



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 50 OF 2010**

**COL. RICHARD N. LEIYAGU.....PLAINTIFF**

**-VERSUS-**

**DR. HELEN W. GICHOHI.....1<sup>ST</sup> DEFENDANT**

**AFRICAN WILDLIFE FOUNDATION.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This is a defamation suit lodged by the plaintiff against the defendants. Therein, the plaintiff is seeking a variety of damages against the said defendants for the publication of a defamatory letter addressed to a third party.

2. The suit is part heard, with the plaintiff having begun giving evidence as PW 1. However, following his production of the documents incorporated in his list and bundle thereof, *Mr. Muthui* counsel for the defendants raised an objection on the production of certain items in the plaintiff's second list and bundle of documents filed on 11<sup>th</sup> July, 2012, namely:

(a) 3 (*minutes from the Defence Council meeting held in MOD Conference Room on 16<sup>th</sup> May, 2007*);

(b) 9 (*Grant of Extension of Service [Level Two] Officers dated 20<sup>th</sup> January, 2011*);

(c) 10 (*Letter dated 6<sup>th</sup> July, 2011 from the headquarters-The Kenya Army*); and

(d) 11 (*Letter dated 18<sup>th</sup> July, 2011 from the Ministry of State for Defence*.)

3. *Mr. Muthui's* basis for raising the objection is that items 3, 9, 10 and 11 are records from the Ministry of Defence and are thus confidential as opposed to public documents under Section 38 of the Evidence Act. The advocate also contended that it remains unclear how the above documents were obtained by the plaintiff and whether or not the same are authentic. It is therefore *Mr. Muthui's* argument that essentially, it is imperative that the recording officer of the Kenya Defence Forces be summoned to court for purposes of producing the aforementioned documents.

4. In her response, *Ms. Lipop* advocate for the plaintiff argued that the documents whose production has been challenged do not fall within the purview of Section 35 of the Evidence Act since they are a reflection of facts that are personal to the plaintiff and form part of his employment records, hence he is entitled to produce the same. The said counsel added that the principle of confidentiality cannot apply to the challenged documents.

5. *Mr. Muthui* responded to the above by simply insisting that the documents be produced by the appropriate party, this being the records officer, who will be able to vouch for their authenticity; otherwise, the defendants stand to be prejudiced should the documents be produced by the plaintiff.

6. I have carefully considered the rival arguments as well as the statutory provisions referenced therein. In ascertaining whether the challenged documents fall under the category of public documents or not, it is important to first determine whether the originators of the documents, that is the Kenya Army and the Defence Council, are public bodies.

7. Section 3 (1) of the *Interpretations and General Provisions Act* gives a precise definition of a 'public body' as hereunder:

**“(a) the Government, or any department, institution or undertaking thereof; or**

**(c) a local authority; or**

**(d) any authority, board, commission, committee or other body, whether paid or unpaid, which is invested with or is performing, whether permanently or temporarily, functions of a public nature”**

8. The functionality of both the Kenyan Army (now incorporated into the Defence Forces) and the Defence Council are provided for under Article 241 of the Constitution, as well as Sections 8 and 20 of the *Kenya Defence Forces Act No. 25 of 2012* respectively. Without citing the content of the said provisions verbatim, it is clear therefrom that the above organs perform functions of a public nature and by virtue of this, are public bodies.

9. It therefore follows that as a general rule, documents derived from the abovementioned bodies are public documents. That notwithstanding, I am of the considered view that not all documents prepared by a public body necessarily fall in the category of public documents as this is dependent on the nature and/or content of the document and the intended audience.

10. As earlier mentioned, item 3 constitutes minutes from the Defence Council. I have perused the said minutes and observed that they entail discussions of a relatively sensitive and confidential nature. That being the case, I have every reason to believe that the minutes were never intended to be accessible to the general public and cannot therefore be termed as being public documents in the ordinary sense of the word.

11. Further to the above, whereas I did note that the appointment of the plaintiff and other army officers at the time formed part of the agenda in the meeting, it remains unclear how exactly the plaintiff managed to obtain the minutes. Likewise, the minutes availed bear no indication that the plaintiff was present in the meeting, thereby making it impossible for him to ascertain their authenticity.

12. From the foregoing, I am satisfied that the minutes cannot be produced by the plaintiff and should instead be produced by the secretary to the Defence Council or other appropriate member of the Council.

13. Item 9 is essentially an application form by the plaintiff for the granting of an extension of service. In the circumstances, I see no reason to hinder him from producing the same and in any case, the form was partly filled by the plaintiff.

14. I now turn my attention to items 10 and 11. Having carefully perused the same, it is noteworthy that they are neither addressed to nor copied to the plaintiff irrespective of the fact that they touch on his employment.

15. Furthermore, there is no way of telling how the plaintiff came to obtain the aforementioned letters as this has not been explained and more so, given that the letters are of a confidential nature. Similarly, the plaintiff is in no position to vouch for their authenticity since he is neither the author nor the recipient thereof. It would therefore only be prudent to have the letters produced by a proper ranking officer or official with the Kenya Army and/or Kenya Defence Forces.

16. In the end, the objection raised by the defendants succeeds as relates to items 3, 10 and 11 of the plaintiff’s list and bundle of documents filed on 11<sup>th</sup> July, 2012.

**Dated, signed and delivered at NAIROBI this 10<sup>th</sup> day of April, 2019.**

.....

**L. NJUGUNA**

**JUDGE**

In the presence of:

.....for the Plaintiff

.....for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants