

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF**  
**KENYA AT NAIROBI**  
**CAUSE NO E898 OF 2023**

**MUCHANE KAGWE**  
**NDUNGU.....CLAIMANT**

**VERSUS**

**FAMILY BANK**  
**LIMITED.....RESPONDENT**

**RULING**

**Background**

1. The Claimant has instituted the instant cause to challenge the Respondent's decision to terminate his contract of service. He contends that the decision was irregular as it was allegedly not supported with valid reasons and that it flouted the tenets of fair procedure.
2. The Respondent has opposed the claim. It contends that the Claimant's contract was terminated because of his involvement in tender malpractices within the establishment. It further avers that the Claimant was subjected to a disciplinary process that was procedurally fair. As such, it contends that the decision to terminate the contract of service between the parties was lawful.
3. After filing its response to the claim, the Respondent filed the application dated 11<sup>th</sup> April 2025 through which it seeks the following interlocutory reliefs:-
  - a) That the court expunges the statement by the Claimant's witness dated 21<sup>st</sup> February 2025.

- b) That in the alternative, the court strikes out paragraphs two (2) to ten (10) of the aforesaid statement.
  - c) That the court expunges the documents at pages 47 to 96 of the Claimant's supplementary list and bundle of documents dated 21<sup>st</sup> February 2025.
  - d) That costs of the application be in the cause.
  - e) That the court grants any other or further orders which it deems fit to grant.
4. The application is founded on a plethora of provisions of law including sections 3 and 12 of *the Employment and Labour Relations Court Act*, Rules 45 and 47 of *the Employment and Labour Relations Court (Procedure) Rules, 2024*, sections 1A, 1B and 3A of *the Civil Procedure Act* and Order 2 rule 15 and Order 51 rule 1 of *the Civil Procedure Rules*. It is also expressed to be founded on any other enabling provisions of law. It is further supported by the grounds on the face thereof and the affidavit by one Joan Nyambura Gachomba.
5. The Respondent contends that the averments in the impugned paragraphs of the statement by the Claimant's witness are inconsistent with the Claimant's pleadings before court. It further contends that the averments are unrelated and irrelevant to the cause of action before court. As such, it alleges that the averments are oppressive to it.
6. The Respondent asserts that the issues raised by the Claimant's witness in the impugned paragraphs of his witness statement are not pleaded in the Statement of

Claim. It contends that the averments dwell on unrelated social issues between the parties. It further avers that the averments are replete with allegations and inferences against individuals who are not party to the suit. As such, it contends that the impugned paragraphs should be expunged from the court record since parties are bound by their pleadings.

7. The Respondent further avers that the Claimant has filed documents which have no relevance to the dispute before court. It contends that the impugned documents dwell on personal attacks against individuals who are not party to the suit. It asserts that the Claimant's decision to present the impugned documents to court is driven by ulterior motive.
8. The Claimant has opposed the application by filing a Statement of Grounds of Opposition dated 6<sup>th</sup> May 2025. He contends that the application is not anchored on sound legal principle. As such, he asserts that it is an abuse of the court process.
9. The Claimant contends that the Respondent has not demonstrated how the impugned evidence is irrelevant to the cause. He further contends that the Respondent has not demonstrated the prejudice it will suffer if the evidence is tendered at the trial.
10. The Claimant avers that the third parties whom the Respondent alludes to have consented to the impugned evidence being presented in the cause. He avers that as a

matter of fact, the evidence is supported by separate witness statements by the third parties.

11. The Claimant avers that the impugned evidence is relevant since it addresses matters which are directly in dispute. He contends that he has every right to present the evidence to court in pursuit of his right to fair trial as guaranteed under article 50 of *the Constitution*.
12. The Claimant avers that the objection which the Respondent has raised through the instant application should have been taken during trial of the case and not earlier. As such, he prays that the application be dismissed.

### **Analysis**

13. The primary law which regulates production of evidence in Kenya is *the Evidence Act* Cap 80 Laws of Kenya. The legislation is complemented by provisions of *the Constitution of Kenya 2010* (the Constitution) which speak to the subject.
14. Before the promulgation of *the Constitution*, the primary determinant for admissibility of evidence in a trial in the country was whether it was relevant to the issue under inquiry. As such, it did not matter how the evidence had been obtained if it was relevant. That was sufficient to warrant its admission in a trial.
15. With the enactment of *the Constitution*, there was a paradigm shift on the matter. Article 50(4) of *the Constitution* now restricts the use of evidence which has been obtained in a manner that violates the rights in the Bill of Rights.

