



**Ogwaro v SGA Security Limited (Cause E871 of 2022)
[2025] KEELRC 264 (KLR) (31 January 2025) (Ruling)**

Neutral citation: [2025] KEELRC 264 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E871 OF 2022
NJ ABUODHA, J
JANUARY 31, 2025**

BETWEEN

NELSON AGONO OGWARO CLAIMANT

AND

SGA SECURITY LIMITED RESPONDENT

RULING

1. The Respondent/Applicant herein filed application dated 14th March, 2024 brought under article 27(1) 31 article 50(4) and article 35 of *the Constitution* of Kenya, 2010, Sections 25,26,28 29& 32 of the Data Protection *Act No. 24 of 2019*, Sections 78A (3), 106B,106G of the *Evidence Act* seeking for the following orders
 - a. That this Honourable Court be pleased to expunge and /or strike out the Claimant's documents filed and served upon the Respondent on 16/10/2023 as the same were illegally obtained thus violating the *Evidence Act; the Constitution* under article 31(d) on the right to privacy of the subject employee; the Hildebrand rules on illegal obtained evidence and article 50(4) that require the exclusions of unlawfully obtained evidence.
 - b. That the said documents include: the resignation letter dated 01/01/2019: acknowledgment letter dated 11/10/2019: and the certificate of release dated 02/03/2020 contain the name Zachariah Magadi Isanda and not the name of the Claimant Nelson Agano Ogwaro.
 - c. That the nature of the details is unique and peculiar to the employer-employee relationship between the subject one Zachariah Magadi Isanda and the Respondent which is exclusive to any other employee as set out in the *Employment Act*.
 - d. That the Respondent be granted leave to amend the statement of Response and file a counterclaim against the Claimant for the loss of Kshs 6,553,326.96/- through his collusion, omission and commission respectively.



2. The application is supported by grounds on the face of the Application herein and the Affidavit of Anne Waheire the legal manager of the Respondent herein sworn on 14th March,2024.
3. The Respondent averred that on 29th September,2023 the matter was slated for hearing and parties were ready to proceed however the court directed the parties to exchange and file documents to support their positions on the single issue of gratuity for it to determine whether there was need to call evidence or rely on the submissions.
4. The Respondent averred that the Claimant went ahead to obtain documents from the Respondent only to turn around and now seek to use them against the Respondent which is illegal. That for an employee who resigned to avoid disciplinary procedures where a loss of over Kshs 6,553,326.96/- to rely on the release and separation procedures of a different employee who had no single incident of theft or misappropriation of company resources was misleading and detrimental to the facts on the nature of the relationship between the Claimant and the Respondent.
5. The Respondent averred that the introduction of private documents between the Respondent and a different employee on whose circumstances were very different and not in any way related was a breach of the former employee's right to privacy and a data breach as contemplated in the Data Protection Act.
6. The Respondent averred that Article 50(4) of *the Constitution* provides that evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice.
7. The Respondent averred that similar fact evidence does not apply where one of the employees runs away during investigation of financial misappropriation while the other honorably leaves employment to another organization; the two cannot be treated as similar hence no discrimination can arise as purported by the Claimant unless they are able to demonstrate any losses or investigations that the subject employee (Zachariah Magadi Isanda) occasioned the Respondent.
8. The Respondent averred that there was a just cause to pursue the lost funds as it had been established without a doubt that the Respondent suffered a loss to the tune of over Kshs. 6,553,326.96/- and had accordingly instructed its Advocates on record to pursue the money through a counterclaim and present the detailed evidence of the acts of collusion, omission and commission by the Claimant which was the reason he resigned while asked to explain his conduct as the senior officer in charge.
9. The Respondent averred that pursuant to Article 27(1) as read with Article 50(1) of *the Constitution* which guarantees that every person is equal before the law and has the right to equal protection and equal benefit of the law and that by the application of the law decided in a fair and public hearing before a court or if appropriate another independent and impartial tribunal or body.
10. That gratuity was an appreciation for service and it was not an entitlement. It is a 'thank you' and there was no way the Respondent would thank the Claimant for overseeing theft and loss of up to Kshs 6,553,326.96/-
11. In response the Claimant filed his Replying Affidavit sworn on 2nd April,2024 while opposing the Respondent's Application.
12. The Claimant averred when the matter came up on 29th September,2023 the court narrowed down the issue to whether the Respondent had paid gratuity before to an employee when the court directed the Claimant to avail any documentation or any evidence to show that the Respondent had paid gratuity before to an employee of the same caliber as the Claimant in this suit.



