



Ongeri v Skytop Technologies Limited (Employment and Labour Relations Cause 235 of 2019) [2023] KEELRC 834 (KLR) (13 April 2023) (Ruling)

Neutral citation: [2023] KEELRC 834 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 235 OF 2019**

BOM MANANI, J

APRIL 13, 2023

BETWEEN

ALFAYO O ONGERI CLAIMANT

AND

SKYTOP TECHNOLOGIES LIMITED RESPONDENT

RULING

1. This is an application by the Claimant seeking leave to file an additional list of documents and a supplementary witness statement. The Claimant argues that the additional information is necessary for the fair determination of the case.
2. The Respondent opposes the application on the ground that it will impede the timely prosecution of the case. Further, the Respondent takes the position that the relevance of documents sought to be introduced has not been demonstrated.
3. In the Respondent's view, the tax information sought to be introduced is of a generalized nature lacking clear indication when the alleged tax arrears accrued or from which tax stream they arose. This, according to the Respondent, will impede its right to mount an appropriate defense to the case.
4. It is the Respondent's position that it is, prima facie, tax compliant. Accordingly, to the extent that the proposed evidence suggests otherwise, it is contrary to law and unduly prejudicial to the Respondent.
5. I have considered the contrasting positions on the application as expressed in the affidavits on record. I have also considered the submissions by the parties.
6. The law regulating the filing of additional documents before this court is to be found in rule 14 (10) of the Employment and Labour Relations Court (Procedure) Rules, 2016. It provides as follows:-

'Where a party intends to rely on a document that has not been filed as part of its pleadings, the party shall make sufficient copies of each document for the Court, file and serve the



other party with a copy at least fourteen days before the case is set down for hearing or such shorter period as the Court may order: Provided that after the close of pleadings, the Court may allow the filing of a supplementary bundle of documents.’

7. This rule empowers the court to permit the introduction of additional documents onto the court record even after the pretrial conference stage. In exercising this power at this preliminary stage, the court is not, in my humble view, concerned with the evidential value of the documents that are sought to be introduced. This is a matter that is best left to the trial process. All that the court needs to consider at this stage is the relevance of the documents to the dispute, the reason for the delayed filing of the documents and the possible prejudice that the opponent may suffer as a result of an order permitting introduction of the documents and whether the prejudice can be remedied in some way.
8. At this stage of the case, determination of the relevance of the documents to the dispute, in my view, is not measured by examining their evidential weight. Rather, this is determined by considering whether the documents, prima facie, touch on an issue that is raised in the pleadings. At this point, all that the court is concerned with is to establish whether there is a nexus between the documents and the pleadings. Whether the evidence ultimately establishes the contested issue is a different matter.
9. In *ABN Amro Bank NV v Kenya Pipeline Company Limited*[2019] eKLR, the Court of Appeal observed as follows on documents that had been sought to be produced during the process of pre-trial discovery:-

‘To determine the issues raised in the plaint, particularly under the head of negligence, the response by the respondent who has sought a set off would be by examining these documents to determine which of the parties’ assertions will hold sway. We are therefore satisfied that the respondent demonstrated a nexus between the documents sought and the suit before the court, and agree with the sentiments of the trial court that these documents are necessary for the determination of the suit.’
10. I have considered the tax demand sought to be included in the Claimant’s additional list of documents. All that the document states is that the Claimant has tax arrears of 1,257,527.00. Whilst it is true that the demand does not disclose the period and stream that the tax arrears relate to, the document is nevertheless prima facie evidence of tax liabilities by the Claimant.
11. In the Claimant’s Memorandum of Claimant, he alludes to the Respondent having failed to remit statutory deductions (including some taxes) on his behalf during the currency of their employment relation. To the extent that the tax demand speaks to the question of tax arrears by the Claimant which is one of the issues raised in the Statement of Claim, there is a nexus between the document and the assertion by the Claimant that there was failure to clear his tax obligations when he was in the employment of the Respondent. In this context, the document is relevant not for its evidential value but to the extent that it speaks to the question of outstanding taxes which is an issue for adjudication in the claim.
12. It is up to the Claimant to ultimately provide evidence to establish his plea that the tax arrears demanded by the tax authority are as a result of the failure by the Respondent to remit the Claimant’s statutory obligations. That is a burden that the Claimant has to overcome at the trial.
13. On the question whether the Respondent is likely to suffer prejudice in the event the order sought is granted, my honest view is that there is no prejudice likely to be suffered. Evidence regarding non-payment of PAYE or indeed any other statutory deductions will be pegged on the records generated by the relevant tax authorities. Since the Claimant has a tax demand, it will be expected that he will provide proof to link the demand to the period he was in the Respondent’s employment and demonstrate that



the arrears are as a result of the Respondent's failure to honour its obligations under the employment contract. This is evidence which the Claimant has the liberty to access from the Kenya Revenue Authority and other statutory bodies. Therefore, it will be up to him to establish the facts as asserted. In any event, the Respondent is at liberty to file documents on its statutory obligations with respect to the Claimant for the duration of their contract of employment which was approximately one year.

14. I have perused the proposed supplementary witness statement. All it does is to address the issue of tax arrears. In this context, it is admissible to provide a basis for producing the documents in the proposed additional list and bundle of documents in evidence.
15. On the question of delay in filing the documents, whilst it is important that this is explained, the court must nevertheless not lose sight of its primary object of facilitating the just resolution of disputes. In this respect, if it is indicated that the admission of the additional records is likely to shade light on an issue in the dispute and no prejudice is occasioned by allowing the filing of the records, the court should allow the application.
16. This point is made in *Britania Sacco v Jambo Biscuits Limited [2018] eKLR* when the court stated as follows:-

'From the practice of this Court, it is to be expected that the evidence will have already been filed prior to the Case Management Conference. But as is sometimes the case, either out of oversight or for other reason, this does not happen. So as to give parties the furthest opportunity of presenting their case, a Court will allow introduction of new evidence if the failure to include it in the first place was bonafide and does not prejudice the adversary or where prejudice can be mitigated by allowing the adversary to file fresh evidence. Invariably therefore whether to allow fresh Statements and Documents will turn on the circumstances of each case.'

Determination

17. The upshot of the above analysis is that I allow the application by the Claimant dated November 18, 2022 as prayed. The Claimant has 14 days to file and serve the documents and witness statement in issue.
18. The Respondent is granted corresponding leave to file supplemental documents and witness statements if need arises within 14 days of being served with the supplementary list and bundle of documents and witness statement by the Claimant.
19. Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED ON THE 13TH DAY OF APRIL, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Applicant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived



compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

