



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NUMBER 1642 OF 2002

THOMAS MUTUNGA KITHUNZI. PLAINTIFF/RESPONDENT

VERSUS

KENYA AIRWAYS LIMITED.DEFENDANT/APPLICANT

RULING

This is an application dated 26th October, 2009 filed by Ms Mohammed Muigai Advocates for the defendant herein **KENYA AIRWAYS LIMITED**. The application was brought under section 3A and 80 of the Civil Procedure Act (Cap 21) and Order 44 Rule 1 and Order 50 Rule 1 of the Civil Procedure Rules.

The application has five prayers, two of which have been spent, as follows: -

1. (spent).

2. (spent).

3. *The order by the Hon. Lady Justice Aroni issued on the 12th day of October 2009 be and is hereby reviewed to read; “the Defendant do produce the Curriculum Vitae of the staff declared redundant and those recruited in the Defendant’s Insurance section in February 2000 only and not in respect of the Defendant’s entire Finance Department”.*

4. *The court do order that the defendant has complied with the order of production.*

5. *Costs of this application be provided for.*

The application has grounds on the face of the Notice of Motion. It was filed with a supporting affidavit, sworn on 26th October, 2009 by Anthony Muriu a Legal Counsel of the defendant’s company.

It was deponed in the said affidavit, inter alia, that on 12th October 2009 the court issued an order directing the defendant to produce documents in paragraph 4 of the affidavit of Jeremy Mutero dated 8th February, 2001 within 14 days; that in the amended plaint filed on 10th July 2003 the plaintiff’s complaint was that he was the only one out of the employees in the Insurance Services Section of the Defendant whose employment was terminated, and that there was no mention in the entire plaint of the Finance Department; that through the court’s order was based on the affidavit of Jeremy Mutero sworn on behalf of the defendant, in view of the facts herein, the reference to the entire Finance Department in the

affidavit was done erroneously; that the Curriculum Vitae of the staff declared redundant in the entire Finance Department would not be of any value; that at the time in question the Finance Department comprised of Financial Accounting, Treasury, Management Accounting, Debtors, Revenue Accounting and Insurance Section that the staff declared redundant in the entire company in the year 2000; was 124; that it was not immediately possible to segregate the staff declared redundant in the entire Finance Department; that there were only six (6) officers in the Insurance Section at that time of reorganization; that only the Curriculum Vitae of the said six (6) officers were relevant and should be availed as pleaded in the suit; that the documents filed had already included all the Curriculum Vitae of the officers in the Insurance Section; that the Curriculum Vitae of the only one new officer who was recruited in the Insurance Section Duncan Maina was attached to the affidavit of Jeremy Mutero; that the plaintiff's Curriculum Vitae had been attached to the defendant's filed bundle of documents; that the defendant had therefore complied with production of the Curriculum Vitae of all employees in the Insurance Section as well as the only employee who was employed in 2000; and that the plaintiff would suffer no prejudice if this application was allowed.

The defendant/applicant through their counsel also filed written submissions on 17th August, 2010. The defendant in the submissions relied on the above supporting affidavit. Counsel for the defendant contended that the defendant wanted the order of Justice Aroni reviewed. The first reason was that the paragraphs in the pleadings and the order referred to the Insurance Section. Therefore the paragraph challenged should not have read "**Finance Department**" but should have read "**Insurance Section**". The second reason was that according to the supporting affidavit in this application, the court's order would involve approximately 124 staff members, while the plaintiff's complaint clearly referred to discrimination in the Insurance Section. Therefore, the intention of the court should have been to refer to only the Insurance Section as the matter only related to the Insurance Services Section. Thirdly, the Finance Department had six (6) sections including the Insurance Section. Therefore, it was clear that the plaintiff could only have sought production of documents relating to Insurance Section. Consequently, the court order dated 12th October, 2009 would not be relevant to the determination of issues in court as even the statement of agreed issues at paragraph 2(a) alluded to matters mentioned in paragraph 9 of the amended plaint, which concerned only the Insurance Services Section. It was the contention that the plaintiff was bound by his pleadings and since paragraph 9(a) of the amended plaint was against the "**Defendant's Manager in Charge of Insurance Services**", the court order for production of the Curriculum Vitae in the entire Finance Department was misplaced.

Fourthly, it was contended that the plaintiff had been on a fishing expedition to obtain documents by issuing three (3) Notices to Produce documents resulting in the subsequent objections to production of documents by the defendants.

Fifthly, that the defendant did not have instructions to produce detailed Curriculum Vitae of all the staff who were terminated in the Finance Department in February, 2000, and that the defendant had already produced the Curriculum Vitae of all the employees in the Insurance Section of the defendant who were in service in 2000.

