



**Ngumo v Burn Manufacturing Usa LLC (Petition E143 of 2025)
[2025] KEELRC 3336 (KLR) (27 November 2025) (Ruling)**

Neutral citation: [2025] KEELRC 3336 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E143 OF 2025
HS WASILWA, J
NOVEMBER 27, 2025**

BETWEEN

ANN NYAMBURA NGUMO PETITIONER

AND

BURN MANUFACTURING USA LLC RESPONDENT

RULING

1. The Respondent Applicant filed a Notice of Motion dated 13th August 2025 seeking orders THAT: -
 1. Spent
 2. The Court grant a stay of the directions requiring the Respondent to respond to the Petition dated 28 June 2025 pending hearing and determination of this Application.
 3. The documents annexed as Exhibits ANN 10a to the Supporting Affidavit of Ann Nyambura Ngumo sworn on 28 June 2025 be expunged from the court record.
 4. Paragraphs 39 of the Petition dated 28 June 2024 be struck out.
 5. The Petitioner does pay to the Respondent the costs for this Application

Respondent Applicant's Case

2. The Respondent Applicant avers that the Petitioner was its Head of HR, terminated for gross misconduct and material breach of company policy.
3. It avers that the Petitioner was contractually, professionally and statutorily bound by a duty of confidentiality and an obligation to return all company documents upon termination, including all personal data processed during her employment.



4. The Respondent Applicant avers that she breached these duties by retaining confidential company data, including the employment contracts of two former colleagues. The Petitioner attached these confidential documents to her supporting affidavit without consent from the Respondent or the individuals concerned.
5. It is the Respondent Applicant's case that these attachments contain highly sensitive personal data including ID numbers, PINs, and addresses and proprietary business information, violating not only her contractual obligations but also the privacy rights of third parties under Article 31(c) of *akn ke act 2010 constitution the Constitution*.
6. The Respondent Applicant avers that the Petitioner's conduct constitutes a clear abuse of process. She produced evidence obtained improperly, in violation of her duty of trust. Therefore, such evidence is inadmissible under Article 50(4) of *akn ke act 2010 constitution the Constitution* and admitting these documents would sanction her misconduct and be detrimental to the administration of justice.
7. The Respondent Applicant avers that paragraph 39 of her Petition, which alleges tax evasion is a malicious attempt to scandalise and prejudice the Respondent and its employees. For these reasons, it is essential that the impugned attachments be expunged and paragraph 39 be struck out.
8. It is the Respondent Applicant's case that this court's jurisdiction does not extend to the determination of an individual or organisation's tax compliance and is limited to determination inter alia of disputes relating to or arising out of employment between an employer and an employee which paragraph 39 has no nexus to as relates the relationship between the Petitioner and the Respondent.
9. It avers that it is required to respond to the Petition within a prescribed timeline and it is in the interest of justice that this Court first determine the propriety of inclusion of the impugned attachments and paragraph 39 of the petition before the Respondent files its response

Petitioner Respondent's Case

10. In opposition to the application, the Petitioner Respondent filed a replying affidavit dated 27th August 2025.
11. The Petitioner Respondent submitted that the impugned documents marked as "ANN-10a" were in a lawful manner in her capacity as the Head of HR and Recruitment whilst under the employment of the Respondent.
12. She contends that their use in the prosecution of my Petition and their presentation before this court is protected by the constitutional rights to access information and a fair hearing.
13. The Petitioner Respondent avers that the Respondent Applicant subject her to discriminatory treatment culminating to her unfair termination. The impugned documents are thus vital to demonstrating the disparities in remuneration and benefits between her and her colleagues holding similar positions, which is the cornerstone of the discrimination claim.
14. It is the Petitioner Respondent's case that the impugned documents are directly relevant as they provide prima facie evidence of the alleged discriminatory practices against her during the employment.
15. She avers that expunging them would severely prejudice her right to fair labour practices and fair hearing under Articles 41 and 50 of *akn ke act 2010 constitution the Constitution* as she would be robbed of the primary evidence needed to prove her case.



