



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ELC CASE NO. E048 OF 2020**

RUFUS MOGERE WAITHAKA.....PLAINTIFF

-VERSUS-

EDITA NAITORE NTONGAI.....DEFENDANT

**RULING**

**INTRODUCTION**

1. The Plaintiff herein filed a Notice of Motion Application dated 6<sup>th</sup> July 2021, whereby the Plaintiff herein has sought for the following Reliefs;

i. *That this honourable court be pleased to expunge and/or strike out the illegally obtained Evidence appearing and produced in the Defendant's Bundle of Documents as Document number 6 contained at pages 156-172; and number 22 contained at pages 173-183.*

ii. *The costs of this application be provided for.*

2. The Subject Application is premised and/or anchored on the basis of grounds alluded to at the foot of the Application and same is further supported by the affidavit of the Plaintiff sworn on the 5<sup>th</sup> July 2021, in respect of which the Plaintiff/Applicant has contended that the Bank statements which forms part of the Defendant/Respondent Bundle of Documents, were procured and/or otherwise obtained illegally.

3. Upon being served with the Application herein, the Defendant filed a Replying Affidavit sworn on the 23<sup>rd</sup> July 2021, and in respect of which the Defendant has opposed the subject application.

**Deposition by the parties**

**Plaintiff/Applicants case**

4. The Plaintiff/ Applicant has contended that though the Defendant and himself were previously married, the marriage was determined upon the issuance of a decree absolute and the parties thereafter ceased to be husband and wife.

5. On the other hand , the Applicant has further averred that following the dissolution of the marriage, same filed the subject proceedings seeking various declarations over and in respect of properties which were acquired and registered in their joint names during the subsistence of the marriage.

6. Nevertheless, the Plaintiff has further averred that upon being served with pleadings in the subject matter, the Defendant, entered appearance, filed a statement of defense as well as Bundle of Documents, part of which contained the Plaintiff's bank statement.

7. The Plaintiff has further averred that the Private Bank statements were procured and/or obtained by the Defendant herein in collusion with the staff working at the various Banks, including HFC Bank, where the Defendant herself works.

8. It is the Plaintiff's further averment, that being Private Bank Statements and not having consented to banks statements being availed to the defendant, same were therefore procured illegally and in contravention of **Article 50 (4) of the Constitution 2010**.

9. In the premises, the Plaintiff has implored the court to expunge the Private Bank Statements from the Defendant's Bundle Documents and to bar the Defendant from relying on same.

### **Defendant's case**

10. The Defendant herein has filed a Replying Affidavit sworn on the 23<sup>rd</sup> July 2021, and in respect of which same has conceded that the Bank Statements belong to and/or relate to the Plaintiff's Bank Accounts, but nevertheless same has proceeded to justify the basis upon which the banks statements came into her possession and/or custody.

11. It is the Defendant's averment, that the Bank statements relating to account number 1959383101-0 extracted from HFC Bank, actually relates to a Bank account in the joint names of the Plaintiff and herself, in this regard the Defendant avers that both the Plaintiff and herself, have access to and are entitled to copies of the said bank statements.

12. As pertains to Bank Statements in respect of Account number xxxx11725-0 HFC Bank, the Defendant has conceded that the same belongs to the Plaintiff, but venture to aver that the said Bank Account was linked to the Joint mortgage account held by the Plaintiff and herself at HFC Bank.

13. In respect of the 3<sup>rd</sup> Account, namely XXXXXX4300 at Standard Chartered Bank, the Defendant agrees that same belongs to the Applicant and avers that the said statement was voluntary shared with her in the year 2017, during the time when same was still married.

14. In the premises, the Defendant/Respondent disputes that the Evidence in respect of the Bank Statements, were illegally procured and/or obtained by herself.

### **Submissions**

15. The Subject matter came up on the 23<sup>rd</sup> July 2021, when the honourable court directed that the Application be argued and/or canvassed by way of written submissions.

