

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI

CAUSE NO. E1003 OF 2024

BANKING INSURANCE AND FINANCE UNION.....
CLAIMANT

VERSUS

STANDARD CHARTERED BANK KENYA
LIMITED.....RESPONDENT

RULING

Background

1. The Claimant has instituted this cause against the Respondent contending that it has a Recognition Agreement with the Respondent on the basis of which the two have concluded several Collective Bargaining Agreements. The Claimant avers that it is authorized under Gazette Notices Nos. 168 and 169 of 2024 to collect agency fees from the Respondent. It contends that these notices revoked previous Notices Nos. 924 and 516 of 2009.
2. The Claimant alleges that it has over time recruited several unionisable members from the Respondent's workforce. It however contends that the Respondent has been reversing these gains by promoting its (the Claimant's) unionisable members into management positions.

3. The Claimant further accuses the Respondent of forcing a decline in its (the Claimant's) membership through outsourcing of labour. It contends that the Respondent has resorted to sourcing labour by engaging a human resource firm to supply workers to it (the Respondent).
4. The Claimant contends that as a result of the foregoing, the Respondent has two categories of employees performing unionisable work: one lot comprising of employees hired directly by the Respondent; and the other lot comprising of employees outsourced from the human resource agency. The Claimant contends that the Respondent's conduct in this respect amounts to bad labour practice.
5. The Claimant avers that the Respondent currently remits trade union dues for 32 out of 700 union members within its rank and file. It further avers that the Respondent remits agency fees for 8 out of 300 unionisable employees who are not yet members of the union.
6. The Claimant avers that the Respondent has refused and or failed to remit union dues for 668 union members and agency fees for 292 unionisable employees who are yet to join it (the Claimant). The Claimant further avers that it invited the Respondent for meetings to address the matter but to no avail. Consequently, it contends that it was forced to report a trade dispute to the Ministry of Labour.
7. The Claimant avers that the Respondent wrote to the Ministry of Labour on 25th November 2021 alleging that it did

not have a Recognition Agreement with the Claimant. It further contends that the Respondent objected to conciliation allegedly on the ground that the Claimant had not exhausted the mandatory dispute resolution mechanisms that the parties had agreed on.

8. The Claimant contends that although the parties eventually agreed to refer the dispute to a Joint Negotiation Council, the Council did not resolve the matter. Despite this, it avers that the Council did not issue them with a certificate to show that the dispute was unresolved thus forcing it (the Claimant) to approach the court over the matter.
9. Together with the Memorandum of Claim, the Claimant filed a Notice of Motion application dated 25th November 2024. However, on 5th December 2024, the parties agreed to abandon the application in favour of the main trial.
10. Subsequently on 18th March 2025, the Claimant filed another application dated 17th March 2025. The application is premised on a plethora of provisions of law including: articles 35(1) (b), 36 and 41 of *the Constitution*; Order 11 rule 3(1) (d) of *the Civil Procedure Rules*; section 69 of *the Evidence Act*; sections 3 and 20(4) of *the Employment and Labour Relations Court Act*; section 10(7) and 74(2) of *the Employment Act*; rules 42(1) and 47 of *the Employment and Labour Relations Court (Procedure) Rules*; section 49(2)(b) of *the Labour Relations Act*; and section 22 of *the Civil Procedure Act*.

11. In the application, the Claimant prays for various interim reliefs including the following:-

a) That the Respondent to produce for inspection and verification the original and or certified copies of the documents/information which are in its possession or power relating to any issues in this matter and specifically:-

- i) The list of all current employees below the rank/position/band of branch managers, their titles, job groups/grades/bands, job profiles/duties/responsibilities, basic salaries plus house allowances and or consolidated salaries.
- ii) The original and certified copies of the organizational chart or the organogram in relation to all the employees in all the branches of the Respondent and Head Office.
- iii) The list of all current unionisable employees in the employ of the Respondent as per the clause A1: Preamble-Job Profile of the parties to the Collective Bargaining Agreement performing the roles of Section Heads (Supervisors), Check Clerks, Clerical Staff, Clerical Assistants & Copy Typists, Technical Staff and Technical Assistants and Subordinate Staff and Subordinate Assistants.

b) The Respondent to produce the list of all employees submitted to the Central Bank of Kenya and categorized

as management, supervisory, clerical, secretarial and other staff as at 31st December 2024.

c) Any other reliefs that the court deems fit to grant.

