued in respect to his illness, which he attributes to mistreatment by the Respondents.
  10. The Claimant states that at paragraph 24 of the 2<sup>nd</sup> Respondent's submissions dated 23<sup>rd</sup> April 2019, in support of its application to strike out the claim against it, the 2<sup>nd</sup> Respondent admitted the existence of the 'Special Report of the Special Committee on the Investigations into Allegations of Mismanagement of GS1 Kenya Limited'. He adds that Kennedy Efetha, the Chairperson of the Special Committee that prepared the Report is available to give evidence with reference to the Report.
  11. According to the Claimant, the presentation by Monica Walsh is part of the Special Committee Report.
  12. The objection on the correspondence between the Claimant and Santury Packaging Solutions in the list of documents dated 2<sup>nd</sup> May 2006, is based on the fact that the document has not been availed. In his



- replying affidavit, the Claimant terms this failure as an inadvertence. In the absence of the document, there is nothing to admit in evidence and the objection in this regard is upheld.
13. Similarly, the medical report included in the list of documents dated 2<sup>nd</sup> May 2006 has not been availed and there is nothing for the Court to consider for admission. Consequently, the objection thereon is also upheld.
  14. In objecting to the medical report from Mater Hospital dated 11<sup>th</sup> November 2004, listed in the documents dated 2<sup>nd</sup> May 2006, the Respondents rely on the decision in *Petra Development Service Limited v Evergreen Marine (Singapore) PTE Limited & another* [2020] eKLR where it was held that a report in the nature of a professional opinion ought to be produced by the maker.
  15. The Respondents further rely on the decision in *Kyalo Ngima & 2 others v Kisau Secondary School (sued through the Chairman, Board of Governors Kisau Secondary School)* [2021] eKLR where it was held that a medical report is primary documentary evidence, which ought to be produced by the maker.
  16. In the present case, no credible reason has been advanced as to why the medical officer who made the report cannot be called to produce it and be examined by Counsel for the Respondents. I therefore direct that the subject medical report is admissible subject to its production by the maker.
  17. Regarding the letter dated 22<sup>nd</sup> November 2002 and the reply dated 28<sup>th</sup> November 2002, listed in the list of documents dated 2<sup>nd</sup> May 2006, the Respondents state that the letters are not addressed to the Claimant nor are they authored by him.
  18. As far as this correspondence is concerned, the Claimant is a stranger and if he wishes to rely on it without breaching the rule against hearsay evidence, he ought to call the parties involved. To this extent, the objection is upheld.
  19. In response to the objection on the ‘Special Report of the Special Committee on the Investigations into Allegations of Mismanagement at GS1 Kenya Limited’ and the annexures marked ‘SAM 1, 2 and 3’, the Claimant states that the 2<sup>nd</sup> Respondent admits existence of the report.
  20. In his written submissions dated 27<sup>th</sup> March 2024, the Claimant cites the decision in *Njau v Gedi & 2 others* [2022] eKLR where it was held that a document whose existence has not been denied by either party is admissible upon production by the party seeking to rely on it.
  21. This Court takes the view that the sole aim of the Respondents’ objection to production of the Special Report is to conceal evidence that is crucial in the determination of the dispute between the parties. This would be a travesty of justice and the Court declines to allow it. The objection in this regard is therefore overruled.
  22. The Claimant states and the Respondents did not deny that the presentation by Monica Walsh is part of the Special Committee Report. Consequently, this evidence would also be admissible.
  23. The costs of the objection will be in the cause.
  24. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 25<sup>TH</sup> DAY OF APRIL, 2024.**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. S.M Mwenesi for the Claimant



Mr. Ratemo for the Respondents

