



**Kiwo & 341 others v Teachers Service Commission (Cause 244 of 2017) [2024] KEELRC 2530 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2530 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
CAUSE 244 OF 2017  
MA ONYANGO, J  
OCTOBER 17, 2024**

**BETWEEN**

**DANIEL MUGO KIWO ..... 1<sup>ST</sup> CLAIMANT  
JANE W. KEFA ..... 2<sup>ND</sup> CLAIMANT  
SAMUEL KIRWA ..... 3<sup>RD</sup> CLAIMANT  
JOSEPH KEBELLOW ..... 4<sup>TH</sup> CLAIMANT  
RUTH J. KIPROTICH ..... 5<sup>TH</sup> CLAIMANT  
OSCAR CHERUIYOT ..... 6<sup>TH</sup> CLAIMANT  
SALLY CHESACH & 335 OTHERS & 335 OTHERS & 335  
OTHERS ..... 7<sup>TH</sup> CLAIMANT**

**AND**

**TEACHERS SERVICE COMMISSION ..... RESPONDENT**

**RULING**

1. This ruling is in respect of the Notice of Motion dated 7<sup>th</sup> June 2024 brought by the Respondent under the provisions of Articles 47, 48, 50(4) and 159 of *the Constitution* of Kenya, sections 12 of the *Employment and Labour Relations Court Act*, Order 50 Rule 1 of the Civil Procedure Rules, 2010. It seeks the following orders:
  - i. Spent
  - ii. That this Honourable court be pleased to expunge from the Court Record the Annexures marked “DMK-1” and “DMK-2” in the Claimant’s further affidavit sworn by Daniel Mugo Kiwa on 17<sup>th</sup> May,2024.



2. The grounds upon which the application is made are contained on the face of the application being that the annexures marked DMK-1 and DMK-2 are illegally obtained documents whose origin, source, legitimacy and/or authenticity has not been disclosed and/or explained by the Claimants; that annexures "DMK-1" and "DMK -2" have been produced in gross violation of Article 31 of *the Constitution*; that annexures "DMK-1" and "DMK -2" have been produced in gross violation of Article 35 of *the Constitution*; that annexures "DMK-1" and "DMK-2" have been produced in gross violation of Section 80 of the *Evidence Act*; that annexures "DMK-1" and "DMK -2" do not meet the criteria of admissibility of evidence set out in Section 35 of the *Evidence Act*; that to allow the documents in question to remain on record would be prejudicial to the rights of the Applicant to a fair hearing; that to allow the documents in question to remain on record will be detrimental to the administration of justice; that the two annexures are illegally obtained in breach of *the Constitution* and statute law hence should be expunged from the record; that annexure marked DMK-1 has been introduced in breach of professional duty by Counsel hence inadmissible; that annexure marked DMK-2 being a private and confidential Internal Memo was stolen and/or obtained or accessed through fraudulent means in gross violation of the law; that the Applicant's prayers are in tandem with the constitutional edicts enunciated under Articles 10, 27, 47, 48, 50 (4) of *the Constitution*; that the production of the two annexures are contrary to the principles of law set out in Nairobi Civil Appeal No. 13 of 2015: Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others[2020]eKLR.
3. The Respondent contends that it is in the interest of justice and fairness that the prayers herein be granted to safeguard a fair trial and just administration of justice.
4. The application is opposed. The Claimants filed a Replying Affidavit dated 12<sup>th</sup> June 2024 sworn by the 1<sup>st</sup> Claimant, Daniel Mugo Kiwo. The Claimants have termed the application as defective, incompetent and bad in law. They further aver that the Applicant has brought the current application in bad faith with the sole intention of delaying this matter which has been in court for eight years. In response to the pertinent issues raised in the application, the Claimants state that the Respondent is the custodian of all records pertaining to the employment of the Claimants and all teachers registered by it and that as such, the documents it seeks to expunge from the record were obtained by the Claimants by virtue of being employees of the Applicant hence were not illegally obtained and are meant to assist this court to arrive at a just decision in this matter. Article 35(1) of *the Constitution* and section 4 of the *Access to Information Act* were cited by the Claimants in opposition to the Respondent's application.
5. The court directed parties to canvass the application through written submissions but it appears neither of the parties filed them.
6. Be that as it may, I have examined all the averments from both parties. The Applicant seeks to expunge certain documents from the record alleging that they were obtained illegally.
7. The document marked as annexure DMK-1 is a "without prejudice" communication between Edwin Musundi, advocate for the Respondent and Reece Mwani & Company Advocates making proposals with a view of settling this matter.
8. In Halsbury's Laws of England Vol 17 paragraph 213, it is stated that: -

"the contents of a communication made "without prejudice" are admissible when there has been a binding agreement between the parties arising out of it, or for the purpose of deciding whether such an agreement has been reached and the fact that such communications have been made (though not their contents) is admissible to show that negotiations have taken place, but they are otherwise not admissible..."



9. Based on the above and upon scrutinizing the contents of annexure DMK-1, it is clear that there was no conclusion on the matter as the import of Exhibit DMK-1 is the Respondent's opinion on how the matter should be settled and not the final proposal agreed by the parties.
10. The document marked DMK-1 is thus to be expunged from the records.
11. With regard to exhibit DMK-2 which the Respondent described as a private and confidential internal memo which was obtained or accessed through means in gross violation of the law, the said document is not annexed to the application. I have however checked the record and noted that Exhibit DM-2 in the further affidavit of Daniel Mugo Kiwo sworn on 17<sup>th</sup> May, 2024 is an Internal Memo from Cavin Anyuor, Director – LLIR to Director (FIN&ACCS) on a letterhead of Teachers Service Commission dated 23<sup>rd</sup> January 2024 with the heading RE: Eldoret Elrc Cause 244 Of 2017: Daniel Mugo & 341 Others VS TSC.
12. It is a private communication between two officers of the Applicant. The deponent of the Affidavit David Mugo has not stated how such document came into his possession.
13. Mr. Mugo has stated in the replying affidavit to the instant application at paragraph 14 that “the annexure marked “DMK-2” was also supplied to our advocate by ourselves and we are therefore strangers to the allegations by the applicant’s counsel ....”.
14. This is not an explanation of how the document addressed to an officer of the Respondent came into the hands of the Claimants. This being a communication between two senior officers of the Respondent discussing the issues in the suit, it is inadmissible unless the affiant can prove that the same came into his possession lawfully.
15. The upshot of the above is that the application dated 7<sup>th</sup> June 2024 is allowed and annexures DMK-1 and DMK-2 are accordingly expunged from the record.
16. The whole affidavit will be physically removed from the record and returned to counsel for the Respondent who will be at liberty to file the same but without the two expunged documents.
17. Costs of the application shall be borne by the Claimants in any event.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 17<sup>TH</sup> DAY OF OCTOBER 2024**

**MAUREEN ONYANGO**

**JUDGE**