16. The Petitioner Respondent asserts that she obtained the impugned documents in the ordinary course of her employment as her role inherently involves handling such records. She did not “rummage” through files or obtain them through clandestine means but she had the approval and authority of the Respondent.
17. She further avers that she only disclosed these documents to her legal counsel and this Court; she has not shared them with any third parties, the media, or the Respondent’s competitors. This limited disclosure aligns with the principle that sharing confidential documents only with one’s legal advisor and the court for the purposes of litigation does not constitute a breach of confidence or privacy that would warrant expunction.
18. The Petitioner Respondent avers that a plain reading of Clause 20.1 of her employment contract shows that it is designed to protect genuine “trade secrets” such as man-hour tariffs, client lists, proprietary techniques and “information confidential to the Employer’s business.” Therefore, the employment contracts of other staff members, do not constitute a “trade secret” or confidential business information in the sense intended to be protected by this clause of the Handbook. Thus, their disclosure to a court does not threaten the Respondent’s commercial interests.
19. The Petitioner Respondent avers that whereas Clause 20.2 mandates the return of documents upon termination, it does not explicitly prohibit the use of such documents in legal proceedings to protect one’s rights. More importantly, Clause 20.3 explicitly carves out an exception for information divulged pursuant to a court order or legislation. Therefore, filing the said documents in court to protect her right to fair labour practices, fall squarely within the spirit of this exception.
20. It is the Petitioner Respondent’s case that even if the clauses were broadly construed, any contractual term that seeks to oust the jurisdiction of a court or prevent an individual from accessing justice is contrary to public policy and outright unconstitutional: her rights to access to information, fair labour practices, and fair hearing under Articles 35, 41 and 50 of *akn ke act 2010 constitution the Constitution* supersede any private contractual term.
21. The Petitioner Respondent avers that the Respondent’s reliance on its Data Protection Policy is misplaced as the employment contract between them contains an “entire agreement” clause, expressly stating that the contract represents the full and complete agreement between the parties. The Policy was never attached to, referenced in, or incorporated into this contract.
22. The Petitioner Respondent avers that the Respondent itself has filed a separate civil suit (Kiambu High Court Civil Case No. E004 of 2025) seeking compensation and injunctive reliefs for the alleged breach of the very same Data Protection Policy. Therefore, this makes the issue sub judice as the question of breach of the policy is still pending determination in another court of competent jurisdiction.
23. The Petitioner Respondent avers that the right to privacy under Article 31 of *akn ke act 2010 constitution the Constitution* is not absolute; it must be balanced against other rights, including the right to a fair trial. In this case, the balance falls in favour of allowing evidence central to a case, especially when disclosure is limited to the court and parties.
24. The Petitioner Respondent avers that the indirect collection of the personal data from the Respondent’s records was necessary for the protection of her own legitimate interests in pursuing the claim for discrimination.
25. The Petitioner Respondent avers that she is willing to submit redacted versions of the impugned documents obscuring personal identifiers such as national ID numbers, personal addresses, and bank



- account details, while preserving the crucial information on job titles, grades, salaries, and benefits necessary to prove her case.
26. The Petitioner Respondent avers that pursuant to Section 69 of the *Kenya Evidence Act 1963*, she is under no obligation to serve a notice to produce these documents upon the Respondent because of the nature of this claim. The claim being for discriminatory treatment means the Respondent, as the custodian of all employment records, must have known it would be required to produce the contracts of my comparators.
 27. The Petitioner Respondent avers that the allegations in Paragraph 39 are not standalone claims but are pleaded as particulars and evidence of the Respondent's operational conduct and the environment of malfeasance that she was expected to manage and condone. They are relevant to context, motive, and the overall relationship between the parties.
 28. She avers that paragraph 39 of the petition goes to the heart of the fairness of the termination and the Respondent's conduct. The Respondent cannot pre-emptively seek to strike out evidence it finds uncomfortable before the case is even heard.
 29. It is the Petitioner Respondent's case that the proper forum for challenging the veracity of pleadings is at the trial, through evidence and cross-examination, not through a preliminary application. The Respondent's duty is to file a comprehensive response to the entire petition, answering to each allegation as required by the rules.

Respondent Applicant's Submissions

30. The Respondent Applicant submitted on two issues: whether the Impugned Attachments should be expunged from the court record; and whether paragraph 39 of the Petition dated 28 June 2025 should be struck out
31. The Respondent Applicant submitted that it is now trite law as set out in various decisions of the Employment Court including *Njenga v Dib Bank Kenya Limited* [2023] KEELRC 1549 (KLR) that the Court will expunge improperly obtained evidence produced by a party from the court record if the evidence will prejudice the fair hearing of the case or is otherwise detrimental to the administration of justice.
32. In *Njenga v Dib Bank Kenya Limited* [supra], the court emphasized that any information that an employee receives in the course of her employment and which the employee was to hold in confidence as set out in their employment contract or in any policies of the employer ought not to be divulged without permission of the employer or a court order. To do otherwise would be to breach the obligation on confidentiality of such information thus rendering the information shared as unlawfully and or irregularly obtained evidence
33. The Respondent Applicant submitted that the Petitioner has expressly admitted at various paragraphs of the Replying Affidavit that she obtained the impugned attachments without the consent of the Respondent or the third parties, Dr. Sylvia Kokonya and Adarsh Shah. Such admission amounts to willful misconduct and is detrimental to the administration of justice under Article 50(4) of *Kenya Constitution the Constitution*, making the expungement not discretionary but necessary to preserve the integrity of the court process.
34. The Respondent Applicant submitted that the Court of Appeal in *Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others* [2020] KECA 589 (KLR) held that under Article 50(4) of *Kenya Constitution the Constitution*, if a court determined that admission of evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights would be detrimental to



- the administration of justice, the court may reject it irrespective of whether it is in connection with a civil or criminal trial.
35. The Respondent Applicant submitted that the impugned attachments represent evidence produced in a manner that violates Article 31 (c) of *akn ke act 2010 constitution the Constitution*, rendering their admission unfair and detrimental to the administration of justice under Article 50(4) of *akn ke act 2010 constitution the Constitution*.
 36. It is the Respondent Applicant's submission that the information relating to an identifiable natural person is considered "personal data" under section 2 of the Data Protection Act, with breach of personal data thereat including unauthorised disclosure of, or access to, personal data. Pursuant to section 25(a) of the Data Protection Act, every data controller or data processor should ensure that personal data is processed in accordance with the right to privacy of the data subject while section 30(1) requires a data processor or controller not to process personal data unless the data subject consents to the processing of the data. The Petitioner has admitted that she did not seek the approval of the Respondent or the third parties before producing the impugned attachments in court and further the third parties are not even parties to the Petition.
 37. The Respondent Applicant submitted that consent having not been sought from members of staff who are not parties to the suit, thus production of such information absent of the Respondent's consent is in violation of the Respondent and third parties' right to privacy under Article 31 (c) of *akn ke act 2010 constitution the Constitution* which guarantees them the right not to have information relating to their private affairs unnecessarily revealed without their approval, consultation or consent. Furthermore, the third parties who are not litigants in the matter cannot defend their privacy and are vulnerable. The Court thus has a duty as guardian of constitutional rights to ensure that third-party privacy is not collateral damage in employment litigation.
 38. The Respondent Applicant submitted that the impugned attachments contain sensitive personal identifiers of Dr. Sylvia Kokonya and Adarsh Shah including their ID numbers, their personal addresses and their bank account details. Production of such sensitive identifies in court, which is a court of public records exposes the third parties to harm including the potential hacking of their bank accounts. For this reason, it is crucial for the court to make a finding that production of the impugned attachments goes against the administration of justice and makes an order for their expungement.
 39. The Respondent Applicant further submitted that this court should reject the Petitioner's proposal to redact the sensitive personal identifiers of the Respondent and third parties' personal data as this does not fix the Petitioner's impropriety of attaching the impugned attachments ab initio. Redaction is an insufficient remedy because the initial disclosure already breached privacy rights, tainted the record, and contravened both statutory and contractual obligations. Expungement alone restores confidence in judicial processes and deters future litigants from tactical misuse of confidential material.
 40. On the second issue, the Respondent Applicant submitted that the inclusion of paragraph 39 to the Petition serves no legitimate purpose and is instead intended to scandalize and prejudice it and its employees by improperly exposing their private information as foreigners and falsely alleging that the Respondent did not pay taxes in relation to their remuneration. Moreover, paragraph 39 improperly invites the Court to opine on tax compliance an issue reserved exclusively for the Kenya Revenue Authority and its statutory mechanisms thereby usurping the mandate of a separate body and offending the principle of judicial economy.
 41. It is the Respondent Applicant's submission that the allegations set out at paragraph 39 of the petition concern matters entirely outside the jurisdiction of this Court and are irrelevant to the employment



