



**Amunya v Tamarind Management Limited (Cause 1564 of 2016)  
[2023] KEELRC 212 (KLR) (31 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 212 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1564 OF 2016  
J RIKA, J  
JANUARY 31, 2023**

**BETWEEN**

**JULIUS SORE AMUNYA ..... CLAIMANT**

**AND**

**TAMARIND MANAGEMENT LIMITED ..... RESPONDENT**

**RULING**

1. This Claim is being heard simultaneously with Cause Number 1566 of 2016, Joel Mwikuyu Kitheka v Tamarind Management Limited.
2. The Claimants gave evidence and rested their respective Claims, on 11<sup>th</sup> March 2022. When it was the turn of the Respondent's Human Resource Manager, Maureen Namiroi to give evidence on the same date, and close the hearing to pave way for Judgment, the Claimant's Advocate objected to production of Respondent's bundle of documents, on the ground that Namiroi did not authorize the documents.
3. The Court directed the Claimant to file a formal Application, detailing the documents in question, to enable the Court fully appreciate the nature of objection, and give the Respondent adequate opportunity to respond.
4. The claimants have since filed the application, dated April 21, 2022, anchored on the affidavit of Rita Wayua Mutie, claimant's Advocate, sworn on April 21, 2022. It was agreed on September 21, 2022 that the Application is heard and determined on the strength of Written Submissions. These were confirmed to have been filed and exchanged at the last mention on October 25, 2022.
5. The documents have been identified by the claimants to include: -
  - I. memorandum of response dated February 10, 2017, from page 5 to 63.
  - II. Supplementary documents dated July 17, 2018.
  - III. Further list of documents dated October 17, 2018.



6. It is submitted by the claimants that Maureen Namiroi, the Human Resource Manager is not the maker of any of the documents. The only documents she can be allowed to produce are the M-pesa statements dated July 3, 2015, and the charge sheet dated July 6, 2015.
7. Section 35 [1] of the Evidence Act requires all documents to be produced by their makers, except where the makers are dead, or cannot be traced, or that the cost of tracing them, would be exorbitant.
8. The documents referenced ‘Tamarind Village Market, M-pesa Sales Audit Report’ dated July 1, 2015 and July 10, 2015 respectively, were prepared by respondent’s Internal Auditor, and only the Internal Auditor is suited to produce them.
9. ‘Tamarind Village Market Fraudulent M-pesa Sales by Employee’ and ‘Unpaid TVM M-pesa Transactions from September 2014 to February 2015’ are undated, unsigned and do not indicate the authors. The ‘Electronic Journal Print’ and ‘Pictures of the Micros System’ ought to have been accompanied by certificate of electronic evidence. The claimants rely on E&LRC decision Samuel Kazungu Kambi v Nelly Kongo & 2 others [2017] e-KLR, where it was underscored that section 106B [4] of the Evidence Act, requires electronic evidence to be authenticated by a certificate.
10. Further, the claimants submit that rule 25[3] of the E&LRC [Procedure] Rules 2016, permits the court to at any stage, call the author of a document. They invoke E&LRC decision in Justus Kibaara Kibai v Mt. Kenya East Farmers Co-op Limited [2018] e-KLR.
11. The totality of the Claimants’ submissions is that the makers of the Respondents’ documents should be called to produce them, to guarantee their authenticity and reliability. The Human Resource Manager is unqualified and incompetent, to produce the documents.
12. The Respondent explains that it originally filed and intended to rely on the Witness Statement of then Human Resource Manager, John Njeru, dated 11<sup>th</sup> October 2018. Njeru has since left employment and the Respondent substituted his Statement with that of the current Human Resource Manager, Maureen Namiroi dated 21<sup>st</sup> October 2021. These averments are anchored on the Replying Affidavit of Respondent’s Advocate, Nicholas Weru sworn on 8<sup>th</sup> June 2022.
13. The Respondent submits that expunging of its documents would occasion it injustice; the Application has been filed after an inordinate delay; and Section 35 [1] of the Evidence Act, gives the Court discretion to admit documents, notwithstanding that the maker is not a Witness.
14. The Claimants did not raise their objection on 29<sup>th</sup> October 2021 when the Respondent was granted leave to substitute its Witness. Instead of raising their Objection at the time, they opted to do so 4 months later, after they had given their evidence and rested their respective Claims.
15. Parties confirmed their compliance with the pre-trial procedures and were assigned 11<sup>th</sup> March 2022, for hearing. The Claimants gave evidence and closed their respective cases. The Claimants’ Advocate objected to Namiroi producing certain documents when she was giving evidence on the same date, which resulted in filing of the present Application.
16. The documents were filed with the Statement of Response, on 10<sup>th</sup> February 2016. For the Claimants to raise objection 6 years later, it is inexcusable, inordinate and unjustified. The Respondent relies on ASSL v ASSMB [2020] e-KLR, where it was held that a party cannot raise objection belatedly. Objection ought to be made on pre-trial, when directions are issued. In Mary Maina Nandeka [suing as the Legal Representative of the estate of the late George Nzuiko] v Monicah Mwenga Manthi & 3 others [2022] e-KLR, the Court ruled that objection to production of documents, must be made at the pre-trial stage and not during the hearing, to avoid stagnation in resolution of disputes.