16. Pursuant to and in line with the directions of the court, the parties herein proceeded to and filed their respective written submissions and which submissions forms part of the court records. For clarity, the Plaintiff filed his written submission on 30<sup>th</sup> July 2021, whereas the Defendant filed her set of submissions on the 21<sup>st</sup> October 2021.

### **Issues for determination**

17. Having reviewed the Notice of Motion Application filed by the Plaintiff/Applicant, the supporting affidavit thereto and the written submissions dated the 30<sup>th</sup> July 2021, on one hand and Replying Affidavit sworn by the Defendant/Respondent on the 23<sup>rd</sup> July 2021, as well as the written submissions dated 21<sup>st</sup> October 2021, **I am of the humble view that the following issues arise for Determination;**

- I. Whether the Bank Statements which have been alluded to, constitute Private Documents belonging to the Plaintiff/Applicant.
- II. Whether the Private Bank statements were illegally obtained and if so, whether same can be relied upon by the Defendant/Respondent.

### **Analysis and determination**

#### **Issue number 1**

18. It is not in dispute that the Bank Statements, which are the subject of the instant Application and by extension the ruling herein, are in the name of the Plaintiff/Applicant. In this regard, they are private and confidential documents which can only be accessed by the Plaintiff/Applicant or alternatively, with his consent and/or permission.

19. As pertains to Banks Account number xxxxxx-x, the Defendant herein had contended that same was in joint names, and thus contended that both the Plaintiff/Applicant and herself, could access and obtain copies.

20. Nevertheless, I have looked at the said Bank statements which are contained at page 159 of the Defendant's bundle and it is clearly shown that the Customer who owns and/or operates the subject bank account is the Plaintiff only and not otherwise.

21. Based on the foregoing observation, it is my finding and holding that the three set of bank statements, which have been objected to, comprise of Private of bank statements which are confidential to the Plaintiff and thus fall with the purview of **Article 31 of the Constitution which provides as hereunder;**

### **Privacy.**

**31. Every person has the right to privacy, which includes the right not to have—**

**(a) their person, home or property searched;**

**(b) their possessions seized;**

**(c) information relating to their family or private affairs unnecessarily required or revealed; or**

**(d) the privacy of their communications infringed.**

**Issue number 2**

22. Having found and held that the three set of Bank Statements constitute and/or amounts to Private and Confidential information belonging to the Plaintiff, the question that then begs the answer is whether the Defendant/Respondent herein, can procure the said information and endeavor to use same, without the consent and permission of the Plaintiff.

23. Before venturing to answer the question, it is imperative to note that every citizen has a right of access to information and this right to information has been codified and/or provided for under Article 35 of the Constitution 2010, which provides as hereunder;

Access to information.

35. (1) Every citizen has the right of access to—

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

**(3) The State shall publish and publicise any important information affecting the nation.**

24. To facilitate the realization of access to information, Parliament was called upon to enact an Act of Parliament and in this regard Parliament proceeded to and enacted **Access to information Act, 2016**, which provides for the steps that must be complied with, when a citizen requires information held by the state, a state agency and/or another person, which information is required by the requesting person for purposes of exercise or protection of any right and/or fundamental freedom.

25. Suffice it to say, that the person seeking the information is first and foremost obliged to generate a request vide letter addressed to the holder of the information sought in the first instance and if the information sought is not granted by the recipient, then the requesting party shall thereafter be at liberty to file a Petition at the high court for the provision of the information sought and/or requested for.

26. However, a person, in this case, the Defendant/Respondent is not allowed to engage in underhand methods and/or collusion with other third parties to access and/or otherwise obtain, information which is private and confidential and which otherwise fall within the Adverse party's Right to Privacy. Such kind of approach is illegal and must be frowned upon.

27. In my humble view, the manner in which the Defendant chose to procure and/or obtain the three set of Bank Statements, was illegal and unlawful and did not comply with the provision of **Section 6(1) of Access to Information Act**.