dispute between the parties herein. The correct forum for the Petitioner to raise the allegations is with the Kenya Revenue Authority or their appeals mechanisms.

42. The Respondent Applicant submitted that while the Employment and Labour Relations Court Rules, 2024 are silent on the power of the ELRC to strike out pleadings, this jurisdiction is expressly conferred by Order 2 Rule 15 of the Civil Procedure Rules and applies to matters such as the present one where a party presents pleadings that are scandalous, frivolous or vexatious; or may prejudice, embarrass or delay the fair trial of the action; or are otherwise an abuse of the process of the court.
43. It is the Respondent Applicant's submission that paragraph 39 is scandalous because it states matters that are offensive; and made for the mere purpose of abusing and prejudicing the Respondent. Frivolous because it has no substance and putting up a defence would be wasting Court's time. Vexatious since it has no foundation, has no chance of succeeding, is brought merely for purposes of annoyance and is brought so that the Petitioner's pleading should have some fanciful advantage; and an abuse of process because it is frivolous and vexatious.
44. The Respondent Applicant placed reliance in *Elijah Sikona & George Pariken Narok on Behalf of Trusted Society of Human Rights Alliance v Mara Conservancy & 5 others* [2014] KEHC 4420 (KLR) where it held that where the suit is without substance or is groundless or fanciful and or is brought or instituted with some ulterior motive or for some collateral one or to gain some collateral advantage which the law does not recognize as legitimate use of the court process, the court will not allow its process to be used as a forum for such ventures. It is the Respondent Applicant's assertion that paragraph 39 of the petition falls within the above category and is liable for striking out.
45. The Respondent Applicant submitted that the admission of the impugned attachments into evidence will be injurious to the administration of justice while paragraph 39 of the Petition is scandalous, offensive, irrelevant, oppressive to the Respondent, and involves matters outside the jurisdiction of this Court

Petitioner Respondent's Case

46. The Petitioner Respondent submitted on six issues: whether the documents marked as "ANN-10a" are relevant and admissible as evidence in the main Petition; whether the Petitioner's method of obtaining "ANN-10a" documents in her capacity as Head of Human Resources, and her subsequent limited disclosure to her legal counsel and to the Court constitutes a breach of confidence, contract or data protection law that warrants the draconian remedy of expunction. Whether the Respondent's Data Protection Policy is contractually binding on the Petitioner and can form a basis for expunging evidence; whether the right to privacy of third-party employees (under Article 31 of *akn ke act 2010 constitution the Constitution*) outweighs the Petitioner's right to a fair hearing (under Article 50) and fair labour practices (under Article 41) in this context; whether the "ANN-10a" documents constitute secondary evidence and, if so, whether the Petitioner complied with the provisions of Section 69 of the *akn ke act 1963 46 Evidence Act* regarding their adduction; whether the Respondent's request to strike out Paragraph 39 of the Petition is procedurally proper and merited at this interlocutory stage; and whether the Respondent has approached this court with clean hands.
47. On the first issue, the Petitioner Respondent submitted that the impugned documents were lawfully accessed by the Petitioner in her capacity as Head of HR, and they contain prima facie evidence of comparative remuneration and other necessary inferences which contradict the reasons why the Respondent terminated her employment. They reveal pay structures, bonuses, and benefits of other employees in comparable or similar roles, which is directly relevant to proving the alleged



discriminatory pay practice against her, thereby proving that the stated reasons are a pretext for an unfair or discriminatory dismissal.

