



Ngongo & 2 others v Roche Kenya Limited (Cause 426, 427 & 428 of 2019 (Consolidated)) [2024] KEELRC 13221 (KLR) (25 November 2024) (Ruling)

Neutral citation: [2024] KEELRC 13221 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 426, 427 & 428 OF 2019 (CONSOLIDATED)**

**JW KELI, J
NOVEMBER 25, 2024**

BETWEEN

**KENNEDY KIMATHI NGONGO 1ST CLAIMANT
LUCY MARY OCHIENG OLERO 2ND CLAIMANT
WALTER WANJALA 3RD CLAIMANT**

AND

ROCHE KENYA LIMITED RESPONDENT

RULING

1. The applicant by way of a Notice of Motion dated 9th May 2024 brought under Section 16 of the *Employment and Labour Relations Court Act*, 2011, Rules 34 and 33(1)(b) of the Employment & Labour Relations Court Rules, Sections 25, 26 and 30 of the *Data Protection Act, 2019* and the Inherent Power of the Court sought the following Orders:
 - a. Spent
 - b. Spent
 - c. The last sentence of paragraph 45 of the Ruling dated 2nd September 2021 be corrected to read; "The Application is therefore dismissed save for an order that the Respondent do supply the Applicant with a list of the Respondent's employees before 28th February 2018 and a further list of the Respondent's employees as at 30th November 2018"
 - d. This Court be pleased to correct the Orders issued on 8th September 2021 by deleting the following words in Paragraph 2(ii) of the said Order; "...disclosing their salaries, benefits, allowances, qualifications, work permits where applicable as well as their nationalities."



- e. The respondent's Supplementary List and Bundle of Documents dated 9th October 2023 be deemed to have been in full compliance of the Orders issued by this court vide the Ruling dated 2nd September 2021 and the consequent Orders issued on 8th September 2021.
- f. Costs of this Application be provided for.

2. Grounds of the application

- a. The claimants filed a Notice of Motion Application dated 19th August 2020 wherein they sought for various orders including an order that the respondent do supply the claimants with a full list of all the respondent's employees before 28th February 2018 and a further list of the respondent's employees as at 30th November 2018 disclosing their salaries, benefits, allowances, qualifications, work permits and nationalities.
- b. On 2nd September 2021, Hon. Justice Onesmus N. Makau delivered a ruling on the claimants' Application (the Ruling) and in paragraphs 42-45 of the Ruling, the Learned Judge decided thus;

“Paragraph 42

The Common Ground is that the said Respondent's employees are not parties to this suit. Despite the fact that the Applicants have a right to access information under Article 35(1)(b) of *the Constitution*, the Respondent and its employees also have a right to privacy under Article 31(a) not to have information relating to their family or private affairs unnecessarily required or revealed.

Paragraph 43

Although discovery is expected to ensure the right to a fair hearing is achieved, it cannot be ordered where it shall result to a violation of another's constitutional right. Consequently I find that it would be unlawful to allow discovery by production of contracts of employees who are not parties because it violates the said employees' right to privacy. I also do not believe that the applicants can only be able to establish their case if the said contracts for other employees are produced in court.

Paragraph 44

However, I see no harm in ordering the Respondent to produce the lists of employees sought because they are necessary in establishing whether or not there was discrimination.

Paragraph 45

In the end, I find that the Applicants have not demonstrated their right of discovery under section 22(a) of the Employment and Labour Relations Court (Procedure) Rules 2016 except with respect to lists of employees...”

- c. However, despite the court's express intentions enounced in Paragraphs 42-44 of the Ruling, the court, by mistake, ordered in the penultimate sentence of paragraph 45 of the Ruling that "the Application is dismissed save for prayer f (i-ii)". The said prayer sought that the Respondent do provide the Claimant with;
 - i. A list of employees as it had on 28th February, 2018 being three (3) months before the redundancy of 31st May, 2018; and