28. Having not complied with the law as pertains to the procurement of such private and confident information and having resorted to the unorthodox manner in obtaining the said information, the evidence at the foot of the three-bank statement were therefore illegally obtained contrary to Article 50 (4) of the Constitution 2010.

29. In support of the foregoing position, I rely in the decision in the case of **OKIYA OMTATA AND 2 OTHERS VERSUS ATTORNEY GENERAL [2020]EKLr**, where the court observed as follows;

**83. We reiterate that the appellants claimed to have been supplied with the contentious documents by “conscientious citizens” and “whistleblowers”. Based on the foregoing, the appellants ought to have requested the concerned Government Departments to supply them with the information they required, and to which they were entitled to receive in accordance with Article 35 of the Constitution. It was not necessary for the appellants to resort to unorthodox or undisclosed means to obtain public documents. If they deemed the documents were relevant (as indeed they were) then, they ought to have invoked the laid down procedure of production of documents.**

**84. We therefore agree with the learned Judge that it would be detrimental to the administration of justice and against the principle underlying Article 50(4) of the Constitution to in effect countenance illicit actions by admission of irregularly obtained documents. However well intentioned “conscientious citizens” or “whistleblowers” might be in checking public officers, there can be no justification, as pointed out by the Supreme Court, for not following proper procedures in the procurement of evidence. We do not have any basis for interfering with the decision of the High Court to expunge the documents in question.**

30. Before I wind up on the issue of the illegally obtained and/or acquired evidence, it is important to address one aspect of the Defendant/Respondent averment and this relates to the averments that the Bank Statements relating to the 3<sup>rd</sup> account, which was domiciled at standard chartered bank, was given to her and she came across same during the period of cohabitation with the Plaintiff/Applicant.

31. In this respect, the Defendant invokes the cover of marriage to explain the basis upon which she intends to rely on the said Bank statement which I have held, was illegally obtained.

32. Suffice it to say, that the Bill of rights and Fundamental freedom provided for and/or contained in the constitution 2010, belong to the individual person and such person are entitled to enjoy the Rights to the largest extent, subject only to the limitation provided for under **Article 24 of the constitution,2010.**

33. In my humble view, the fact that the Defendant was previously married to the Plaintiff, before same was terminated, does not confer upon the Defendant a right to procure information illegally and seek to utilize same before a court of law, to the prejudice and/or detriment of the Plaintiff/Applicant.

34. In support of the foregoing holding, I subscribe to the decision in the case of **RC v K K R (2021) eKLR**, where the court observed as follows;

**“**

**I must say that the Constitution regards every person as a distinct individual whose rights and fundamental freedoms are individually and variously guaranteed and protected. Marriage does not take away the constitutionally-guaranteed rights and fundamental freedoms of a spouse neither are such rights and fundamental freedoms of one spouse subsumed by the other spouse upon marriage.”**

#### **Final disposition**

35. Based on the foregoing observations, I find and hold that the three-sets of Bank Statements, which are the subject of the Notice of Motion Application dated the 6<sup>th</sup> July 2021, were illegally procured and/or obtained.

36. Secondly, having been illegally procured and/or obtained, the said Evidence and/or information cannot be relied upon and/or otherwise be admissible in court of law, either in the manner envisaged by the Defendant/Respondent or at all.

37. In the premises, the Notice of Motion Application dated the 6<sup>th</sup> July 2021, is hereby allowed and the Bank statements contained **at pages 159 to 183 of the Defendants bundle of documents dated the 6<sup>th</sup> November 2020, be and are hereby expunged.**

38. To facilitate compliance with the order hereof, the Defendant is hereby ordered to file a Compliant Bundle of Documents, excluding the Offensive bank statements, which have been expunged by dint of the Ruling herein. Same shall be filed and served within the next 14 Days from the Date hereof.

39. As pertains to costs, same shall abide the cause.

40. It is so ordered

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF NOVEMBER 2021.**

**HON. JUSTICE OGUTTU MBOYA,**

**JUDGE.**

**ENVIROMENT AND LAND COURT,**

**MILIMANI LAW COURTS**

In the Presence of: