

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

NAIROBI

CAUSE NO. E958 OF 2021

PROF. GEORGE GONGERA..... CLAIMANT

VERSUS

MOUNT KENYA UNIVERSITYRESPONDENT

CORAM

Before Lady Justice J.W. Keli

C/A Otieno

Ruling

1. The matter was scheduled for hearing on the 24th October 2025. While the claimant was in the process of producing his documents in the case the respondent objected to the reliance on a memo dated 14th January 2022

annexed to the affidavit of the claimant in a determined application and filed as further undated list of documents. The respondent contended that the document was an internal memo of the respondent and not addressed to the claimant. The respondent stated that in 2022, the claimant was not an employee of the respondent. The respondent submitted that this was illegal evidence as held in *Mue & another v Chairperson of Independent Electoral and Boundaries Commission (Presidential Election Petition 4 of 2017) [2017] KESC 45 (KLR) Petitions (11 December 2017) (Ruling)* and in *Okiya Omtatah Okoiti [2020] KECA 589 (KLR)*. The respondent submitted that the 2 authorities were to effect that illegally obtained documents are not to be relied on. That the claimant ought to have procedurally obtained the documents.

2. In response the claimant's advocate submitted that the objection was an ambush. The claimant accused the respondent of disturbing pattern of applying unorthodox means in the trial. The claimant contended that the impugned Memo was before the court under which ruling was done by Justice Ocharo Kebira and in subsequent ruling of the court. That the objection is ill-conceived as the Memo had been relieved before by the

court. That the claimant as deponent in application before the court at paragraph 5 of his replying affidavit had stated that when he visited the office in the year 2022 he was furnished with internal memo from the office of the respondent and annexed copy as GG1.

3. In reply, the respondent's counsel, Mr. Kenyatta, stated that the ruling was issued in the absence of the respondent. That it was only when a further list of documents was filed on 2nd February 2023 introducing the Memo that they objected.

4. The court was guided by the decision in *Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others* [2017] KESC 45 (KLR). Where the supreme court held as follows- *'In order to give effect to the rights under article 35 of the Constitution, Parliament enacted the Access to Information Act which provided for the modalities of obtaining any information held by the State or another person. Section 3 was relevant to the instant application as it stipulated the objectives of the Act. Section 6(1) on the other hand provided the extent of the disclosure of the information held by an entity.*

Article 35(1)(a) and (b) of the Constitution, read with section 3 of the Access to Information Act granted all citizens the right to access information held by the State, or public agencies including bodies such as the 2nd respondent. The right to information implied the entitlement by the citizen to information, but it also imposed a duty on the State with regard to provision of information.

The right of access to information was however not absolute and there were circumstances in which a person was denied particular information. Specifically, procedures were provided in a law on how a person ought to access information held by another person and particularly a State organ or entity. Section 8 of the Access to Information Act provided that a person could apply in writing, or where one was unable to write, could apply orally to an information officer who was to put the request in written form.’’

5. The Supreme Court appreciated the common law position that the applicable test in both civil and criminal cases in considering whether evidence was admissible was whether it was relevant to the matters in issue. If it was relevant, it was admissible and the court was not concerned with how it was obtained. It mattered not how one obtained the evidence. Even

where it was stolen, the evidence was still admissible. The common law did not reject relevant evidence on the ground that it had been obtained illegally. So far as civil cases were concerned, the court had no discretion; the evidence was relevant and admissible. The court could reject it on the ground that it may have been unlawfully obtained in the beginning.

6. The Supreme Court in the aforesaid decision further held- "*The Constitution provided for the right of access to information which had been operationalized through two pieces of legislation, the Independent Electoral and Boundaries Commission Act and the Access to Information Act. The information held by the State or State organs, unless for very exceptional circumstances, had to be freely shared with the public. However, such information was to flow from the custodian of such information to the recipients in a manner recognized under the law without undue restriction to access of any such information.*

A duty had been imposed upon the citizens to follow the prescribed procedure whenever they required access to any such information. That duty could not be abrogated or derogated from, as any such derogation could

lead to a breach and/or violation of the fundamental principles of freedom of access to information provided under the Constitution and the constituting provisions of the law. It was a two way channel where the right had to be balanced with the obligation to follow due process.’’

7. The court confirmed that the Impugned internal memo was annexed as **GG1** in an affidavit sworn by the claimant on the 9th August 2023 in response to the Notice of Motion dated 31st July 2023. The court found that in ruling dated 19th October 2023, the Trial court, Justice Kebira, in paragraph 4 of the ruling cited the said affidavit, which had annexure of the said Memo. The absence of a party at the delivery of a ruling is immaterial as to the validity of the content of the ruling. There was no objection by the respondent to the reliance of the Memo at the application. The respondent is estopped to object to the production of the Memo at the trial as the same document has already been the subject of a past decision of the court. The claimant explained how he obtained the documents in those proceedings, as set out in paragraph 5 of his replying affidavit. He was lawfully within the premises of his employer in pursuit of his dues and explained he was issued with the memo by the office of the Vice Chancellor. The claimant was not a stranger to the respondent. The decision in **Mue** is distinguished. I find that

the claimant did not obtain the Memo illegally. The same is held as admissible as evidence before the court and /or could be relied on as evidence in the suit.

8. The objection is dismissed with costs to the claimant in the cause.

9. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI
THIS 10TH DAY OF DECEMBER, 2025.**

**J.W. KELI,
JUDGE.**

IN THE PRESENCE OF:

Court Assistant: Otieno

Applicant – absent

Claimant/Respondent- Mr. Nyakundi

ORIGINAL