Reliance was placed on Order 44(1) of the Civil Procedure Rules. It was contended that Order 44 Rule 1 of the Civil Procedure Rules provided that review could be granted "**on account of some mistake or error apparent on the face of the record**". It was contended also that though the initial error herein was made in the affidavit of Joseph Mutero dated 8th February 2007 leading to the court making a similar error, Order 44 Rule 1 of the Civil Procedure Rules provided the remedy for such an error on the face of the record. Counsel argued that the plaintiff having been terminated from his service in the Insurance Section, his case had nothing to do with for example Treasury or Management Accounting sections of the Finance Department. Therefore, there was no justification for the order to produce Curriculum Vitae from those sections.

Reliance was also placed on section 5 of the Evidence Act (**Cap 80 Laws of Kenya**) which provides:

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"5. Subject to the provisions of this Act and any other law, no evidence shall be given in any suit or

proceedings except evidence of the existence or non-existence of a fact in issue, or of any other fact declared by any provision of this Act to the relevant.”

It was contended that the facts in issue herein would not justify relevance or admission of the Curriculum Vitae from the employees of the entire Finance Department.

Reliance was placed on **Halsbury’s Laws of England 3rd Edition Vol. 12 page 6** wherein it was stated that besides irrelevance, a party may resist inspection or production of a document in his possession on behalf of or jointly with some other person not a party to the proceedings. It was emphasized that in **Halsbury’s Laws of England, 3rd Ed. Vol. 12 page 26** it was stated as follows: -

“A document relates to matters in question in an action if it contains information which may- not which must - either directly or indirectly enable a party requiring the affidavit either to advance his own case or to damage the case of his adversary, or which may fairly lead to a train of inquiry which may have either of those two consequences.”

It was contended that the above principle was discussed at length in the English Case of **THE CAMPAGNIE FINANCIERE ET COMMERCIALE DU PACIFIQUE-VS-THE PERUVIAN GUANO COMPANY (1882) 11QBD55CA** pp. 62 and 63.

The defendant/applicant also filed supplementary submissions on 16th November, 2010. In the supplementary submissions, some parts of paragraphs of the Amended Plaintiff dated 3rd July 2003, that is paragraph 5, 6 and 7 were highlighted. It was contended that paragraph 6 in part stated: -

“... In particular, the plaintiff’s department/section of Insurance Services was dissolved and all officers were obliged to re-apply afresh for consideration for deployment either in that section or any other department”

On the other hand paragraph 7 of the plaintiff in part stated: -

“... There were six (6) Officers manning six positions in the Insurance services section before the purported re-organization exercise, but the positions were reduced to four after the alleged re-organisation. Interestingly, four out of six officers already in the insurance services met the minimum criteria for the four positions, the plaintiff being among them. Yet out of the six officers, the plaintiff was the only one whose services were terminated even though he was the only most experienced and had the requisite qualifications and had shown exemplary competence in the job...”

It was therefore contended that the alleged discrimination of the plaintiff could only be in comparison to co-employees in the Insurance Section. Therefore the only Curriculum Vitae to be produced should relate to the Insurance Section.

Reliance was placed on the case of **ACHOLA & ANOR-VS-HONGO & ANOTHER [2004] IKLR 462** wherein the Court of Appeal stated -

“It is trite that cases must be decided on the issues pleaded and we need not cite any authority for that proposition.... In the circumstances of the present case, we think Tanui J was not right in first, allowing the issue of limitation to be raised when it had not been pleaded. We accordingly set aside the ruling and order of Tanui J. dated 1st November 2001 dismissing the Preliminary Objection raised by the second Respondent to the Appellant’s claim.....”

Reliance was also placed on the case of **MWAI-VS-KENYA TOURIST DEVELOPMENT CORPORATION [1983]eKLR1**, at page 7 – wherein Kneller JA held: -

“First the agency was not specifically pleaded and the plaintiff was drawn by Opanyi’s Advocate. So it was not an issue... in my view, the learned judge’s orders were right and should be upheld.”

The application was opposed. The plaintiff filed a replying affidavit sworn on by himself on 4th February 2010 through his counsel M/s B N Kiptoo & Company Advocates. It was, deponed in the said affidavit, inter alia, that in his plaint he had pleaded in paragraphs 5, 6, and 9 that the machinations were hatched to be executed in the Finance Department in particular the Insurance Section; that as it was a collective scheme in the Finance Department, there was need to avail to this court in detailed terms the Curriculum Vitae and identity of those declared redundant as well as those who were newly recruited and those who were involved in the exercise to enable the court arrive at a fair decision; that the list annexed to the applicant's affidavit as annex "AM3" of 124 staff purportedly terminated for various reasons was irrelevant; that the plaintiff/respondent had confined his discovery of documents to the orders made by Mutungi J, on 18th January 2007; that the defendant/applicant had willfully and deliberately failed to produce those documents; that the defendant had failed to produce those documents in respect of certain known persons as contained in paragraph 10 of the plaintiff's affidavit; that the defendant's application was an attempt to justify a deliberate and willful failure to comply with the court's orders of 18th January 2007, and subsequent orders of 12th October, 2009 by Mutungi J. and Ali Aroni J. respectively; that the present application was misconceived, frivolous, vexatious, made in bad faith and an abuse of court process.

