



**Kiilu v Standard Chartered Bank (Cause 1213 of 2017)
[2022] KEELRC 1263 (KLR) (8 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1263 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1213 OF 2017**

**SC RUTTO, J
JULY 8, 2022**

BETWEEN

STEVE KIILU APPLICANT

AND

STANDARD CHARTERED BANK RESPONDENT

RULING

1. The instant Application, which is dated 1st April, 2022, seeks orders for the issuance of summons compelling Ms. Winnie Kaaka, Ms. Beatrice Kimei and Mr. Chris Awori to attend Court and proffer evidence.
2. The Application is supported on the grounds appearing on its face and on the Affidavit of the Claimant/Applicant. Briefly that: -
 - i. The said Winnie Kaaka, Beatrice Kimei and Chris Awori are custodians of critical evidence which are crucial for the Honourable Court to reach a just and expeditious conclusion of the matter.
 - ii. On or about the 25th and 26th days of February 2015, the claimant received emails from one Winnie Kaaka of the IT department of the respondent bank, informing him that, there was a data leakage from a computer, that was using his password or login credentials and the computer data leakage needed to be fixed.
 - iii. The said Winnie proceeded to request the claimant to login her in, into the adjacent computer which was not being used by anyone, using his login credentials or password so that she could proceed and fix the data leakage issue on the computer.



- iv. He logged the said Winnie into the adjacent computer on further direction and instruction from the line manager and proceeded to attend to customers, since the customer's queue at the banking hall was building up.
 - v. Winnie never informed him whether the issue of data leakage had been fixed, or how his password (PWID) or login credentials had been used, since he had not shared it.
 - vi. Beatrice Kimei, being the Line Manager and Chief Teller at Moi avenue branch where he worked, was aware of the request for Winnie Kaaka from the respondent's IT department, since he reported this issue to her.
 - vii. The said Beatrice Kimei instructed him to comply with the request from Winnie Kaaka to add her onto the adjacent computer, using my login credentials and added that he should be careful to obey instructions or he would be marked for disciplinary action.
 - viii. Chris Awori was the lead investigator, in the fraud that led to the loss of Kenya Shillings 7,460,00/=.
 - ix. The said Chris Awori interviewed the claimant and prepared a report which was handed to the respondent bank.
 - x. The said Winnie Kaaka, Beatrice Kimei and Chris Awori are in exclusive knowledge of the facts pertaining to this matter, hence their evidence is crucial for this Honourable Court to reach a fair determination of the issues on trial.
3. The Respondent opposed the Application through the Replying Affidavit of Ms. Lorraine Oyombe, who avers that:
- i. The application is brought in bad faith and malicious.
 - ii. Since pleadings had closed, the claimant cannot wait until the last minute after giving evidence to purport to make such an application without disclosing what kind of evidence could not be disclosed through his testimony and more particularly why it was not indicated in the pleadings the information which could not be disclosed through interrogatories.
 - iii. The witnesses the claimant intends to call and give evidence are no longer employees of the respondent hence it has no control over them.
 - iv. The Application is premature and presumptuous as there is no provision of the law that allows a party to compel witnesses of the opponent to appear in Court to adduce evidence in favour of the rival party in an adversarial system.
 - v. The respondent had presented a witness who is ready to give evidence and is available to be cross examined.

Analysis and determination

4. The Court has considered the contention by both parties and evidently, the sole issue for determination is whether the identified persons, Winnie Kaaka, Beatrice Kimei and Chris Awori, should appear in Court as witnesses, to testify in the matter.



5. Section 20 (4) of the [Employment and Labour Relations Court Act](#) (ELRC Act) is key in this regard and it provides as follows: -

“[20 (4) For the purpose of dealing with any matter before it, the Court may by order in writing signed by or on behalf of the Court require any person to—

- (a);
- (b) attend before it;
- (c) give evidence on oath or otherwise; and
- (d) produce any relevant documents.”

6. To give effect to the aforesaid provision, Rule 18 (2) of the [Employment and Labour Relations Court Rules](#) (2016), provides as follows: -

“[18.]

- (1) The Court may, on its own motion and where it considers it fit, serve or order service of a pleading on any party whom it is satisfied may be interested in the matter being considered.
- (2) The Court may summon any person or expert for the purposes of examination of facts and full adjudication of a dispute.
- (3) A party may request the Court that a particular expert, if any, who took part in and is conversant with particulars of any matter in issue, makes representation in writing or be called upon to attend the hearing of the case and give evidence.”

7. Notably, the aforesaid Rule 18 (2) which is to be read together with the Court’s powers under section 20(4) of the [ELRC Act](#), is provided for under the title, case management. It therefore follows that a party requiring the attendance of any witness for purposes of giving evidence, is required to make such an Application at any time before the pretrial conference or at the case management stage.

8. The instant Application has been brought after the Court had taken the Claimant’s case and almost four (4) years, after the pretrial directions were issued on 12th February, 2018.

9. In light of the foregoing, I find the timing of the Application not to be suitable. This type of Application is one that ought to be made as early as possible in the proceedings. Further, the witness to be called by the Respondent was disclosed through its witness statement filed on 5th June, 2018, hence the Claimant had the opportunity at that time, to make the appropriate application if it felt it required further witnesses from the Respondent, to appear and testify. Coupled with the foregoing, no reason has been advanced by the Claimant as to why it did not make the Application timeously.

10. Over and above, it bears to note that this being a matter relating to unfair termination from employment, the Respondent is required under sections 43, 45 and 47(5) of the [Employment Act](#), to prove the reasons/grounds for the termination. This is logical since it is the Respondent which has exclusive knowledge as to the reasons for the Claimant’s dismissal.

11. Subsequently, it should not be the Claimant’s problem as to how the Respondent will discharge its evidentiary burden under sections 43, 45 and 47(5) of the [Employment Act](#).



12. The upshot of the foregoing is that the Application dated 1st April, 2022 is found to be without merit and is disallowed.
13. Accordingly, the matter shall proceed for defence hearing as scheduled.
14. Each party shall bear its own costs for the Application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JULY, 2022.

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STELLA RUTTO

JUDGE

Appearance:

Ms. Kubai for the Claimant/Applicant

Mr. Masese for the Respondent

Court Assistant Barille Sora

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 had 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.

STELLA RUTTO

JUDGE

