THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

LABOUR DISPUTE MISCELLANEOUS APPLICATION NO. 005 OF 2022
(Arising from Labour Dispute Reference No.031 of 2020)

KIRYANKUSA SIMON::APPLICANT
VERSUS

CROWN BEVERAGES LTD :::RESPONDENT

BEFORE.

THE HON. JUSTICE ANTHONY WABWIRE MUSANA:

<u>PANELISTS;</u>

Ms. ADRINE NAMARA,

Ms. SUSAN NABIRYE &

Mr. MICHAEL MATOVU.

RULING.

1.0 This ruling is in respect of an application for orders to produce for inspection a human resource manual dated September 2010 and Duty/Attendance Register (Muster Roll). It was brought under Order 10 rules 12(1), 14, 15, 18(2), 19, 21 and 24 of the Civil Procedure Rules S.I 71-1(CPR) Section 98 of the Civil Procedure Act Cap.71 (CPA), Sections 50, 59 and 60 of Employment Act, 2006 and Regulation 28 of the Employment Regulations 2011.

2.0 The grounds of the application are laid out in the chambers summons and affidavit of the applicant, Mr. Simon Kiryankusa. The respondent filed an affidavit in opposition to which a rejoinder was made. Both parties filed written submissions in support of their respective cases.

3.0 When the matter came up for hearing, Mr. Suleiman Isota, appearing for the Applicant, informed the Court that he had received the Human Resource Manual. Mr. Raymond Aruho, for the Respondent, confirmed this position. It would follow that this Court is invited to consider the prayer for production of the daily attendance register of muster roll.

4.0 On a preliminary point, Mr. Isota submitted that the affidavit in reply had been filed out of time and ought to be struck out. He cited Order 5 rule 1(1) (a), Order 8 rule 1(2) and

Order 9 rule 5 CPR. He also cited 2(two) cases[1] in support of his proposition. Mr. Aruho countered that the interests of justice would be best served if the affidavit were not struck out and relied on Supreme Court Election Petition Appeal N0.04 **BAKALUBA PETER MUKASA VS NAMBOOZE BETTY BAKIREKE** to bolster the viewpoint that the Court ought to uphold substantive justice over the rules of procedure.

4.1 The application before us, seeks production of documents for inspection. The Industrial Court has, in circumstances where no rules of procedure are enacted, applied the CPR. The summons and affidavit were served on the Respondent's Counsel on 10th day of January 2022. The affidavit in reply was filed on the 8th of February 2022 and a rejoinder thereto was filed on the 22nd of February 2022. The matter came for mention on 3 separate occasions before it was called for hearing on 22nd September 2022. The Respondent owned up to filing the affidavit outside the 15 day timeline. This would ordinarily render the affidavit out of time in terms of the strict application of the rule as emphasized in the case of **STOP AND SEE (U) LTD VS. TROPICAL AFRICA BANK LTD HCMA NO.333 OF 2010**.

4.2 However, there has been useful judicial discourse on the point. Affidavits in reply have now been re-categorized from pleadings to evidence. In **LAM LAGORO VS MUNI UNIVERSITY HCMA NO. 0007 OF 2016**, the Court held that;

> *"an affidavit can be used in a number of important ways, most often as containing evidence to support or oppose an application. The affidavit becomes evidence in the case……. an affidavit in reply presents evidence on oath. Affidavits are a way of giving evidence to the court other than by giving oral evidence. They are intended to allow a case to run more quickly and efficiently as all parties know what evidence is before the Court. Consequently, time constraints applied to defences may be misplaced when applied to affidavits."*

5.0 This Court, in the considering the question of late filings, adopted the view that denying a vigilant party the opportunity to file a defence would be amounting to shutting out the defence thus causing an injustice.[2] Coupled with the decision in the Lam Lagoro case (ibid) we are of the viewpoint that the Respondent intended to defend the application and filed its affidavit evidence on the record. The Applicant duly rejoined and therefore no prejudice was occasioned. In the circumstances of this case, the affidavit in reply shall not be struck out.