17. The Respondent submits that Article 159 of *the Constitution* requires Courts to administer justice without delay; without undue regard to procedural technicalities; and with a mind to protection and promotion of the principles of *the Constitution*. Further, it is submitted for the Respondent that Section 4 [not 4 but 3] of the E&LRC Act, states that the main purpose of the E&LRC is to facilitate the just, expeditious and proportionate resolution of disputes.
18. The Claimants have testified and closed their Claims. They referred to the documents being objected to, in their evidence. Section 35[2] of the *Evidence Act* provides that documents can be produced without calling their makers on certain occasions stated under the provision.

### **The Court Finds:**

19. Section 20 of the E&LRC Act is the main law governing presentation of evidence before the Court. It provides that in any proceedings to which this Act applies, the Court shall act without undue regard to technicalities.
20. This legislation has strong anchorage under Article 159 of *the Constitution*.
21. There is no strict requirement in proceedings of this Court, that documents must be produced by their authors. Such a requirement would offend Section 20 of the E&LRC Act, as well as the principle enunciated in Article 159 of *the Constitution* of Kenya.
22. Rule 21 of the E&LRC [Procedure] Rules, 2016, allows the Court on its own motion, or with the concurrence of the Parties, to determine matters relying entirely of the Pleadings, Affidavits, Documents and Submissions made by the Parties. The rule underscores the discretion of the Court in admitting documents, without calling their authors.
23. Rule 25 [3] similarly extends discretion to the Court, on receiving of evidence. Evidence may be given orally, or if the Judge so orders, by Affidavit, or a Written Statement. The Court may at any stage require the attendance of a deponent or an author of a written statement. There is wide discretion in the hands of the Court, on admission of evidence. The discretion is underscored by Rule 38, which states that subject only to the Rules, the Court may regulate its own procedures.
24. Section 35 of the *Evidence Act*, allows documents to be produced in Court by other Witnesses other than their makers, where for instance, the maker is dead or cannot be readily available.
25. The Respondent has explained that its previous Human Resource Manager left employment. The documents subject of the Claimants' objection, are proposed to be exhibited by the successor Human Resource Manager. These are employment records, in the custody of the Human Resource Office, rather than an individual Employee. They are corporate documents, not any individual's documents. The serving Human Resource Manager, or her designate, would always be the relevant Officer to bring those employment records to Court, on behalf of the Employer.
26. There is no compulsion for the Internal Auditor to attend Court and produce documents attributed to him. These too are employment records, in the custody of the Human Resource Office. The custodian of the documents, in the absence of the author, is authorised to present the documents before the Court.
27. The Human Resource Manager shall be cross-examined by the Advocate for the Claimants on the contents of the documents. If she cannot vouchsafe for the truthfulness of the contents, it can only weaken the Respondent's case, not prejudice that of the Claimants. The E&LRC procedural regime, on presentation of evidence, heavily leans on the maxim, *nemo dat qui non habet* [no one can give what they do not have]. The documents are in the employment records of the Respondent, and in



the view of the Respondent, they are relevant to its Response. The Court should therefore not readily strike out documents proposed to be exhibited by Parties in proceedings before this Court, so long as a matter has been certified ready for hearing after pre-trials. Admission of the documents as exhibits, it must always be recalled, does not establish the truthfulness of the contents, and failure by the Witness presented by the Party relying on the documents to show their truthfulness, can only be detrimental to that Party's position.

28. The Court also agrees with the Respondent that there was delay by the Claimants, in raising objection. They had already testified and rested their respective cases, at the point they raised objection. The documents have been on record for years. The rules of fair play do not allow the Claimants to raise objection, after they have given their own evidence and referred to some of the documents they are objecting to. There is a crucial test whether an objection, if raised at the right time, would have enabled the Party tendering the documents to cure the defect and resort to mode of presentation the Objector would deem regular. The delay becomes fatal, because the Objector has allowed the Party relying on the documents, to act on the assumption that there is no objection to production of its documents. The Court agrees entirely with the decisions relied upon by the Respondent on this: *ASSL v ASSMB* [2020] e-KLR and *Mary Maina Nandeka [suing as the Legal Representative of the estate of the late George Nzuiko] v Monicah Mwenga Manthi & 3 others* [2022] e-KLR, on the why objection should be raised at the pre-trial stage.
29. Ultimately, the Court shall weigh all evidence presented by the Parties, and is unlikely to place much weight, on evidence which is for whatever reason, infirm. Parties however must be allowed to place their documents before the Court. The current Human Resource Manager is the custodian of these documents if not their author, and fair administration of justice demands she is not inhibited, in bringing these employment records before the Court.
30. There is no good ground shown by the claimants to compel any witness to attend court and present the documents filed by the respondent, or to bar the Human Resource Manager from producing those documents. Production does not mean the contents have been established to be true. If the Witness cannot vouchsafe the truthfulness of the documents upon cross-examination by the claimants' Advocate, that can only damage the respondent's case, who under the *Employment Act*, is required to justify termination.
31. It is unfortunate that the claimants raised objection after they closed their respective cases, with the effect that they have delayed finalization of their claims, which were filed 7 years ago.

It Is Ordered: -

- a. The Application dated April 21, 2022, filed by the claimants is declined.
- b. Costs in the cause.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 31<sup>ST</sup> DAY OF JANUARY 2023.**

**JAMES RIKA**

**JUDGE**

