THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE MISCELLANEOUS APPLICATION NO. 164 OF 2023
(Arising from Labour Dispute Reference No.54 of 2023)

TWINOMUJUNI FRED:::APPLICANT

VERSUS

1. MEC PLASTICS LTD ::RESPONDENTS
2. SUNSARA AGRO LIMITED

Before:

The Hon. Justice Anthony Wabwire Musana:

Panelists:

1. Hon. Adrine Namara,
2. Hon. Suzan Nabirye &
3. Hon. Michael Matovu

Representation:

1. *Mr. Brian Emurwon of Emurwon and Partners for the Applicant.*
2. *Ms. Ritah Nabirye of M/S Luhom & Co. Advocates for the Respondents.*

RULING.

[1] By summons in chamber brought under Order 10 Rules 18 and 24 of the Civil Procedure Rules S.I 71-1*(from now "CPR")*, the Applicant sought orders for the Respondent to produce invoices, receipts, and other documents relevant to the Applicant's claim. The Applicant also sought costs of the application. By a supporting affidavit, the Applicant was deposed to having requested the Respondent to produce the documents, which request was denied. It was the Applicant's case that he was employed in sales and marketing and promised a commission on every sale of damp-proof course rolls*(from now "DPC")*, cooking oil, and sisal rolls. It was averred that the commission was not paid and that the sales invoices, receipts, gate pass records, and audited books of accounts from 2010 to 2012 would support his claim for UGX 14,520,000/= in unpaid sales commission.

[2] In the affidavit in reply opposing the application, Mr. Sundeep Singh deponed that the verbal agreement between the Applicant and Respondent was that the Applicant would only be paid a commission on the price difference from the sales or percentage from the sales made by the Applicant and every transaction was looked at differently. It was also averred that the onus lay on the Applicant to prove that he made the sales, and that the Respondent did not deal in cooking oil. It was also suggested that the Respondent's practice was to keep documents for six years from the year of accounting, and as such, the documents requested were not in its custody. The application was suggested to be untenable and premised on a fishing expedition.

[3] In rejoinder, the Applicant was deposed to entering a commission agreement for 2% of sales. He also averred that between 2009 and 2024, the 1st Respondent produced only DPC. When other products were added in 2014, his commission was increased to 5%. It was also averred that he had generated so much business that there was a backlog in orders. The Applicant was deposed to an admission by the Respondent to 6 years' worth of information, and the records were crucial in determining the number of sales and commissions due.

[4] On the 22nd of November 2023, when the application was called before us, we issued filing directions. We have considered the written submissions below.

The Applicant's submissions

[5] In his written submissions, Mr. Emurwon submitted that the main claim, LDR 54 of 2023 for recovery of commission, was pending before this Court. Counsel also submitted that the records sought had not been denied for a period going back six years. He argued that the documents were relevant to determining the dispute.

The 1st Respondent's submissions

[6] Relying on the cases of **John Kato v Muhlbauer AG & Anor HCMA No. 175 of 2011** and **Sibamanyo Estates Ltd & Anor v Equity Bank(U)Ltd H.C.M.A N0. 583 of 2022,** it was submitted for the 1st Respondent that for the application for production or inspection, the documents must be in the Respondent's possession, custody, or control these being disjunctive expressions. It was also submitted that the documents sought were no longer in the 1st Respondent's control beyond the practice of retaining company records for about six(6) years. Counsel contended that the financial statement's reporting formats were irrelevant in proving the Applicant's claim. Finally, it was submitted on the authority of **Loftin v Martin 776 S.W.2d 145(1989)** that discovery should not be used as a fishing expedition by vague and ambiguous requests. It was suggested that this Court could not support a decision on conjecture, speculation, attractive reasoning, and fanciful theories on an application with no legal basis, which is an abuse of the court process.

