



Manoti v Kenya Revenue Authority (Employment and Labour Relations Cause E370 of 2021) [2024] KEELRC 1886 (KLR) (12 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 1886 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E370 OF 2021**

AN MWAURE, J

JULY 12, 2024

BETWEEN

CLIFF BWOGO MANOTI CLAIMANT

AND

KENYA REVENUE AUTHORITY RESPONDENT

RULING

1. The Applicant filed a Notice of Motion dated 9th November 2023 seeking the following orders that: -
 1. This Honourable Court be pleased to expunge the Claimant's list of documents dated 3rd October 2023 which were filed out of time and without leave of this court in particular:
 - a. The memo dated 13th June 2019 and 8th July 2019 at page 7-18 of the Claimant's list of documents dated 3rd October 2023.
 2. The costs of this Application be in the suit.

Respondent/Applicant's Case

2. The Respondent/Applicant avers that the Claimant has failed to show how he procured and accessed the documents showing the communication between the officers of the Respondent.
3. The Respondent/ Applicant avers that the use of illegally procured information, accessed without following requisite procedures under the custody of public bodies in judicial proceedings renders the same inadmissible.
4. The Respondent/Applicant avers that the Claimant employs the documents obtained to advance personal interest, monetary compensation and not advancement of protection of fundamental rights or freedoms.



5. The Respondent/Applicant avers that the Claimant has failed to state the right he wishes to protect, what information is required and how the information would assist in exercising or protecting that right. He further failed to request the concerned government department to supply him with the information required in accordance with Article 35 of *the Constitution*.
6. The Respondent/ Applicant avers that the prejudicial effect of the illegally acquired documents exceeds their probative value in the administration of justice.
7. The Respondent/Applicant avers that the Claimant's conduct is against Article 50(4) of *the Constitution* in effect countenance illicit actions by admission of irregularly obtained documents.

Claimant/Respondent's Case

8. In opposition to the Application, the Claimant/Respondent filed replying affidavit dated 19th February 2024.
9. The Claimant/Respondent avers that the impugned documents are copies of a signed memo forwarding an advisory to the Applicant's Human Resources Department, advising them to implement a judgment in Nairobi ELRC No. 547 of 2018; Erastus Gitonga & Others vs National Environment Authority; in which the court found that in-house counsel working in the National Environment Authority were entitled to prosecutorial and non-practising allowance payable to their counterparts at the ODPP and the State Law Office (AGs Office).
10. The Claimant/Respondent avers that Rule 14(10) of the ELRC Rules allows a claimant who has not filed documents they wish to rely on to file and serve upon the other party at least 14 days the case is listed for hearing.
11. It is the Claimant/Respondent's case that the documents were filed and served on 03/10/2023 and the same are properly on record as the case has not been set down for hearing. The same are not supplementary documents for which leave of court ought to be sought.
12. The Claimant/Respondent avers that the documents are authentic and came as a result of the in-house fraternity in the Legal Services & Board Coordination Department. Everyone was called upon to give their input to the final draft that was eventually signed off by the then Chief Manager- Legal Services & Board Coordination Department and forwarded to the HR department by the Commissioner- Legal Services & Board Coordination Department.
13. The Claimant/Respondent avers the documents were accessible by staff working in Legal Services & Board Coordination Department including himself.
14. It is the Claimant/Respondent's case that sections 6, 8 and 9 of the *Access to Information Act*, 2016 does not apply as he was part of the Respondent's officers.
15. The Claimant/Respondent avers that the documents are for the advancement of a fundamental right and claim of financial compensation as a result of the Respondent's violation of his rights.
16. The Claimant/Respondent avers that the documents demonstrate lack of independence of the Respondent's in-house counsel and its actions offend the Section 32B of the *Advocates Act* on rendering independent professional advice by in-house counsel to their employer.



Respondent/Applicant's Submissions

17. The Respondent/Applicant submitted that Section 134 of the [Evidence Act](#) limits the admissibility of privileged documents in court proceedings. It relied on the case of Derby and Company Limited and Others vs. Weldon and Others (1990) 3 ALL ER 672.
18. The Respondent/Applicant submitted that the subject documents are internal memos issued by the chief manager legal services and board coordination, in their official capacity as in-house legal advisers with the Respondent. Hence, the subject memos by virtue of Section 134 of the [Evidence Act](#) is privileged and therefore inadmissible.
19. It is the Respondent/ Applicant submission that the legal consequence of section 134 of the [Evidence Act](#) is that neither the Claimant/Respondent nor the undersigned of the memorandum may seek to rely on the subject documents without the Applicant's express permission. There being no evidence in support of such a permission being granted, the court has no other option but to strike out the documents.
20. It is the Respondent's submission that the impugned documents are contrary to the public interest as: they are internal official correspondence between the Commissioner- Legal Services and Board Coordination, Deputy Commissioner- Human Resources and Chief Manager- Legal Services and Board Coordination on diverse dates in June & July 2019; the Claimant failed to disclose evidence of how they acquired the information as he resigned on 10/11/2020; and there is no evidence that he adhered to Article 35 of [the Constitution](#) and sought access to the information as prescribed by law.
21. The Respondent/Applicant submitted that the balance of public good in the circumstances of this particular case tilts in favour of refusing the production of the subject documents for prejudicing the chances of the Applicant's case.
22. The Respondent/Applicant's further submitted that the documents are not vital to the success of the Claimant's case, for the reason that, constitutional remedies are premised on the principles set out in [Anarita Karimi Njeru v Republic](#) [1979]eKLR being locus, particularizing of the constitutional provisions infringed upon and evidence in support of the alleged constitutional violation, the latter of which is a question fact subject to the rules of evidence.
23. The Respondent/Applicant submitted that Rule 14(10) of the ELRC (Procedure) Rules, 2016 is not relevant to the proceedings on grounds that the subject documents are part of the Claimant's bundle of document listed on his list of documents dated 3/05/2021. In any event, leave has not been sought for the reason stated above.