48. The Petitioner Respondent cited Evangeline Nyegeera (Suing as the Legal Representative of Felix M'Ikiugu alias M'ikiugu Jeremia M'Raibuni (Deceased) v Godwin Gachagua Githui [2017] KECA 72 (KLR) where the court held: "The test for admission of evidence is relevancy. The appellant avers that the original documents are either lost or cannot be found. Implicitly, this relates to the subject land in the suit in the lower court. The *akn ke act 1963 46 Evidence Act* allows secondary evidence by way of copies of documents made from the original by mechanical process which in themselves ensure the accuracy of the copy, and copies compared with such copies. We think the appellant ought to have specified the nature of the documents and their relevance. As the suit is still pending, and as there is need for fair determination of the dispute in the suit which may not be possible if a party is denied the opportunity to adduce relevant evidence, we hold the view that the appellant should not be barred from adducing secondary evidence through copies of the original documents. It is imperative that the nature of the documents, their number and relevance is shown. The other party will have an opportunity to cross-examine on veracity and legitimacy if it be necessary."
49. The Petitioner Respondent submitted that since the documents contains direct evidence of pay practices and inferences of actions leading to termination, it is logically probative of the facts in issue in the Petition which are, among them, discrimination and unfair labour practices. Under the Nyegeera test, this relevancy alone makes it admissible
50. The Petitioner Respondent submitted that the Respondent's proper recourse is not expungement, but the right to cross-examine the Petitioner on the stand regarding how she obtained the documents, their context, and their authenticity. Nevertheless, the Court can further manage any confidentiality concerns by ordering that the documents be used only for the purposes of the petition and disclosed only to the legal teams. This balances all interests without excluding critical evidence.
51. The Petitioner Respondent submitted that she alleges specific, serious wrongs, among them, discriminatory pay practices and unfair termination. These are not simple claims, they require proof of disparate treatment, bad faith, and a violation of fair labour practices through the impugned documents. She cited Statpack Industries v James Mbithi Munyao [2005] KEHC 2043 (KLR) the court held: "it is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily a result of someone's negligence."
52. It is the Petitioner Respondent's submission that to grant the Respondent Applicant's application would be to create an insurmountable paradox: demanding her prove her case while simultaneously denying her the only evidence capable of doing so. This would render her constitutional right to a fair hearing a nullity.
53. On the second issue, the Petitioner Respondent submitted that at the time of accessing the documents, she was still the Respondent's employee, actively performing her duties. Her access was through authorized company systems and was within the scope of her duties. She did not hack, steal, or employ any subterfuge; she accessed information central to her professional responsibilities. She cited Deepesh Subhaschandra Modi v Pan Africa Express Transport Ltd (Licensee of the Federal Express Corp) [2019] KEELRC 2524 (KLR) the court held that "Further, the documents sought to be expunged were not illegally obtained by the Claimant. He prepared them in the normal course of his employment and he made certain observations and recommendations which may appear acrid to the Respondent."



