REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2238 OF 2014

YARON GUREVICH.....CLAIMANT

VERSUS

CARNATION PLANTS LIMITED..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Monday, 2nd December, 2019)

RULING

The suit is part heard. The claimant testified and closed his case subject to final submissions. The respondent's 3 witnesses have already testified. The respondent's 4 witnesses are yet to testify and further hearing is scheduled for 02.12.2019 at 9.00am or soon thereafter as per the directions given on 23.10. 2019. This ruling is being delivered just prior to the scheduled hearing.

The respondent has filed an urgent application on 26.11.2019 through Michuki & Michuki Advocates. It is by the notice of motion under rule 14(10), rule 17(1) and rule 38 of the Employment & Labour Relations Court (Procedure) Rules, 2016 and all enabling provisions of the law. The prayers are for orders:

a. The Honourable Court be pleased to certify this matter urgent and fit to be heard ex-parte on the first instance.

b. The Honourable Court be pleased to grant the respondent leave to file further additional supplementary list of documents and supplementary witness statement as per the attached statement of Manilal Jamnadas Gohil and bundles of documents.

c. That upon such leave, additional supplementary list of documents and supplementary witness statements be deemed as duly filed and served.

d. The Court be pleased to order the recall of any necessary witnesses as it may deem fit.

e. The costs of the application be provided for.

The application is based on the supporting affidavit of Dan Harel and upon the following grounds:

a. The Court enjoys jurisdiction to grant the orders sought.

b. The pleadings have closed and leave of the Court is necessary as prayed for.

c. The application is made in good faith and when granted will meet the ends of justice.

d. The claimant will not be prejudiced if the application is granted.

e. In the course of cross-examination the respondent's (applicant's) witness No. 2 (RW2) one Manilal Gohil informed the Court that his schedules in the evidence were derived from bulky vouchers and other source documents which had not been filed in Court but were available in the respondent's archives. The purpose of the application is for leave so that the bulky vouchers and other source documents in that regard are made available on the Court record.

f. The applicant has since 23.10.2019 obtained the vouchers and other source documents and they should be allowed on record for proper and complete determination of the issues in dispute. It is just and fair to allow the documents which were not readily available

at the pre-trial stage.

g. The Court of justice should accommodate the application towards justice provided no party is disadvantaged.

The claimant opposed the application by filing the grounds of opposition on 28.11.2019 through Rachier & Amollo Advocates LLP and Mr. Ligunya Advocate urged the claimant's case. The grounds of opposition are as follows:

a. The application is frivolous, an abuse of Court process and made in bad faith to scuttle the hearing scheduled for 02.12.2019 at 9.00am or soon thereafter.

b. The applicant was given chance to file pleadings, list and copies of documents and witness statements. The case then went for pre-trial directions and the applicant did not indicate that it wished to file further documents or it had any difficulty to trace documents as now alleged in the application.

c. The claimant has testified and closed his case subject to final submissions. The applicant's 3 witnesses have testified and 4 more applicant's witnesses are yet to testify.

d. The vouchers to be introduced as prayed for in the application were in issue during the cross-examination of RW2 and RW2 confirmed that they had not been filed. RW2 had also testified that the vouchers were in his car and not at the archives as alleged in the application. The documents are being introduced to fill the gaps of weaknesses in the respondent's case obviously discovered at the last hearing. Allowing the documents on record as prayed for will defeat the role of cross-examination which is to punch holes on an adversary's case.

e. The prayers sought would amount to reopening the case ***de novo*** to recall the claimant and other witnesses in circumstances where by the justification has not been given and the case has not been heard and determined since it was filed in 2014.

f. In **Mohamed Ahmed Hassan Hashi –Versus- Swala HUdh Mohamed Ahmed [2011]eKLR** Omondi J held that reopening of a case is not an impossibility, but there must be cogent reason for re-opening, and not because a party has suddenly had a brain wave and spotted a loophole in its case which it can now seal by re-opening its case. In the present case no cogent reason has been established to justify reopening of the case.

g. RW2 testified that the documents were in his car at the Court parking space. Thus the applicant always had the documents but chose not to file them. It is unbelievable that the documents had been missing then they have suddenly been retrieved as at 23.10.2019 just a few days after RW2's cross-examination. The Court should not allow trial by ambush.

h. The applicant is out to seal loopholes established during RW2's cross-examination and not to advance substantive justice. The claimant will suffer injustice having closed its case. The case is old having been filed in 2014 and it should be concluded without further delay.

The Court has considered the parties' respective cases and submissions and makes findings as follows:

1. The evidence is that the reason for the prayers made is to fill the gaps exposed during the cross-examination of RW2. The Court has revisited the record and with respect to the vouchers in issue RW2 testified thus, "**They are summary tables on the items. Vouchers in issue not filed. They are in the car park in my car. They are bulky. I have not filed bank statements showing cash was withdrawn and paid out. Supply documents not filed….**" Thus the Court finds that as submitted for the claimant the applicant had the documents in its possession throughout the pre-trial stage and on the hearing date and the desire to file and exhibit them is a clear afterthought calculated to seriously prejudice the claimant's case. The respondent is clearly attempting to prosecute its case by instalment based on gaps disclosed at the hearing and that should be prejudicial to the claimant.

2. The Court has considered the circumstances of the application and finds that the applicant has failed to show that by due diligence it could not avail, prior to commencement of the hearing, the documents sought to be allowed on record belatedly. Thus the application is not merited.

3. Further the documents to be admitted run into over 477 pages. In the opinion of the Court such amounts to massive evidence that may change the character of the suit completely and will require the claimant to go back and even reopen pleadings. There are no prayers for reopening pleadings and the Court will not allow the parties to prosecute their cases by instalment with the consequence that the purposes of the rules of pleading and pre-trial case management are defeated. The discovery by instalment in a case whose hearing is already underway and is hotly contested like in the instant one will lead to absurd outcomes in which the parties shift and re-shift the character of their respective cases and the scope of the dispute. Under Rule 14(10) of the Court's rules of procedure documents to be relied on at the hearing are to be served upon the other party in 14 days or shorter time the court may order, before the scheduled hearing date. If pleadings have closed, then leave of Court is needed to file supplementary documents. In the instant case leave is being sought after the claimant had closed his case and some of the respondent's witnesses had already testified. As submitted for the claimant, it will be prejudicial. Needless to state, allowing such massive evidence that may substantially change the character of the parties' respective cases is inconsistent with section 3 of the Employment and Labour Relations Court Act, 2011 that requires the Court to facilitate the just, expeditious and proportionate resolution of disputes governed by the Act.

In conclusion the application dated 24.11.2019 and filed on 26.11.2019 is hereby dismissed with costs and parties to proceed with the hearing as already directed by the Court.

Signed, dated and **delivered** in court at **Nairobi** this **Monday, 2nd December, 2019.**

BYRAM ONGAYA

JUDGE