



Republic v Joshua Nyamweya Oigara, CBS, Chief Executive Officer, KCB Bank Kenya Ltd & 4 others; Inyangu (Exparte) (Miscellaneous Application E002 of 2023) [2024] KEELRC 2241 (KLR) (19 September 2024) (Ruling)

Neutral citation: [2024] KEELRC 2241 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E002 OF 2023
BOM MANANI, J
SEPTEMBER 19, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

JOSHUA NYAMWEYA OIGARA, CBS, CHIEF EXECUTIVE OFFICER, KCB BANK KENYA LTD 1ST RESPONDENT

CHIEF EXECUTIVE OFFICER, KCB BANK KENYA LTD 2ND RESPONDENT

JAPHETH OCHIENG ACHOLA, GROUP HUMAN RESOURCE DIRECTOR, KCB BANK KENYA LTD 3RD RESPONDENT

KCB BANK KENYA LTD 4TH RESPONDENT

COMMISSION ON ADMINISTRATIVE JUSTICE 5TH RESPONDENT

AND

DAVID MUGASIA INYANGU EXPARTE

RULING

1. The application before me is dated 29th February 2024. It seeks to review the court’s ruling which was delivered on 15th June 2023.
2. The said ruling adopted the order of the 5th Respondent dated 5th May 2022 as the court’s order to enable its enforcement. The 5th Respondent’s order required the other Respondents to provide the *Ex-Parte* Applicant with certain documents and information as more particularly set out therein.



3. The 1st to 4th Respondents now contend that some of the documents which they were ordered to supply to the *Ex-Parte* Applicant are not available. As such, they are unable to comply with the order as they have nothing to supply.
4. The 1st to 4th Respondents specifically indicate that the 4th Respondent does not have Balanced Score Cards (BSCs) in respect of the *Ex-Parte* Applicant for the duration between 2015 and 2019. The said Respondents also indicate that the 4th Respondent does not have Job Descriptions (JDs) for the *Ex-Parte* Applicant for the period between 2016 and 2019.
5. With respect to the BSCs, the 1st to 4th Respondents contend that the *Ex-Parte* Applicant was a fixed term employee whose contracts did not last beyond one year every time they were issued. As such, the contracts automatically lapsed at the close of every financial year.
6. The 1st to 4th Respondents contend that since the contracts were fixed term and lapsed at the close of the year, there was no need to review the *Ex-Parte* Applicant's performance as this would only have been useful if he was an indefinite term employee. The four Respondents contend that for fixed term employees, such an exercise would have been a futile exercise as their assessment results were not required since there was no guarantee that their contracts would be renewed to enable them continue in service.
7. The 1st to 4th Respondents argue that when the 4th Respondent's Head of Employee Relations wrote to the 5th Respondent indicating that the *Ex-Parte* Applicant had been assessed and his BSCs supplied to him, the said officer was acting on an honest but mistaken belief that both indefinite and fixed term employees were subject to full cycle performance review. However, this assumption was incorrect since only indefinite term employees were taken through the exercise.
8. The 1st to 4th Respondents contend that as a result of this inadvertence, the 4th Respondent's officer made a wrong representation to the 5th Respondent regarding the status of the *Ex-Parte* Applicant's performance review records. As a consequence, the 5th Respondent made an erroneous order which was adopted by this court. The four Respondents contend that the order was premised on inaccurate information suggesting that the *Ex-Parte* Applicant had been subjected to performance reviews and that there existed BSCs in respect of his performance yet this was not the case.
9. With respect to the JDs, the 1st to 4th Respondents contend that the *Ex-Parte* Applicant was given only one JD when he was first recruited by the 4th Respondent. They contend that the JD remained the same for the duration that the *Ex-Parte* Applicant's contract was periodically renewed. As such, there are no separate and distinct JDs for his position for the duration that he served the 4th Respondent.
10. The four Respondents have therefore moved the court to review the order in question in order to excuse the 4th Respondent from the obligation of supplying the aforesaid documents. They contend that the purported documents do not exist. Therefore, they cannot be supplied. As such, the orders cannot be implemented.
11. The application is opposed by the *Ex-Parte* Applicant. Contrary to the position expressed by the four Respondents on BSCs, the *Ex-Parte* Applicant contends that he was subjected to performance review every year in order to qualify for the award of annual bonuses. He argues that the Respondent's Performance Manual requires that all employees be subjected to this process for purposes of determining who among them qualifies for bonus. As such, it is his view that the BSCs in respect of his annual reviews do exist.



12. The *Ex-Parte* Applicant contends that for the duration that he served the 4th Respondent under different contracts, his job description kept changing. As such, he was issued with new JDs every time he entered into a fresh contract with this Respondent.
13. The *Ex-Parte* Applicant has referred to the court record generally and to his previous filings to anchor his arguments. Having regard to the fact that he appeared in person, I will not penalize him for this informality. In any event, the documents which he refers to already form part of the court record. As such, they ought to be considered in the interest of making a just decision.