12. The Claimant contends that the Respondent cannot possibly be having only 39 out of 978 employees as unionisable. It contends that if this were to be the case, it will mean that 939 of the Respondent's employees are in management.
13. The Claimant asserts that the information it seeks will assist it in advancing the rights of its members and all unionisable employees within the rank and file of the Respondent's workforce. It contends that the Respondent has been unilaterally removing some of the employees from unionisable positions and placing them in management without revoking their union membership and without the affected employees applying to join management.
14. The Claimant avers that the movement of staff from unionisable to management positions is often done without commensurate adjustment to their remuneration. It contends that the affected employees retain salaries and responsibilities of unionisable employees thus rendering the purported promotions a mirage.
15. The Claimant contends that the information it seeks to access through the instant application will help it expose the aforesaid irregularities. It contends that there is no other way it can access the information except through intervention by the court.

16. The Claimant avers that the information it seeks arises from employer-employee relations. It further avers that the request is anchored on article 35(1) (b) of *the Constitution*.
17. The Claimant avers that the information in question is necessary to assist the court to make a fair assessment of the matters in dispute. As such, it prays for the orders to issue.
18. The Respondent is opposed to the application. It contends that the Claimant's quest is motivated by the fact that it has a low number of unionisable employees who are its members. In the Respondent's view, the Claimant is indirectly attempting to use the court to aid it in recruitment of members from the Respondent's rank and file.
19. The Respondent contends that although the Claimant has accused it of irregularly promoting its (the Claimant's) members to management position in order to reduce the Claimant's membership, it (the Claimant) has not tabled evidence to support this assertion. In any event, the Respondent argues that it is not irregular to promote a member of staff from one position to another as this is an expression of the employer's appreciation of the employee's skills.
20. The Respondent contends that the Claimant's actions amount to seeking its (the Respondent's) assistance to recruit union members outside the law and the Recognition Agreement between the Claimant and Kenya Bankers

Association. The Respondent avers that the aforesaid Recognition Agreement provides for levels of unionisable employees and also grants the Claimant the right to access the Respondent's premises to undertake recruitment of members. The Respondent contends that in view of this, it is insincere for the Claimant to seek the information and assistance it requests for through this application.

21. The Respondent contends that it has no legal obligation to assist the Claimant to undertake recruitment of members from its (the Respondent's) members of staff. It further avers that although the Claimant has demanded for details of salaries and benefits of unionisable employees, it has not demonstrated how this information is relevant in assisting it (the Claimant) to undertake membership recruitment from among the Respondent's employees.
22. The Respondent contends that it has already issued the Claimant with its organizational chart showing the number of employees in each band. The Respondent also avers that it has already issued the Claimant with sample job descriptions for non-unionisable employees. It contends that the Claimant has not demonstrated how the organizational chart for its branches will be of use in adjudicating the dispute between the parties.
23. The Respondent avers that it supplied the Claimant with a list of all unionisable employees. It further contends that it

has already shared with the Claimant a list of all employees who are members of the union.

24. The Respondent avers that the power to issue an order for discovery is discretionary and should be exercised judiciously. It urges the court to decline the Claimant's request.

Analysis

25. Through the instant application, the Claimant seeks access to certain information in order to pursue its case against the Respondent. The motion is founded on, inter alia, provisions of *the Constitution* which acknowledge the right to access information generally and those of other statutes which sanction the process of discovery during a trial process. However, these two regimes are intended to serve distinct purposes and ought not to be conflated.
26. A critical component of the discovery process is that it should not be used for "fishing" purposes. A party should not utilize the tool of discovery to conduct a wide and non-specific search for information.
27. Speaking to this fact in the context of the law on the subject in South Africa, the High Court of South Africa in the case of ***Ewels v Francis and Others (6497/2022) [2024] ZAWCHC 384 (21 November 2024)*** expressed itself as follows:-

"These sub-rules are both intended to cater for the situation where a party knows or, at the very least,

believes that there are documents (or tape recordings) in his opponent's possession or under his control which may be relevant to the issues and which he is able to specify with some degree of precision. In the case of Rule 35(3) the intention is to supplement discovery which has already taken place, but which is alleged to be inadequate. Rules 35(3) and (14) do not afford a litigant a license to fish in the hope of catching something useful."

28. Alluding to the same matter, the court in the case of **Nyanza Management Limited & another v National Bank of Kenya Limited & 3 others [2023] KEHC 19329 (KLR)** expressed itself as follows:-

"Discovery is a formal pre-trial process through which a party to litigation may seek to discover evidence and facts that are crucial to his case, and as can be seen from section 22 cited above, the scope of discovery is quite broad. A party may seek to discover any fact that is not privileged but is relevant to the subject matter in the suit. The emphasis should be that the documents sought are relevant to the issue before the court....