54. The Petitioner Respondent submitted that as Head of HR, the Petitioner came across the documents in the ordinary course of her employment. She had not rummaged, and she has shared them only with her legal counsel and the Court as held in *Leland I. Salano v Intercontinental Hotel* [2013] KEELRC 536 (KLR).
55. The Petitioner Respondent submitted that the confidentiality clause found in Clauses 20.1 and 20.2 of the Petitioner's employment contract and the similar provisions in Paragraph 4 of the Employee Handbook, were crafted to protect genuine "trade secrets" such as man hour tariffs, client lists, proprietary techniques and "information confidential to the Employer's business." On the interpretation of such clauses in employment contracts, the court in *Magdalene Kiboi & 17 others v Engen Kenya Limited* [2020] KEELRC 1060 (KLR) held that: "As long as the information is proprietary in nature and is revealed in confidence, the employee has a common law duty not to reveal the information. The question must however be asked as to what constitutes confidential information. In *Advtech Resourcing (Pty) Ltd v Kuhn* 2007(4) ALL SA 1386, C para [51] the Court held that for information to qualify as confidential the following requirements must be fulfilled: a) The information must involve and be capable of application in trade and industry; that is: it must be useful; b) The information must not be public knowledge and public property, that is objectively determined it must be known to a restricted number of people or to a closed circle; c) The information objectively determined must be of economic value to the person seeking to protect it."
56. The Petitioner Respondent submitted that the impugned attachments consist of internal employment contracts and payroll data. It does not constitute a trade secret, a business method, or a proprietary technique that gives the Respondent a competitive advantage in the market. It is administrative data, not commercially applicable intelligence.
57. The Petitioner Respondent submitted that the Respondent cannot credibly argue that the specific salary figures of its employees have inherent economic value. In fact, their true "value" in this context is as evidence of alleged unlawful conduct and discrimination. Revealing this data to a court will not financially harm the Respondent's business operations; it potentially exposes its liability. This application by the Respondent stems from a desire to avoid legal accountability, not to protect a revenue-generating asset.
58. It is the Petitioner Respondent's submission that the impugned attachments do not meet the legal definition of "confidential information" that would trigger a common law duty so absolute as to require its expunction from a court record. At best, the data is private personal data, a concern which is amply addressed by the Petitioner's offer of redaction and the Court's power to issue a confidentiality order.
59. The Petitioner Respondent submitted that since she is a former employee, the stringent duty of confidentiality that existed during her employment has now been relaxed. The law recognizes that the balance of power has shifted, and her right to protect her legitimate interests in a legal action against the Respondent takes precedence over a broad, perpetual duty of secrecy. The Petitioner's right to a fair trial in these circumstances supersedes this diminished obligation. She cited *Okeyo v Board of Directors HHI Management Service Limited & another* [2024] KEELRC 1992 (KLR).
60. The Petitioner Respondent submitted that her use of the impugned attachments is for the purpose of judicial proceedings to assert a right, not for any "commercial purpose" such as marketing, selling, or financial gain. Hence, as a matter of law under the Data Protection Act, her actions with regard to access and production of the documents before this court are lawful. In *Yoya v Kenyatta International Convention Center & 2 others; Mwaura (Interested Party)* [2025] KEELRC 967 (KLR) the court provided a clear, statutory interpretation on the distinction between use of personal data for litigation and the prohibition on "commercial use".