Analysis

14. I have considered the contrasting positions expressed by the parties on the matters under review. It is correct that the court has power to review its decisions for, inter alia, sufficient cause.
15. As the four Respondents correctly point out, the term “sufficient cause” ought to be given a liberal interpretation in order to advance the cause of justice. However and as was indicated in the case of *The Registered Trustees of the Archdiocese of Dar es Salaam v The Chairman Bunju Village Government & Others* quoted by the four Respondents, the term should not be expanded so as to admit applications for review where there has been negligence, inaction or want of bona fides on the part of the applicant.
16. The four Respondents contend that the reason why the 5th Respondent issued an order requiring them to supply the *Ex-Parte* Applicant with the documents they contend that they do not have is that their officer erroneously gave the 5th Respondent the impression that the documents existed when they, in actual fact, did not. In effect, the four Respondents are understood to be stating that the impugned order issued as a result of the erroneous action of their officer. However, they contend that the error was inadvertent.
17. I have considered the position expressed by these Respondents on the reasons that resulted in the issuance of the impugned order. I note that the officer who allegedly supplied the 5th Respondent with erroneous information is actually in charge of employee relations and wellness within the rank and file of the 4th Respondent. Consequently, he is expected to have a clear picture of employee policies including those which speak to performance evaluation. As such, the officer ought to have had clarity of mind on employees who were subject to annual performance reviews and those who were not.
18. Considering the position held by this officer, it is difficult to understand why he gave out wrong information on an employee to third parties. The least that he would have done, if in doubt, was to consult the 4th Respondent’s records on the employee before he made representations to the 5th Respondent. In my view, the officer’s actions amounted to negligent conduct on his part. As such, the errors arising from this conduct cannot be remedied through a review process.
19. Importantly, although the four Respondents insinuate that fixed term employees were not required to undergo a full cycle performance review as there was no guarantee that their contracts would be renewed, I note from the contract of service issued to the *Ex-Parte* Applicant for the duration between January 2017 and December 2017 that the 4th Respondent made renewal of the contract conditional on, inter alia, satisfactory performance by the *Ex-Parte* Applicant. Clearly, this requirement suggests that the *Ex-Parte* Applicant was subjected to performance reviews before his contracts were renewed the 4th Respondent.
20. The four Respondents contend that the reviews for fixed term employees were rather informal. They contend that reviews for this category of employees were mainly through self-assessment followed by informal comments by their line supervisors.



21. However, this suggestion is not anchored in the 4th Respondent's Performance Review Manual. The document contains a uniform performance review process. As such, I am not convinced that fixed term employees were subjected to a different review process as suggested by the Respondents' officer.
22. The suggestion by the Respondents' officer implies that fixed term employees were not subjected to a complete performance review. As such, their review records do not exist. If this be true, then how were these employees assessed for purposes of award of bonuses which, as appears from the Performance Review Manual, was anchored on one's performance? As well, how were the employees assessed for purposes of renewal of their contracts as suggested in the *Ex-Parte* Applicant's contract for 2017?
23. Having regard to the foregoing, I am convinced that contrary to the assertion by the four Respondents, the *Ex-Parte* Applicant's performance was reviewed at the close of every contract for two reasons: to determine whether he qualified for bonus payments; and to determine whether his contract would be renewed. As such, the 4th Respondent ought to release to him the BCSs for these reviews as ordered by the 5th Respondent.
24. As regards the JDs, the four Respondents contend that the *Ex-Parte* Applicant was issued with only one JD in 2015 since his job profile remained the same throughout the period that he served the 4th Respondent under the various contracts. However, the evidence on record suggests the contrary. The *Ex-Parte* Applicant has pointed to two JDs attached to his application dated 13th October 2023 to demonstrate that contrary to the assertion by the four Respondents, the *Ex-Parte* Applicant signed JDs for 2017 and 2021.
25. In view of this evidence, the contention by the four Respondents that the *Ex-Parte* Applicant served only under one JD is misleading. The evidence suggests that the latter was issued with JDs for every of the contracts that he entered into with the 4th Respondent.

Determination

26. Having regard to the foregoing, I find that there are no sufficient reasons why the court's ruling of 15th June 2023 should be reviewed in order to relieve the 4th Respondent of the obligation of issuing the *Ex-Parte* Applicant with the disputed documents. All indicators point to the fact that these documents exist and are in the possession of the 4th Respondent.
27. As such, the application is declined.
28. There is no order as to costs.

DATED, SIGNED AND DELIVERED ON THE 19TH DAY OF SEPTEMBER, 2024.

B. O. M. MANANI

JUDGE

In the presence of:

..... for the *Ex-Parte* Applicant

.....for the 1st to 4th Respondents

.....for the 5th Respondent

Order

In light of the directions issued on 12th 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