Claimant/Respondent's Submissions

24. The Claimant/Respondent submitted that the guiding principles for excluding evidence is provided under Article 50(4) of [the Constitution](#) limited to: evidence must have violated fundamental rights and freedoms in the bill of rights; evidence would render the trial unfair; and evidence would be detrimental to the administration of justice.
25. It is the Claimant/Respondent's submission that he did not violate any right or fundamental freedom in obtaining the documents and the Respondent/Applicant has not demonstrated the rights and fundamental freedoms violated as such documents are properly procured, on record and admissible in evidence.



26. The Claimant/Respondent submitted that the Applicant employs two types of memos either ‘public’ and ‘confidential’. The communications were neither confidential between departmental heads, the Respondent would have challenged the documents for being confidential and out of reach from everyone including its staff.
27. The Claimant/Respondent submitted that the documents are relevant to the fact in issue and form part of the admitted facts by the Applicant at paragraph 27 of the Statement of Defence admits advising its HR department to implement circulars nos. MSPS.10/145A VOL.VII/40 and MSPS.10/5A VOL.VII (78). They form part of the facts that would ordinarily not need any proof by dint of Section 61 of the *Evidence Act*.
28. The Claimant/Respondent submitted that Section 61 of the *Evidence Act* which gives the court discretion to require the Respondent to provide the very documents that the Respondent is now attacking as illegally obtained.

Analysis and Determination

29. The main issue for this court’s determination is whether the memos dated 13/06/2019 and 08/07/2019 at page 7-18 of the Claimant’s list of documents dated 03/10/2023 are illegally procured privileged documents and if they are therefore admissible.
30. Privileged information was defined in *Jackline Chpkemoi Kimeto v Shafi Grewal Kaka & 3 others* [2019] eKLR as follows:

“Privileged Information is defined under section 130 – 137 of the *Evidence Act* deals with privilege and provides for instances when communication between certain categories of persons can be inadmissible in proceedings for being privileged. These include communication during marriage, official communication to a public officer, communication between an advocate and his client and communications between advocates.

Section 134, *Evidence Act* provides:

134. Privilege of advocates

- (1) No advocate shall at any time be permitted unless with his client’s express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:
Provided that nothing in this section shall protect from disclosure—
 - a. any communication made in furtherance of any illegal purpose;
 - b. any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client.
- (2) The protection given by subsection (1) of this section shall continue after the employment of the advocate has ceased.”



31. Further, Ndolo L in the case of *Susan Wariara Kariuki v Diakonie Katastrophenhilfe* [2016] eKLR held:-

“.....In addition, there is now firm jurisprudence from this Court that an employee may not exhibit restricted information belonging to their employer without authorisation of the employer or an order by the Court (see *SBI International Holdings AG (Kenya) v Amos Hadar* [2015] eKLR).

The Claimant simply states that she came across the subject letter in the course of her employment with the Respondent but does not provide details. The Court could not therefore tell how the letter which was neither addressed nor copied to her came to her possession. In the absence of any further explanation, the Court reached the conclusion that the Claimant used unethical and unlawful means to access the letter.

This Country now has a Constitution that enables parties to access documents necessary for their case through legal means and there is therefore no need to resort to street methods to do so and as held by Lenaola J in *Okiya Omtatah Okoiti & 2 Others v Attorney General & 3 Others* [2014] eKLR a court of law will not rely on documents that are improperly obtained.”

32. The respondent avers the documents which are the subject matter herein are memo dated 13th June 2019, 8th July 2019 being part of claimant’s list of documents dated 3rd October 2023. The law is that he who alleges must prove as provided in sections 107 and 108 of the *Evidence Act*. The respondents have given no evidence to portray that the obtained these documents illegally or un procedurally.
33. The claimant worked as an officer in litigation department of the applicant. These documents were public documents some giving advice in relation to a judgment of the a case ELRC 547/2018 Erastus Gitonga & Others vs National Environment Management Authority. This was the Court’s holding that in house counsel working in NEMA be paid non practising allowance in keeping with their counterparts at ODPP State Law Office.
34. These are common documents and emanate from a finding in a court. There is no valid reason why these documents should not be admitted.
35. As opposed to the documents referred in the authorities cited *Jackline Chepkurui Kimeto vs Shafi General Kaka & 3 Others* (2019) eKLR and *Susan Wariara Kariuki vs Dianonie* (supra) where these documents referred thereto were on the one hand privileged and on the other hand obtained illegally. These documents were not in that category and the Court finds no reason to reject them for admissibility in Court. In any event, the Court will still determine the main suit on its merit at the hearing.
36. In section 14(10) of *Employment Act* it is provided:

“Where a party intends to rely on a document that has not been filed as part of its pleadings, the party shall make sufficient copies of each document for the court, file and serve the other party with a copy at least fourteen days before the case is set down for hearing or such shorter period as the Court may order.

Provided that after the close of pleadings, the Court may allow the filing of a supplementary bundle of documents.



37. The court finds the documents were filed procedurally since the suit had not been yet set down for hearing.
38. The referred documents in the notice of motion dated 9th November 2023 are therefore admissible. The notice of motion application referred hereto is found unmerited and is dismissed.

Costs will be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 12TH DAY OF JULY, 2024.

ANNA NGIBUINI MWAURE

JUDGE

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