Analysis and decision of the Court

[7] The restatement of the principles regarding the production of documents by the parties was unanimous. These principles are twofold: First, 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 determining the pending suit before the court.[1] On the test of relevance, in **Sibamanyo Estates Ltd & Anor v Equity Bank(U)Ltd & 4 Others H.C.M.A N0. 583 of 2022,**[2] the Honourable Mr. Justice Mubiru suggests that the application must be calculated to discover admissible evidence, which must tend to prove an element of the claim or defence, to prove or disprove a fact in issue. The other aspect of the test is that the grant of an order for the discovery of documents is discretionary. The court will deny discovery if the applicant uses it as a fishing expedition to obtain information to start an action or develop a defence.[3]

[8] Ms. Nabirye suggested that the expression for documents sought to be produced are in the disjunctive in terms of possession, custody, and control, and, therefore, only one of the requirements must be met. A disjunctive test is where a rule establishes multiple elements, but only one of those elements needs to be proved to invoke the rule's consequences. They are either or tests implying that proving one element of the test is sufficient.[4]

[9] Under 10 Rule 18 CPR by which this summons originated, sub-rule (2) provides;

> *" Any application to inspect documents, except such as are referred to in the pleadings, particulars, or affidavits of the party against whom the application is made or disclosed in his or her affidavit of documents, shall be founded upon an affidavit showing what documents inspection is sought, that the party applying is entitled to inspect them and that they are in the possession or power of the other party. The court shall not make an order for inspection of those documents when and so far as the court shall be of the opinion that it is not necessary either for disposing fairly of the suit or for saving costs."*

In our view, the rule requires, as a start, possession or power and control of the party against whom the application is made. In the present case, the documents are said to be in the possession of the 1st Respondent. Secondly, the rule requires the Court to exercise its discretion to determine the relevance of the documents. It is, therefore, not entirely accurate to suggest that the rule is disjunctive. The test may be in the disjunctive

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[1] See **HCMA No. 060/2015 Gerald Kafureka Karuhanga & Another V Attorney General & Others** and **HCMA No. 912 of 2016 Patricia Mutesi V Attorney General** which we cited **LDMA No. 005 of 2022 Kiryankusa Simon v Crown Beverages Limited**

[2] **Sibamanyo Estates Ltd & Anor v Equity Bank(U)Ltd & 4 Others H.C.M.A N0. 583 of 2022** at page 7.

[3] See **Kiryankusa***(ibid)*

[4] Per C. Hari Shankar J. in **Jayson Industries and Anr V Crown Craft(India) Pvt Ltd Cs(Comm) 580/2022, I.A. 13422/2022, I.A. 13425/2022**

concerning possession, power and control, but the rule read as a whole is not disjunctive as submitted by the Respondent. Upon proof of possession, power, or control over the documents, there is a secondary test. The Court is enjoined to determine whether the document is necessary. It is not a question of either possession, control, or relevance. It is first possession, power, or control and then relevance. Disjunctive tests are purely either or and not either power, possession, or relevance, which would permit the Court to determine the application on any one of a multi-factor test. In other words, the tests as set out in the jurisprudence, including the cases cited above, are, first, the documents must be in possession of the party against whom the application is made, and secondly, they must be relevant to the issues in the trial. In determination of relevance, the Court exercises its discretion.

[10] In the matter before us, the Applicant, by a notice to produce dated 11th September 20233, sought sales invoices and receipts for DPC, cooking oil, and sisal rolls from 2015 to 2022. The 1st Respondent countered that it did not sell cooking oil and only retained records for an accounting period of six years. It also submitted that the relevance of the documents sought had not been established. The claim before us consists of several orders, including a declaration that the Applicant's discharge was unlawful. One of the remedies sought is an unpaid commission for sales of cooking oil, DPC, and sisal. In paragraph 4 (f) of the memorandum of claim, the Applicant pleads a commission of 2% of sales of DPC, and in paragraphs 4(g) and (h), pleads that the sales commission was 3% on cooking oil and 5% on sisal sales. Paragraphs 4(v), (w), and (x) of the memorandum of claim list the prices of the items on which commission is claimed, and it is also pleaded that the volumes of sales can be established from the Respondent's written records. The Respondent denies this relevance, but the affidavit in reply, particularly in paragraphs 4, 9, and 11, suggests that there was an agreement on payment of a percentage of sales, that it has records for the last six years, and that it has financial records.