The plaintiff/respondent through his counsel filed written submissions on 2nd September 2009. It was submitted that the documents requested were relevant to the issues in the substantive case. It was also contended that both Mutungi J. and Ali Aroni J. dealt substantially with the issue of documents to be supplied. The two judges even found that other documents were not important, but that the documents requested herein were relevant. It was contended that the plaintiff did not require documents in relation to 124 employees because not all of them were from the Finance Department. It was the contention that the documents required herein only related to fifteen (15) employees or staff.

The plaintiff through his counsel also filed supplementary submissions on 4th November 2010. It was contended that the court's order was based on the undertaking in the affidavit of Jeremy Mutero, and that the defendant/applicant has not given a valid reason why it had to change its mind three years after that undertaking. It was contended that Justice Mutungi and Justice Ali Aroni had already carefully considered the relevant issues and were of the opinion that the documents and information requested were relevant and material to the suit. It was reiterated that the documents requested were not in respect of 124 staff as alleged by the defendant. It was contended that this application was an attempt to circumvent the court's orders and to delay the delivery of justice.

On the hearing date, Mr. Mogere for the defendant/applicant and Mr. Kiptoo for the plaintiff/respondent relied upon the written submissions.

This is an application for review of the court's orders brought under Order 44 Rule 1 of the Civil Procedure Rules. The said rule provides: -

"1(i) Any person considering himself aggrieved

(a) By a decree or order from which an appeal is allowed but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is hereby allowed;

and who from the discovery of any new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of the judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for review of judgment

notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when being a respondent, he can present to the appellate court the case on which he applied for the review”.

The defendant/applicant herein has come to this court for review claiming that there was a mistake or error on the face of the record in the order granted by Ali Aroni J. He does not rely on the other grounds for review provided for under Order 44 Rule 1 of the Civil Procedure Rules.

It is obvious from the undisputed facts that in making the order, the learned Judge merely lifted the commitments made in paragraph 4 of the affidavit of Jeremy Mutero sworn on 8th February, 2007 on behalf of the defendant/applicant. The contents of that affidavit are not said to be an error. The paragraph stated that the defendant would provide Curriculum Vitae of staff in Finance Department. The applicant now merely tries to interpret the order of the court by giving it a narrow meaning. They say that it is not possible to bring out all the names of specific people in the Finance Department, from a list of 124 employees whose Curriculum Vitae are in question. They say that they have, in any case, provided the Curriculum Vitae for staff members in the Insurance section. They also say that they do not have authority to give the Curriculum Vitae from the staffs in the Finance Department. The respondent states that he never asked for Curriculum Vitae of 124 people. He only gave the names of around 15 people whose Curriculum Vitae is to be provided.

In my view, the reasons or grounds given by the applicant in this application do not satisfy the requirements of error or mistake on the face of the record for the grant of review orders. It was on the applicant to show what error was committed by the court. If for example, the number of staffers was to be nineteen (19), and the court wrote 119, then that would be an error on the face of the record. If the affidavit of Jeremy Mutero undertook to provide data on staff in Finance Department and the court ordered that data be provided in Finance and Engineering Departments, that would be an error on the face of the record. In the present case however, there was no real or apparent error or mistake committed by the court. The applicant has not attempted to demonstrate any error or mistake on the face of the record. They merely give an interpretation of what they would prefer to be in the order, which does not amount to a mistake or error on the face of the record. They have failed to discharge their burden, and cannot therefore be entitled to the review, sought.

The applicant has given a number of reasons for inability to provide the information, including a reason that they are not able to separate staff from Finance Department from other staff. I do not see how an employer, or a reputable employer can seriously take such a stand. Reputable employers should keep proper records of employees. In my view, it is easy enough to provide Curriculum Vitae of 15 employees. They also say they do not have authority from staff in Finance Department to provide the Curriculum Vitae. One wonders where they got the authority to provide the Curriculum Vitae for the Insurance Section Staff. In any event, those arguments are not relevant to the ground relied upon for the request for review based on mistake or error on the face of the record. The reasons given by the applicant are not relevant considerations for review of the court’s order on the basis an error or mistake on the face of the record under Order 44 Rule 1 of the Civil Procedure Rules.

The cases cited by the applicant are not relevant to the issues in the application. They go to relevance of evidence to be tendered in court rather than mistake or error on the face of the record under Order 44 of the Civil Procedure Rules. I, therefore, find and hold that they are not applicable and are not of any assistance to the applicant.

For the above reasons, I find that the application has no merits and is for dismissal.

Consequently, I dismiss the application with costs to the plaintiff/respondent.

Dated and delivered at Nairobi this 14th day of March 2011.

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GEORGE DULU
JUDGE

In the presence of

Mr. Kiptoo for the respondent

Catherine Muendo – court clerk