6.0 Turning to the notice to produce the daily attendance record, the common fact between the parties in this application are that the Applicant was employed by the Respondent and now seeks an attendance register for the period October 2012 to October 2015. The

[1] SCCA No. 6 of 2004 **EDISON KANYABWERA VS PASTORI TUMWEBAZE** and **H.C.M.A No. 0017 of 2005 SAMUEL MAYANJA VS URA**

[2] See LDMA No.23/2021 **ATTORNEY GENERAL VS IDA NTEGE**

Applicant submitted that under the Collective Bargaining Agreement 2015-2016, the Respondent was required to keep attendance records of all employees. By producing the Human resource Manual, the Respondent could not turn around and deny possession and control of attendance records. On its part, the Respondent countered that it does not have records for this period and that it only kept records for one(1) year for the sole purpose of annual audits. It was the Respondent's contention that keeping such records for a long period is a constraint and that it was not under any legal obligation to keep the documents.

7.0 The general principles regarding the production of documents are that the party seeking the production of the documents must have a suit in the same court and there must be issues pending determination by the court. The documents sought to be produced must also be relevant to the determination of the pending suit before the court.[3]The grant of an order for discovery of documents is discretionary and the court will deny discovery if the applicant is using it as a fishing expedition to obtain information for the purpose of starting an action or developing a defence.

8.0 The Applicant (Claimant in LDR 31/2020) has filed a claim seeking overtime payments inter-alia. He has filed witness statements and pay-slips indicating payments for overtime. We are of the considered view that the Claimant ought to make out his case. The Human Resource Manual which was in possession of the Respondent was handed over to the Applicant upon filing this application. The Respondent contends that it does not have in its possession a document over 6 years old. Notably, a document which is not available, lost or destroyed cannot be produced for inspection. The Respondent contended that it was not under any legal obligation to keep the documents. It is useful to note that under Section 17 of the National Record and Archives Act, 2001, public records are required to be kept for 30 years. Under the Tax Procedure Code Act, 2014 a person is required to keep records for 5 years. Under Section 59(1) of the Employment Act, 2006 the employer is entitled to written particulars the rate of overtime payable and normal hours of work. Under Regulation 28 of the Employment Regulations 2011, an employer is required to keep a record of the employee's payroll. An examination of this legislation does not contain a unanimity of view on the time an employer is required to keep records. We determine that seeking records 7 years after the fact is unreasonable. The proof of the case is not dependent on what documents the Respondent is in possession of but the case of the Claimant. A claim without requisite evidence would amount to a fishing expedition[4] which Lord Scrutton L.J described thus;

> **"A *plaintiff who issues a writ must be taken to know what his case is. If he merely issues a writ on the chance of making a case he is issuing what used to be called a "Fishing Bill" to try to find out whether he has a case***

[3] See HCMA No. 060/2015 **GERALD KAFUREKA KARUHANGA&ANOTHER V ATTORNEY GENERAL & OTHERS** and HCMA No. 912 of 2016 **PATRICIA MUTESI V ATTORNEY GENERAL.**

[4] See **GALE VS DENMAN PICTURE HOUSES LTD [1930] KB 588, *590*** cited in Patrica Mutesi vs A.G(ibid)

or not. That kind of proceeding is not to be encouraged. For a plaintiff after issuing his writ but before delivering his statement of claim to say, "show me the documents which may be relevant so that I may see whether I have a case or not" is most undesirable proceeding."

9.0 Minded that the Claimant has ample opportunity to prove his case an the hearing of the main cause, we are not satisfied that this application should succeed. It is dismissed with no order as to costs.

Dated at Kampala this 12th day of October 2022

ANTHONY WABWIRE MUSANA, Judge _____

PANELISTS

1. **Ms. ADRINE NAMARA,** _____
2. **Mrs. SUZAN NABIRYE &** _____
3. **Mr. MICHAEL MATOVU.** _____

Ruling delivered in open Court in the presence of:

Court Clerk: Mr. Samuel Mukiza.