13. The Claimant averred that the court directed the Respondent to prove its assertion that the fact that they had accepted and written to the Claimant that they could pay him gratuity was an oversight. That the Claimant having worked in the Respondent company for 8 years, he had worked with several of the company employees some of who had been released and paid gratuity and he embarked on the journey to get one of his former colleagues to give him his documents to avail to court as evidence of previous payments.
14. The Claimant averred that he met the said Zachariah Magadi Isanda who was released in the same manner as the Claimant by the Respondent and he was willing to share his documents with the Claimant to avail to court as proof of previous payments hence the documents were filed and served to the Respondent as per court directions.
15. The Claimant averred that it was not true that the documents were obtained from the Respondent as alleged but from the former employee Zachariah willingly. That he resigned out of his own volition having exhausted all the notices to show cause and the letter from the Respondent dated 10th November,2021 made it clear that the resignation had been acknowledged and gratuity was to be paid to the Claimant.
16. The Claimant averred that the Respondent failed to prove its assertion that they would pay him gratuity and came up with different allegations. That the essence of the court requesting the Claimant to furnish the documents was to ensure he was not discriminated by the Respondent despite agreeing to the said payment.
17. The Claimant averred that the issue of how money was lost in the company had been addressed and since there was no evidence pointing at the Claimant, the Respondent have not pressed any charges against the Claimant, in fact in a bid to show leadership the Claimant agreed to bite the bullet and accepted the recovery from him of Kshs 75,000/= hence settling the issue as per the Respondent letter dated 13th July,2022 from the Respondent.
18. The Claimant averred that the evidence was properly in court and should be admitted as a cornerstone of promoting justice as the primary duty of the court.
19. The Application was dispensed of by written submissions.

Respondent's Submissions

20. The Respondent submitted on whether the documents were illegally obtained that the employment contract between it and the Claimant and the other employee Zachariah were different as well as the circumstances under which each of them left the employment. That the documents were obtained illegally as processing of the personal data had to be carried out in accordance with the Provisions of Data Protection Act and the principles of section 25 of that Act. Counsel also relied on the provisions of sections 26 and 30 of the said Act.
21. Counsel further submitted that if the documents were obtained willingly from Zachariah as alleged by the Claimant nothing stopped him from swearing an affidavit that he gave the documents willingly. Counsel relied on the case of John Muriithi & others v Registered Trustees of sisters of Mercy(Kenya) t/a "The Mater Misericordiae Hospital" & Another(2018) eKLR on illegally obtained documents. Counsel relied on the right to privacy under Article 31 of *the Constitution*.
22. Counsel submitted that under the Act only the registered data controller or data Processor was allowed to process an individual's personal data and in accordance with grounds on which processing of



personal data may be allowed as set out under section 45 of the Act. Counsel relied on the case of Allan Chacha vs The County Assembly of Migori on this assertion.

23. On the issue of whether the said documents should be expunged from the Court's record counsel submitted in the affirmative while relying on article 50(4) of *the Constitution*. Counsel relied on among other cases the case of RC V KKR (2021) eKLR on admissibility of illegally obtained evidence.
24. On the issue of whether the Respondent should be granted leave to amend its statement of response and include a counter claim counsel relied on the case of Kenline Agencies Ltd vs Housing Finance Company of Kenya Ltd & Another (2007) eKLR while submitting that leave to amend pleadings should be granted anytime before judgment so long as no injustice will be met to the other party.
25. Counsel submitted that the need to put in counterclaim was occasioned by the conclusion of investigations and tracing of funds which were paid out under the hand and signature of the Claimant. That the investigations were concluded after the institution of the suit herein. Counsel relied on article 50(1) of *the Constitution* while requesting to be allowed to put in its counterclaim so that the matter may be determined conclusively. He further submitted that the Claimant did not demonstrate the prejudice he will suffer if the application was allowed and he will be given a corresponding leave to respond to the Counterclaim. Counsel relied on among others the case of Mirema Drive Estate Ltd v Church of Jesus Christ of Latter Day (2017) eKLR on this assertion.

Claimant's Submissions

26. The Claimant submitted that the documents in question were private property of Zachariah and he could give to anyone. Counsel relied on among other cases the case of Jones vs Owen (1870) 34 JP 759 while submitting that evidence procured illegally was admissible so long as it was relevant. That the evidence was obtained willingly from the owner which became public documents once issued to Zachariah and no prejudice would be suffered by the Respondent should the documents be produced in court.
27. On the issue of inclusion of counterclaim the same was opposed by the Claimant who submitted that the same was made to waste court's time and the issues raised in the counterclaim had been addressed internally and a decision made to recover Kshs. 75,000/= as stated by the respondent above even though he was not guilty. That due to such resolution there was no criminal charges preferred against the Claimant or criminal offence reported anywhere and the Respondent continued doing business with the companies he was accused of colluding with.
28. Counsel submitted that pleadings had closed in this matter and the court narrowed down to the issue of gratuity which was the only issue to be determined and opening up the matter would be a delay to justice and waste to court's time.

Determination

29. The court has considered the Respondent's Application, the Claimant's Replying Affidavit and the submissions as well as authorities relied by both counsels above and makes a determination as follows: _
30. On the issue of the documents introduced by the Claimant belonging to former employee, Zachariah Magadi Isanda who resigned and was paid his gratuity, the Respondent submitted that gratuity was a thank you appreciation which it could pay to the Claimant but he left on a bad note where money was lost. That the other employee had a clean record hence was paid the gratuity.
31. The Claimant on the other hand alleged that the same documents were not obtained from the Respondent but the former employee who gave them willingly. From the foregoing, it is the Court's



- view that once the Respondent gave the documents to the former employee the same became his private documents and he was free to share them as he wishes.
32. The court takes cognizance of the definition of the personal data breach as “ a breach of security leading to the accidental or unlawful destruction, loss alteration, unauthorized disclosure of, or access to, personal data transmitted, stored or otherwise processed”. This court also notes the provisions of article 50(4) of *the Constitution* which provides as follows “Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.”
33. In addition, Blacks Law Dictionary 10th Edition – Page 673 defines illegally obtained evidence as:
evidence obtained by violating a statute or a person’s constitutional or other rights especially
- the guarantee against unreasonable search and seizure.
34. In the case of John Muriithi & 8 others v Registered Trustees of Sisters of Mercy (Kenya) t/a “The Mater Misericordiae Hospital” & another [2018] eKLR the Court held as follows:-
In Kenya, illegally obtained evidence is admissible so long as it is relevant to the fact in issue or its admission would not affect the fairness of the trial...In the current case, there is no indication that the evidence sought to be excluded by the Applicants was obtained in a manner that violates the right or fundamental freedom in the Bill of Rights. The same evidence would also not render the trial unfair or be detrimental to the administration of justice.
35. Similarly in this case there is no violation of any right in admitting the documents in question more so where they were obtained willingly. A closer look at the proceedings of 29th September, 2023 shows that the Claimant stated that other officers who left the Respondent were paid gratuity while the Respondent maintained that the promise to pay the same was an oversight. Each party was therefore tasked to prove their assertion. The efforts of the Claimant getting another employee who was paid gratuity was relevant to the court in proving the claimant’s assertion. The Court therefore finds no reasonable cause to expunge the said documents since they will help serve justice in the matter.
36. Regarding leave to amend the memorandum of response to include a counter claim by the Respondent, Rule 14 (6) of the Employment and Labour Relations Court (Procedure) Rules 2016 provide as follows:
“
“(6) A party may amend pleadings before service or before the close of pleadings:
Provided that after the close of pleadings, the party may only amend pleadings with the leave of the Court on oral or formal application, and the other party shall have a corresponding right to amend its pleadings.”
37. The Respondent averred that it is in the interest of justice for it to be granted leave to amend its reply to introduce a counterclaim on the issue of Kshs 6,553,326.96/- which was discovered lost in the hands of the Claimant after the investigations were done. That the said investigations were done after the suit was filed.
38. The court will not delve in to merits or not of the said counterclaim at this point. The counterclaim is subject to limitation period of 3 years as per section 90 of the *Employment Act*. The cause of action



arose in November,2021 when the Claimant resigned and the application filed in March 2024 which is within the limitation period.

39. The law as regards amendment of pleadings is well settled. The general rule is that an amendment should not create injustice to the other party which cannot be compensated by way of costs. In the same vein, amendments are necessary so as to enable the court to determine the real question in controversy.
40. The court is guided by these principles and further by the case of Joseph Ochieng & 2 Others v First National Bank of Chicago (1995) eKLR where it was stated.
- a) the power of the court to allow amendments is intended to determine the true substantive merits of the case;
 - b) the amendments should be timeously applied for;
 - c) power to amend can be exercised by the court at any stage of the proceedings (including appeals stage);
 - d) that as a general rule, however late the amendment is sought to be made, it should be allowed if made in good faith provided costs can compensate the other side;
 - e) the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaintiff the defendant would be deprived of his right to rely on Limitations Act but subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation.
 - f) that the Court has powers even (in special circumstances) to allow an amendment adding or substituting a new cause of action in respect of which relief has already been claimed in the action by the party applying for leave to seek the amendment.”
41. From the foregoing, the court is of the opinion that an amendment can be done at any time of the proceedings. In this case proceedings had closed but hearing had not started and further that the Respondent needed the leave to file the said amendments.
42. Considering the court appreciates that the purpose of a trial court is to provide an even playing ground for parties to ventilate their issues as per article 50 (1) of *the Constitution*, what the Respondent seeks to do is to introduce a counterclaim on the issue of lost money which the court will determine during the hearing. The Claimant will have corresponding leave to respond to the Counterclaim.
43. In the upshot the Application partly succeeds on the issue of leave to file an amended Response to Claim and Counterclaim and fails on the issue of expunging the documents introduced by the Claimant and the same are deemed properly on record.
44. It is so ordered.

DATED AT NAIROBI THIS 31ST DAY OF JANUARY, 2025

DELIVERED VIRTUALLY THIS 31ST DAY OF JANUARY, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