61. The Petitioner Respondent submitted that once documents are in the Court's custody, the remedy for any apprehension of breach of privacy rights or confidential obligations is an order for protection, such as sealing the file or restricting access. The remedy of expunging relevant evidence is never appropriate when lesser, effective measures are available. The Petitioner has already offered to submit redacted versions to address any such concerns.
62. The Petitioner Respondent submitted that on the application of data protection and privacy laws vis-à-vis production of documents which potentially contain sensitive personal data of third parties as evidence in a suit in which the documents themselves go to the root and substance of proving breach of constitutional rights was well elaborated in *Musee v Local Authorities Provident Fund Board & another* [2025] KEELRC 2266 (KLR).
63. The Petitioner Respondent submitted that the impugned attachments are necessary to prove discriminatory pay disparities, making them indispensable for a fair hearing. The ruling in *Musee v Local Authorities Provident Fund Board* (supra) validates the Petitioner's position that redaction is the legally sound and proportionate remedy, not expunction. The modern, judicially approved method is to use redaction to minimize privacy intrusion while maximizing evidential value.
64. On the third issue, the Petitioner Respondent submitted that the Respondent Applicant's private interest in confidentiality is outweighed by the Petitioner's constitutional rights to access information, a fair hearing, and fair labor practices under Articles 31, 50 and 41 of *akn ke act 2010 constitution the Constitution*. Therefore, the constitutional balancing exercise in this case favors the Petitioner. She cited *Njenga v Dib Bank Kenya Limited* [2023] KEELRC 1549 (KLR) which provided the legal test for such a situation. It moves away from an automatic rule of exclusion and establishes a prejudice-based test that the party seeking expunction must meet. The key question is whether its admission would prejudice the fair trial of the case or be detrimental to the administration of justice.
65. The Petitioner Respondent submitted the application contains broad assertions about confidentiality and privacy but fails to sufficiently demonstrate how the admission of "ANN-10a" would make the trial itself unfair or harm the administration of justice. They do not explain how they would be unable to respond to the evidence or how its presence corrupts the judicial process. This failure to meet the constitutional burden is fatal to their case.
66. It is the Petitioner Respondent's submission that Another consideration in balancing is on one hand, there is a limited privacy interest, which can be managed by redaction. On the other, there is the overwhelming public interest in the administration of justice, which would be severely hindered by excluding the only evidence capable of proving a case of systemic discrimination. To expunge "ANN-10a" would be "detrimental to the administration of justice," as it would render the Petitioner's Petition unprovable.
67. It was submitted for the Petitioner Respondent that the party seeking exclusion must prove that admission would prejudice a fair trial or be detrimental to the administration of justice. The Respondent has failed entirely to meet this burden, offering no evidence of specific prejudice. Furthermore, any residual privacy interest is not absolute and is perfectly capable of being protected by the proportionate and court-endorsed remedy of redaction.
68. On the fourth issue, the Petitioner Respondent submitted that the Respondent's application is not merely premature; it is fundamentally misplaced. The Respondent is seeking a ruling on the admissibility of evidence before they have even committed their own position to the record. This puts the cart before the horse to a degree that is condemned as the full context for admitting evidence is not yet established. Here, the context is even more undeveloped, as the pleadings are not yet closed.



69. The Petitioner Respondent submitted that nature of the case being a claim for discriminatory treatment. The Respondent, as the employer and custodian of all employment records, must know that the contracts of comparators are the central evidence. If the Respondent disputes the authenticity of the documents marked "ANN-10a", they are at liberty to produce their version of the same pursuant to Section 69 of the *akn ke act 1963 46 Evidence Act*.
70. On the final issue, the Petitioner Respondent submitted that the petition is not an invitation for this Court to conduct a forensic audit or make a final determination on the Respondent's tax compliance. Rather, the paragraph pleads a key factual particular of the Respondent's conduct which forms the basis of the employment dispute. The Petitioner will demonstrate, through viva voce evidence, that she was pressured to participate in and conceal accounting practices they reasonably believed to be improper, and that their subsequent objection to these practices was a proximate cause of their termination.
71. The Petitioner Respondent submitted that it is not an invitation for this Court to conduct a forensic audit or make a final determination on the Respondent's tax compliance. Rather, the paragraph pleads a key factual particular of the Respondent's conduct which forms the basis of the employment dispute. The Petitioner will demonstrate, through viva voce evidence, that she was pressured to participate in and conceal accounting practices they reasonably believed to be improper, and that their subsequent objection to these practices was a proximate cause of their termination.
72. The Petitioner Respondent submitted that the impugned attachments go to the very core of issues within this Court's exclusive jurisdiction: namely, the fairness and lawfulness of the termination and the construct of fair administrative action within the employment relationship. Allegations that an employee was dismissed for refusing to engage in potentially unlawful conduct at the employer's behest raise fundamental questions of unfair labour practices, which this Court is eminently empowered to determine.
73. The Petitioner Respondent submitted that the Respondent's request to strike out paragraph 39 is neither procedurally proper nor merited. The paragraph is not an extraneous claim but the very factual bedrock upon which the Petitioner's case of unfair termination and retaliatory dismissal rests. To excise it at this juncture would be to blindfold the Court at the threshold of justice, contravening the cardinal principles articulated by the Court of Appeal in *WZO Konjit Tedla & Another v Osborne Ashiono Mutumira* [2017] KECA 82 (KLR) and the constitutional mandate for substantive justice.
74. On the final issue, the Petitioner Respondent submitted that the Respondent's hands are soiled by this act of unlawful disclosure. To ask this Court for a protective order while itself being the source of a violation is conduct that does not endear him to equitable remedies. The Court cannot and should not reward such hypocrisy.
75. It is the Petitioner Respondent's submission that the Respondent Applicant has a fundamental obligation to respect her right to privacy and data protection. By disclosing her mental health status, ID number, and other private details without consent or redaction, the Respondent has flagrantly violated this obligation. The Respondent Applicant now comes before this court to insist on its right to object to certain evidence. However, it has not first remedied or even acknowledged its own violation. It has not "done equity" towards the Petitioner. Having failed to fulfill its own basic obligations of fairness, the Respondent is not entitled to the equitable relief it seeks.
76. The Petitioner Respondent submitted that the Respondent's Application is a quintessential procedural technicality. It seeks to expunge crucial evidence ("ANN-10a") that goes to the very heart of the Petitioner's case. Granting the application would artificially restrict the factual matrix before