[11] In our view, the sum effect of an examination of the above pleadings together with the application papers is that the Respondent's financial records would be relevant in the matter of payment of commission. It would also be somewhat premature to suggest, as Counsel for the 1st Respondent submits, that the format of the financial reports would not aid the Applicant's case. That is one of the subjects of the trial. We are fortified by the decision of this Court in the Kiryankusa case(ibid), where a daily attendance record sought to be produced was a common fact between the parties. Similarly, the present application has a commonality on a sales commission. Both parties make assertions on sales commission. To prove or disprove this fact, the financial records of the Respondent would be necessary and relevant. This view would be consistent with the dicta of the Industrial Court in the case of **Anthony Katamba v MTN(U) LTD** [2] where the Court found that a generalized pleading of discrimination in the main claim entitled the Applicant to an order of discovery of the MTN Group Expatriate Policy.

[12] The second fortifying element of our view is the liberal approach to the discovery of documents. In the exercise of discretion, Mubiru J opines in the Simbamanyo case*(supra)* of a liberal system of procedure in discovery proceedings where the courts, in applications for discovery, apply a standard lower than the balance of probabilities. That is not to suggest a finding on conjecture, speculation, attractive reasoning, or fanciful theories as Counsel for the Respondent submits but, as His Lordship puts it, a sufficient prima facie basis for believing the evidence sought exists is material and relevant to the issues at the trial. From the facts before us, the Applicant has established a sufficient prima facie case for believing the financial records of the 1st Respondent to exist, and the 1st Respondent has admitted to their existence for six years running. They are not doubted. There may be questions about format, but the existence and relevance of the documents are not in doubt. For this reason, we would hold the application to meet the threshold of Order 10 Rule 18 CPR.

[13] We also think seeking six-year financial statements and sales records is reasonable. In the Kiryankusa case, we observed that under Section 17 of the National Record and Archives Act of 2001, public records must be kept for 30 years, and under the Tax Procedure Code Act of 2014, a person must keep records for five years. Therefore, we think the period 2015 to 2022, as sought by the Applicant, is reasonable.

[14] As a result, we are persuaded that the application is not a fishing expedition as described by Scrutton L.J in **Gale v Denman Picture Houses Ltd [1930] Kb 588 at 590.** We do not think that the Applicant has made a case of;

> ***"show me the documents which may be relevant so that I may see whether I have a case or not."***

The Applicant has made the alternative case. The documents exist and are relevant and we so find.

[15] In the circumstances and for the reasons above, we are persuaded that this application is meritorious and succeeds. Accordingly, we direct the 1st Respondent to produce, within 21 days of this order, the following documents:

(i) The sales invoices and receipts for damp course rolls and sisal rolls for 2015 to 2022;
(ii) The gate pass records for the years 2015 to 2022, and
(iii) The audited books of accounts for 2015 to 2022.

There shall be no order as to costs.

It is so ordered.

Signed in chambers at Kampala this 30th day of January 2024.

Anthony Wabwire Musana,
Judge, Industrial Court

The Panelists Agree:

1. Hon. Adrine Namara,

2. Hon. Susan Nabirye &

3. Hon. Michael Matovu.

30th January 2024

2:52 pm

Appearances

1.	**For the Applicant:**	Mr. Brian Emurwon
2.	**For the Respondent:**	None.
Court Clerk:		**Mr. Samuel Mukiza.**
Mr. Emurwon:		Matter for ruling. I have tried calling Counsel for the Respondent but cannot reach him. We are ready to receive the ruling.
Court:		Ruling delivered in open Court.

Anthony Wabwire Musana,
Judge, Industrial Court.
3:05 pm