..... Discovery is also intended to aid a party access vital documents to his case that are solely in the custody of the opposite party, thus levelling the litigation ground. (See Ramji Megji v Kisii University [2016] eKLR). In Concord Insurance Co. Ltd v NIC Bank

Ltd [2013] eKLR the court emphasized that only relevant documents should be disclosed and that relevance is to be tested in the pleadings, and that discovery should not be used as a fishing expedition. (See also in Selecta Kenya Gmbh & Co Kg & another v Peter Wanderi [2015] eKLR)."

29. It is thus clear to the court that a party to a suit is entitled to seek discovery of documents that are in the opponent's position. However, before the process of discovery can be sanctioned, the court must satisfy itself that the information sought is relevant to the action before it. Importantly, the court should not encourage a party to engage in a voyage that is intended to use discovery as a "fishing" tool.
30. It is also critical that the party seeking discovery should be precise regarding the information which he seeks to access. As such, the court should decline any request which is general and imprecise.
31. Prior to the Claimant filing the instant application, it issued the Respondent with a notice to produce the same information it seeks in the motion. The Respondent objected to the request on the following grounds:-
 - a) That some of the information sought is not relevant to the dispute before court.
 - b) That some of the information was confidential and its production would be in breach of the right to privacy of

the staff in respect of whom the information relates and who are not party to the suit.

c) That some of the information contains the Respondent's trade secrets.

32. The court notes that the Claimant is a registered Trade Union which has a Recognition Agreement with the Kenya Bankers Association to which the Respondent is a member. This being the case, the relationship between the two is regulated by, inter alia, *the Labour Relations Act* and the aforesaid Recognition Agreement.
33. Once a Trade Union is granted recognition by an employer by virtue of section 54 of *the Labour Relations Act*, it is entitled to recruit unionisable employees from the employer's members of staff as its (the Trade Union's) members. The employer's obligation to the Trade Union in this regard and by virtue of section 56 of the aforesaid Act, is to allow the Trade Union access to its (the employer's) premises for purposes of, inter alia, conducting recruitment of members.
34. It appears to me that apart from the foregoing, the law does not impose any other obligation on the employer in respect of the process of recruitment of trade union members by a Trade Union. As such, it is not expected that the employer should be compelled to take steps outside what is contemplated under section 56 of *the Labour Relations Act* to aid a Trade Union in membership recruitment.

35. Section 57 of *the Labour Relations Act* imposes an obligation on an employer who has entered into a Recognition Agreement with a Trade Union to conclude a Collective Bargaining Agreement with the Trade Union. To facilitate this exercise, the law obligates the employer to disclose to the Trade Union all relevant information which will enable the Trade Union to effectively negotiate on behalf of employees.
36. It is noteworthy that it is only in the context of the collective bargaining process that an employer is obligated to disclose to a Trade Union information which is relevant to the process. There is no similar obligation when it comes to the process of recruitment of Trade Union members.
37. The reasons for the foregoing is apparent to the court. At the point of recruitment of members to a Trade Union, the employees are yet to become members of the Trade Union. As such, they are entitled to have information on them that is in the possession of the employer held in confidence. The employer can only disclose the information to a third party, including the Trade Union, with the express consent of the employees.
38. In the instant case, the Claimant having been recognized by the Respondent's umbrella association, is entitled to undertake recruitment of members from the rank and file of the Respondent's members of staff without expecting the Respondent's assistance in this respect. All that the Respondent is required to do is to provide the Claimant with

access to its premises to, inter alia, conduct recruitment processes. The Claimant should not expect the Respondent to share with it data relating to individual employees who are not the Claimant's members as this will be in breach of the confidentiality obligation that the law imposes on the Respondent in respect of this data.

39. I dare say that the same position applies to the Respondent's employees who are the Claimant's members but who have not given their express consent to the Respondent to share their personal data with third parties, including the Claimant. In my view, instead of the Claimant seeking to compel the Respondent to share specific data on the salaries and benefits of unionisable employees who are its (the Claimant's) members, it should get this information from these employees since they are already its members.
40. With regard to non-unionisable and unionisable employees who are not members of the Claimant, all that the Respondent can provide to the Claimant is general information which does not focus on any particular employee. The information should be limited to the following:-
- a) The absolute number of employees in the Respondent's establishment.
 - b) The absolute number of employees who are in management.
 - c) The absolute number of employees who are unionisable.

- d) The absolute number of employees who are unionisable but have not taken up membership with the Claimant.
 - e) The absolute number of unionisable employees who have taken up membership with the Claimant.
 - f) The job grades and descriptions for the various cadres of employees within the Respondent's rank and file without sharing details relating to specific employees.
41. The court cannot compel the Respondent to disclose information on specific employees without their express consent. Such attempt will violate the law on and right to privacy.
 42. In addition to the above information, the Respondent should disclose to the Claimant its organizational chart. This is because it (the Respondent) has signified its non-objection to sharing this data by disclosing in the replying affidavit that it had previously shared the chart with the Claimant.
 43. As regards basic salaries and house allowance for various unionisable staff who are below the rank of managers, the court holds the view that the Claimant should source this data from amongst its members. This information may then be used to estimate the salaries and house allowance for unionisable employees who are not members of the Claimant instead of compelling the Respondent to disclose the data to a third party without the express consent of the affected employees in breach of data protection rules.