the Court and prevent a full and fair hearing on the merits. The Petitioner, as the author of these documents, relies on them to prove her case. Striking them out would severely prejudice her ability to present her case, contrary to the court's duty to lean towards a determination on the merits.

77. The Petitioner Respondent cited *Kyangaro v Kenya Commercial Bank Ltd & Another* (2004) 1 KLR 126 which referred to *Patrick Waweru Mwangi & Another v Housing Finance Co of Kenya Ltd* (2013) eKLR at page 145, the court stated as doth:

“He that comes to equity must come with clean hands and must also do equity. The conduct of the plaintiff in this case betrays him. It does not endear him to equitable remedies. ... He who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights. The plaintiff has not done that. Consequently, he has not done equity.”

78. The Petitioner Respondent submitted that this equitable doctrine disqualifies a party guilty of misconduct from receiving the court's equitable relief. Thus, the Respondent's unlawful disclosure of her sensitive personal data is a clear demonstration of "unclean hands."
79. I have examined all the evidence and submissions of the parties herein. At the core of the application before court is the contention by the applicant respondent that the evidence the petition seeks to rely on was illegally obtained and should therefore be expunged from the record. The documents the applicant want expunged from the record are 2 employment documents exhibit Ann 10(a) and para 39 of the petition.
80. The documents in question relate to promotions received from 1st August 2016 to 1st March 2024. Para 39 on the other hand displays minutes of the meeting held by the respondents applicants. The petitioner was the respondent's head of HR and she has averred that she didn't get the documents illegally but got them by virtue of her employment in the course of employment and so she should rely on them to prove her case on discrimination.
81. The applicants contend that the respondent was by virtue of her employment expected not to disclose any confidential information and return all company documentation upon termination and that she breached this undertaking and should not be allowed to rely on the said information and documents.
82. The law is clear on issue of illegally obtained evidence. Such is evidence that is obtained by acts which are illegal and incudes evidence obtained in breach of the law and *akn ke act 2010 constitution the Constitution*. Such evidence would be evidence that render the trial unfair and detrimental to the administration of justice.
83. The petitioner sought to rely on the evidence of promotion contracts and minutes of meetings held by the respondent which she avers she obtained in the course of her employment. By virtue of being head of HR, she had custody of documents relating to employees and to which at the moment she rightly held. It was however part of the contract that upon existing employment she was to return all such documents and if she decided to use the same after termination, she was using the information illegally and this cannot be sanctioned by Court.
84. This positon has been taken by Courts in Kenya in various cases see *Njenga vs DIB Bank Ltd* (supra), *Okiya Omtata Okoiti & 2 Others vs AG and 4 Others* (2020) KECA 589 (KLR) supra amongst others.
85. Having found that the information (documents) the petitioner has sought to rely on were obtained after her termination from service, or which she held onto upon termination contrary to the employment contract, it would be to the detriment of justice to allow her to use them as they are. I would accordingly allow the application as prayed. Costs in the petition.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF
NOVEMBER 2025.

HELLEN WASILWA

JUDGE