16. However, my understanding of this constitutional edict is that it does not create an absolute bar to admission of illegally obtained evidence. Rather, it requires that such evidence be excluded if it is demonstrated that its admission will be detrimental to the administration of justice or will render the trial unfair (***Njenga v Dib Bank Kenya Limited [2023] KEELRC 1549 (KLR)***).
17. As such, it is apparent that under the current legal framework, the yardstick for admission of evidence in a trial is no longer relevance of the evidence alone. Besides evaluating the relevance of the evidence to the issue under consideration, there are new constitutional considerations regarding how the evidence was obtained.
18. Consequently, evidence which is otherwise relevant will now be excluded if it was obtained illegally and it is demonstrated that its admission in the case will render the trial unfair or will otherwise be detrimental to the administration of justice. However, the burden of demonstrating the foregoing lies with the party who is opposed to production of the evidence (***Njenga v Dib Bank Kenya Limited [2023] KEELRC 1549 (KLR)***).
19. Chapter II of *the Evidence Act* deals with admissibility and relevance of evidence. Section 5 thereof declares that no evidence is admissible in a trial unless it points to the existence or non-existence of the fact in issue or is otherwise declared to be relevant by the Act.

20. Evidence which is admissible in a trial includes: facts which though not directly in issue are connected to the fact in issue as to form part of the same transaction; facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts or facts in issue; facts which show or constitute a motive or preparation for any fact in issue or relevant fact; facts which explain or introduce the facts in issue or relevant facts; statements or acts which point to a common intention in relation to a fact in issue or a relevant fact; and facts which affect the probability of a fact in issue or a relevant fact.
21. All such evidence is relevant. As such, subject to it (the evidence) satisfying the constitutional edict regarding the mode of its acquisition, it is admissible in a trial.
22. The Respondent has moved this court to expunge certain pieces of evidence from the evidence which the Claimant proposes to rely on at the trial. It contends that the evidence is not relevant or connected to the matters under inquiry. Further it asserts that the evidence touches on third parties who are not party to the suit.
23. As can be seen from the discussion above, there is no rule of evidence which bars production of evidence on the ground that it touches on a non-party to a suit. The determinant for admissibility of evidence in a trial is the relevance of the evidence to the issue under inquiry subject of course to how the evidence was acquired. As such, the proposition by the Respondent that some evidence be excluded merely

because it touches on third parties has no legal basis and is rejected.

24. From the material before court, it is apparent that the Respondent is not challenging the manner in which the impugned evidence was acquired. It is not the Respondent's case that the evidence was acquired illegally.
25. The Respondent's main challenge to the evidence relates to its relevance to the trial. As such, all that the court ought to do is to make a preliminary determination regarding whether the evidence is relevant and thus admissible.
26. The court has scrutinized paragraphs 2 to 10 of the witness statement which is the subject of the attack by the defense. In summary, all that the witness states in the aforesaid paragraphs is: that Cutlass Technology Solutions Ltd has had a longstanding business relation with the Respondent which predates the engagement of the Claimant as the Respondent's employee; that the business relation arose from earlier social relations between founders of the two companies and or their relatives; that Cutlass Technology Solutions Ltd was properly prequalified for the impugned tender; and that the Claimant has had a social relation with some of the directors of Cutlass Technology Solutions Ltd which explains the financial dealings between them contrary to the Respondent's assertion that the said company was bribing the Claimant in connection with the impugned tender.