44. The Claimant also prays for an order to compel the Respondent to provide it with the list of the Respondent's employees as at 31st December 2024 which the Respondent submitted to the Central Bank of Kenya. However, the court does not think that this information will be of much use because it has been overtaken by events. The court takes judicial notice of the fact that staff movement in an enterprise may occur with the passage of time. As such, data on staff which was generated in 2024 may not present a true picture on the matter almost one year down the line. For this reason, the court is not inclined to order the Respondent to provide the aforesaid data for want of relevance.
45. As I pen off, let me comment on the applicability of article 35 of *the Constitution* to the instant application. In my view, article 35 of *the Constitution* should not be used as a tool for enforcing discovery in civil proceedings in the face of a robust legal framework which guides the process of discovery.
46. As the theory of constitutional avoidance underscores, litigants should avoid invoking provisions of *the Constitution* to seek remedies which can be sought using ordinary legislation. To do otherwise is to water down the sanctity of the supreme law of the land.
47. Article 35 of *the Constitution* deals with the right of access to information generally and the procedure for enforcing the right is distinct from the process of discovery which the

Claimant seeks to undertake through the instant application. The procedure for enforcement of the right to access information under article 35 of *the Constitution* is provided for under *the Access to Information Act* and not any other legislation that addresses the process of discovery in civil proceedings. Indeed, the preamble to the Act underscores this fact by describing the legislation as “an Act of Parliament to give effect to Article 35 of *the Constitution*; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes”.

48. Further, section 3 of the Act which sets out the objectives of the legislation, underscores this reality by providing as follows:-

“The object and purpose of this Act is to:-

- i) give effect to the right of access to information by citizens as provided under Article 35 of the Constitution;*
- ii) provide a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles;*
- iii) provide a framework to facilitate access to information held by private bodies in compliance with any right protected by the Constitution and any other law;*

- iv) promote routine and systematic information disclosure by public entities and private bodies on constitutional principles relating to accountability, transparency and public participation and access to information;*
- v) provide for the protection of persons who disclose information of public interest in good faith; and*
- vi) provide a framework to facilitate public education on the right to access information under this Act.”*

49. Under section 4 of the Act, every citizen has a right to information which is held by a state agency or private entity subject of course to the various limitations that are contemplated in law. A person who wishes to access information which is held by another is required to first write to that other party specifying the information in question and requesting access to it. The party from whom the information is sought is required to respond to the request within the specified timeframe either disclosing the information or indicating why the information cannot be disclosed (see sections 8 to 13 of the Act).
50. If the applicant is denied access to the information sought or is dissatisfied with the response of the party holding the information, he may seek the intervention of the Commission on Administrative Justice. The Commission shall in turn inquire into the matter and make appropriate orders which may include an order requiring that the information sought

be released to the applicant. It is only after the Commission has made its decision on the application for review that the applicant or indeed any other person who is affected by the process may move to the High Court to either seek for review or adoption and enforcement of the Commission's decision (see Parts IV & V of the Act).

51. It is therefore apparent that a litigant is not entitled to invoke the provisions of article 35 of *the Constitution* to enforce the right to access information before a court of law as the port of first call. He must exhaust the procedure that is prescribed under *the Access to Information Act* before approaching the High Court over the matter. It is in this context that I find the Claimant's attempts to invoke article 35 of *the Constitution* to undertake the process of discovery in the suit as misplaced.

Determination

52. After evaluating the application dated 17th March 2025 together with the supporting affidavit, the replying affidavit and submissions by the parties, the court allows the said application in the following terms:-
- a) The Respondent is to provide the Claimant with information on the following:-
 - i) The absolute number of employees in the Respondent's establishment.
 - ii) The absolute number of employees who are in management.

- iii) The absolute number of employees who are unionisable.
 - iv) The absolute number of employees who are unionisable but have not taken up membership with the Claimant.
 - v) The absolute number of unionisable employees who have taken up membership with the Claimant.
 - vi) Sample job grades and descriptions for the various bands within the Respondent's rank and file.
 - vii) Information on the Respondent's organizational chart.
53. For the avoidance of doubt, the aforesaid information shall not include details of specific employees.
54. Costs of the application shall be in the cause.

Dated, signed and delivered on the 28th day of November, 2025

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI