

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT MOMBASA
ELRC CAUSE NO. E 071 of 2022
(Before Hon. Justice Ocharo Kebira)

ALPHEUS ALUOCHCLAIMANT
VERSUS
KENYA PORTS AUTHORITY.....1ST RESPONDENT
DANIEL OGUTU.....2ND RESPONDENT

R U L I N G

Background

- 1 When this matter came up for hearing on 20th November 2024, Counsel for the Claimant indicated to the Court that though the Claimant was set to testify on his case, there was a hitch, the 1st Respondent hadn't supplied him with the documents that he had requisitioned through his notice to produce filed herein.
- 2 Counsel for the Respondent in rejoinder stated that all the documents sought in the notice are on record. None is left in the Respondent's possession that is unfiled.
- 3 In the circumstances, this Court was prompted to direct that the Claimant file a response affidavit to the Respondent's replying affidavit to the Notice to Produce,

and that the substantive hearing of this matter shall proceed after the Court has rendered its decision on the controversy regarding the production of documents.

The Notice to Produce

4 Through a Notice to Produce dated 6th June 2024, which read in part;

“

1. THAT this Honourable court be pleased to order and direct the Respondents to produce the following documents:

a. Claimant’s Personal File

b. Claimant’s Medical File

c. Claimant’s Confidential File

d. Two recorded tapes of the disciplinary hearing.

The Response by the Respondent.

5 Through an affidavit sworn on 13 November 2024 by Liza M. Nguti, its Senior Human Resource Officer, the 1st Respondent asserts that it is unaware of any two recorded tapes of the disciplinary hearing conducted against the Claimant.

6 They further assert that the Claimant’s personal file, confidential file, and medical file, which were requisitioned by the Claimant in his Notice to Produce, are among the documents they have placed before this Court under their

list of documents dated May 8, 2023. The documents are within the possession of the Claimant.

- 7 It is further stated that the Respondent wishes to share additional documents, Marked MK 2, which may not have been included on their list of documents.
- 8 The documents that they have placed before this Court, as listed above, and the additional documents, MK2, are the only documents they have in their possession relevant to the instant matter.
- 9 The Claimant is only engaged in a fishing expedition, and his actions are aimed solely at derailing an expeditious and just resolution of this matter.

The Claimant's Rejoinder

- 10 The Claimant states that the extracts from the files, as submitted to the court by the Respondent, do not portray the correct picture of his case.
- 11 The Claimant believes, as stated, for the reasons among others;
 - a. A memo written by the head of the Employees Relations Department after investigating his case of incitement on the shop floor, which was reported to the General Manager of Human Resources after he sent people to spy on him and record him speaking

without his knowledge. The head of Employee Relations investigated the case and concluded that the allegations were false and that he had no case to answer. However, because he harboured a grudge against the Claimant, he proceeded with initiating his transfer to Kisumu.

b. There are two taped recordings of the incident which the 1st Respondent ought to produce.

c. He was accused of speaking to the press when one of the first victims of COVID-19, an employee of the 1st Respondent, died and was buried in an inhumane manner, and was charged by the 1st Respondent for expressing his opinion. The documents relating to this haven't been furnished to him.

12 The Claimant asserts further that he was interdicted, and following an inquiry by a committee constituted by the General Manager Human Resources and Administration, he was exonerated of any misconduct, and the interdiction was lifted. He was subsequently reinstated. The 1st Respondent should provide the proceedings of the inquiry.

13 The medical file, if submitted, will reflect that he was unwell, but the General Manager Human Resource & Administration, unfairly went ahead to have him transferred to Nairobi against the Doctor's advice, and

that on one of the correspondences, the General Manager absurdly commented that the Doctor's advice was just to please the Claimant.

- 14 It will therefore be necessary that the 1st Respondent be directed to produce all the documents in relation to his employment.

Analysis and Determination

- 15 The legal framework for a notice to produce documents is found in Section 69 of the Evidence Act, Cap 80, laws of Kenya. The purpose of a notice to produce is to ensure that a party who possesses or controls a document (s) relevant to a case produces it for inspection or use as evidence.

- 16 Section 69 of the Evidence Act provides;

“Secondary evidence of the contents of the documents referred to in Section 68[1][a] shall not be given unless the party proposing to give such secondary evidence has previously given to the other party in whose possession the document is, or to his advocate, such notice to produce it as required by law or such notice as the court considers reasonable in the circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases;

- i. When the document to be proved is itself a notice;***
- ii. When, from the nature of the case, the adverse party must know that it will be required to produce it;***
- iii. When it appears or is proved that the adverse party has obtained possession of the original by fraud or force;***
- iv. When the adverse party or his agent has the original in court;***
- v. When the adverse party or his agent has admitted the loss of the document;***
- vi. When the person in possession of the document is out of reach of, or not subject to, the process of the court;***

17 The function of the discovery of documents has been elaborately set out in Paragraph 1 of Volume **13 of the Halsbury Laws of England**, thus;

“The function of the discovery of documents is to provide the parties with relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases, and thus to provide the basis for the fair disposal of the proceedings before or at the trial. Each party is

thereby enabled to see before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation”.

18 A similar view was expressed by Havalock, J [as he then was] in **Concord Insurance Co. Ltd v NIC Bank Ltd [2013] eKLR.**

19 In **Oracle Production Limited v Decapture Limited & 3 others [2014] eKLR,** on the point, Justice Kimondo expressed himself thus;

“Pre-trial discovery is so central to litigation that the entire Order 11 of the Civil Procedure Rules 2010 has been substantially devoted to it, including sanctions for non-compliance..... The true purpose of discovery is to level the litigation field, to expedite the hearing, reduce costs and also allow parties to gauge the case they will face at the trial”

20 In my view, pre-trial discovery of documents, in addition to aiding the parties in the manner outlined above, helps the Court to fulfill its constitutional mandate under Article 159 of the Constitution of Kenya, 2010, and its overriding objective of expeditious disposal of matters. It is for this purpose that, through the re-engineering of court

processes, the Employment and Labour Court (Procedure) Rules, 2024, have expressly made the discovery of documents a pivotal mechanism for active case management.

- 21 Having stated the purpose of discovery of documents as I have above, it is pertinent to note at this juncture that the notice should clearly specify the required documents, as well as the time and place for production. Having this in mind, it isn't difficult for me to conclude that the Claimant's "Notice to Produce" was deficient. It does not appear to be a notice addressed to the Respondent to produce documents, but an application to the court to direct production of certain documents. In my view, it was too general a requisition, with no specificity on the documents required to be produced.

- 22 The documents that a party seeks to have produced must be seen as relevant to the controversy at hand. As such, a generalised demand for the production of the documents as the Claimant did, cannot be deemed a demand properly made under a notice to produce.

- 23 Having not clearly and specifically sought documents in the "Notice to Produce," the Claimant cannot purport to supply specificity through an affidavit after the notice, as he has purported to do.

24 Lastly, I have carefully considered the two bundles of documents filed by the 1st Respondent, under the two separate lists of documents, and hold that, in the circumstances of the “Notice to Produce”, which I have hereinabove held, was crafted in a general manner, I am of the view, that they sufficiently reflect what the Claimant is craving for.

25 In the upshot, I decline to issue an order for the production of any further documents by the Respondents.

26 Orders accordingly.

Read, signed and delivered virtually in Nakuru this 10th day of April, 2025.

OCHARO KEBIRA
JUDGE