27. I have also looked at the witness statement of the Respondent's witness. It is apparent from the said statement that the Respondent's case is that the Claimant had an unholy financial relation with Cutlass Technology Solutions Ltd which was allegedly awarded the impugned tender irregularly. It is the Respondent's case that this is the reason why it subjected the Claimant to disciplinary action which led to the termination of his services.
28. From the foregoing, it is apparent that the matters which the Respondent now describes as irrelevant are in fact a response to the issues that are raised in the witness statement by its witness. Looked at from the foresaid viewpoint, the evidence is certainly relevant. As such, it is inconceivable that the Respondent would describe the evidence as irrelevant.
29. The documents which the Respondent seeks to expunge from the record are intended to support the averments in the contested witness statement. Since the court has found the averments in the witness statement to be relevant, it follows that the documentary evidence in support of the averments is also relevant.
30. The impugned evidence: speaks to the facts in issue or relevant facts; is intended to explain the true motive for the financial transactions which took place between the Claimant and the directors of Cutlass Technology Solutions Ltd; and is intended to demonstrate the relation between the Respondent and Cutlass Technology Solutions Ltd with a

view to discounting the probability of the bribery allegations against the Claimant. As such, it is relevant and therefore admissible. Whether it is of probative value is a different matter altogether.

31. The Respondent has further attacked the impugned witness statement on the ground that it seeks to address matters which are not pleaded by the Claimant. It avers that in this context, the witness statement offends the principle that parties are bound by their pleadings.
32. The Respondent's contention misses yet another critical legal principle that pleadings should not contain evidence which is meant to support the averments in them. This principle is encapsulated in Order 2 (3)(1) of *the Civil Procedure Rules* which provides as follows:-

*"Subject to the provisions of this rule and rules 6, 7 and 8, every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defense, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits."*

33. The central issue in controversy between the parties relates to whether the Respondent had a valid reason to terminate the Claimant's employment. Whilst the Claimant contends that there was no justification for the decision, the Respondent contends otherwise.

34. The Respondent contends that the reason why it terminated the Claimant's contract was his involvement in tender irregularities with Cutlass Technology Solutions Ltd. On the other hand, the Claimant seeks to tender the impugned evidence to demonstrate that the Respondent's assertions are baseless.
35. In the court's view, the averments in the impugned witness statement constitute facts which are to be tendered in evidence to rebut the Respondent's assertions of corruption against the Claimant. As such, they fall in the scope of evidence which is to either support or rebut the averments in the pleadings by either of the parties and which should not be included in the pleadings.
36. The Respondent relies on this court's decision in the case of ***Mwaura v Safaricom PLC [2023] KEELRC 2392 (KLR)*** to seek the orders in the instant application. However, the circumstances which informed the application to strike out the impugned witness statement in the case of ***Mwaura v Safaricom PLC*** (supra) are distinguishable from the circumstances informing the application in this suit.
37. In the case of ***Mwaura v Safaricom PLC*** (supra), the offending witness statement indirectly invited the court to make determinations in respect of contested matters in another case which was still pending in court. The court observed that inviting it to do so was tantamount to asking it to adjudicate on an unrelated suit which was still pending which was not acceptable. That is not the scenario which the

impugned witness statement in the instant case presents. As such, the two cases are distinguishable.

38. Before I pen off, it is perhaps important to address one matter which the Claimant has flagged. According to him, the issues which the Respondent has raised in the application ought to have been raised during the trial of the case and not at this preliminary stage.

39. In a sense, I agree with the Claimant's contention. Except for matters which are to be handled during the pretrial conference such as which documents are agreed between the parties and which ones are not and which witnesses are to be presented at the trial, questions regarding the relevance and probative value of evidence should ideally be addressed during the trial of a case. Indeed, this court expressed a similar view in the case of **Mwaura v Safaricom PLC** (supra) when it stated as follows:-

*"As regards the relevance of the documents proposed for introduction through the claimant's list of documents filed on January 27, 2023, it is premature for the court to seek to determine this matter at this stage. This is a matter that can only be addressed during trial to evaluate the relevance and probative value of the impugned documents. As a result, the prayer to strike out the said further list of documents is rejected."*

40. The approach suggested by the Claimant will ensure that the court is not called upon to interrogate evidence which is

proposed to be presented in a case even before the trial begins. It will also ensure optimum utilization of judicial time.

**Determination**

41. The upshot is that the court finds that the application dated 11<sup>th</sup> April 2025 is devoid of merit.
42. Consequently, it is disallowed.
43. Costs of the application are granted to the Claimant.

**Dated, signed and delivered on the 15<sup>th</sup> day of December, 2025**

**B. O. M. MANANI  
JUDGE**

In the presence of:

..... for the Claimant

.....for the Respondent

**ORDER**

**In light of the directions issued on 12<sup>th</sup> 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**

ORIGINAL