- ii. Another list of employees as at 30th November, 2018 six (6) months after the redundancy of 31st May, 2018 disclosing their salaries, benefits, qualifications, work permits (where applicable) and nationalities.
 - d. That on the strength of the said Ruling, and after considering paragraphs 42-45 thereof, the Respondent filed a Supplementary Bundle of Documents dated 9th October 2023 wherein the Respondent filed a full list of its employees as at 28th February 2018 and a further list of the Respondent's employees as at 30th November 2018. In the said list, the Respondent provided the full names and nationalities of all its employees.
 - e. The Claimants have since extracted an Order based on the said Ruling and, as a result, the Plaintiff is now demanding for confidential information relating to the Respondent's employees, who are not parties to the suit and whose right to privacy is at stake. The said employees have not consented to the processing of their personal data and therefore production of such data would be in violation of the [Data Protection Act, 2019](#).
 - f. Throughout the Ruling, the Learned Court had expressly declined to grant any of the orders sought which, in the opinion of the Court, would amount to infringement of the privacy of the Respondent's employees. The Court also declined to grant an order seeking the production of employment contracts of the Respondent's employees for reasons that the said contracts would disclose the employees' private details including their salaries and various terms of employment. Similarly, in Paragraph 44 and the first sentence of paragraph 45 of the Ruling, the Learned Judge expressly decided that the Respondent should only supply the list of employees to the Claimant.
 - g. It is therefore apparent that the last sentence of the Ruling was an obvious mistake and/or error which do not reflect the Court's express intention and is not in consonance with the body of the Ruling.
 - h. The continued demand and any consequent release of the said personal data would expose the Respondent to a myriad of suits by its employees who would have a right to enforce their rights to privacy under [the Constitution](#) of Kenya 2010 and the [Data Protection Act, 2019](#).
 - i. The Claimant stands to suffer no prejudice should this Application be allowed.
 - J. It is fair, just and in the interests of justice that the application is allowed and the Orders sought granted
3. The Application was supported by the Affidavit of Jacqueline Wambua and annexed bundle of documents. At page 1-17 of the annexed documents, was the ruling of the court, page 18-22 was correspondence between the advocates on the ruling, at page 23 was the extracted Order from the ruling, at page 24-26 was the supplementary bundle of documents by the applicant dated 9th October 2022 exhibiting the list of employees as at February 2018 and as at November 2018 apparently in compliance with the ruling.
 4. The parties are unable to agree on the Order of the court hence the instant application for review on ground of error apparent on the face of the record.
 5. The jurisdiction of the court to review its decisions is under section 16 of the ELRC Act reads:-
 16. The Court shall have power to review its judgements, awards, orders or decrees



in accordance with the Rules.”

6. Rule 74 of the ELRC (procedure) Rules provides: - “(1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling-
 - (a) if there is discovery of a new and important matter or evidence which, despite the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
 - (b) on account of some mistake or error apparent on the face of the record;
 - (c) if the judgment or ruling requires clarification; or
 - (d) for any other sufficient reason”
7. The Parties filed written submissions which the court perused.
8. The Court is well aware of the limited scope it can exercise its powers of review under Rule 74(supra). The trial Judge pronounced himself on the application by the respondent as follows:-

“Paragraph 42

The Common Ground is that the said Respondent’s employees are not parties to this suit. Despite the fact that the Applicants have a right to access information under Article 35(1) (b) of *the Constitution*, the Respondent and its employees also have a right to privacy under Article 31(a) not to have information relating to their family or private affairs unnecessarily required or revealed.

Paragraph 43

Although discovery is expected to ensure the right to a fair hearing is achieved, it cannot be ordered where it shall result to a violation of another’s constitutional right. Consequently I find that it would be unlawful to allow discovery by production of contracts of employees who are not parties because it violates the said employees’ right to privacy. I also do not believe that the applicants can only be able to establish their case if the said contracts for other employees are produced in court.(emphasis mine)

Paragraph 44

However, I see no harm in ordering the Respondent to produce the lists of employees sought because they are necessary in establishing whether or not there was discrimination. The order is also necessary because it is only the Respondent with the exclusive custody of the same. (emphasis mine)

Paragraph 45

In the end, I find that the Applicants have not demonstrated their right of discovery under section 22(a) of the *Civil Procedure Act* and Rule 25 of the Employment and Labour Relations Court (Procedure) Rules 2016 except with respect to lists of employees. The application is therefore dismissed save for prayers f(i-ii) above. Costs in the cause.” (emphasis mine)

9. The said prayers f(i-ii) stated:
 - “i. A list of employees as it had on 28th February, 2018 being three (3) months before the redundancy of 31st May, 2018; and



- ii. Another list of employees as at 30th November, 2018 six (6) months after the redundancy of 31st May, 2018 disclosing their salaries, benefits, qualifications, work permits (where applicable) and nationalities...”
10. The Respondent contends there is no mistake on the record.
11. The court returns that in paragraph 43 the court’s decision on the application was clear namely:- “Consequently I find that it would be unlawful to allow discovery by production of contracts of employees who are not parties because it violates the said employees’ right to privacy.” The Court returns that contracts contain the salaries, benefits, qualifications, work permits and nationalities. It is obvious, on the face of the record, that the court declined the request under paragraph 43, the disclosure of the details of employees, not parties to the suit, salaries, benefits, qualifications, work permits (where applicable) and nationalities. This is emphasised in paragraph 45 where the court stated;-“I find that the Applicants have not demonstrated their right of discovery under section 22(a) of the *Civil Procedure Act* and Rule 25 of the Employment and Labour Relations Court (Procedure) Rules 2016 except with respect to lists of employees.” The court then held the other prayers were dismissed save for prayers f(i-ii). They say the devil is in the details. The details under the prayer f(ii) included details of the contract which the court had disallowed. The court returns that this is a clear error apparent on the face of the court record. It is an error that the court is obliged to correct to uphold the intention of Justice O.N Makau clearly stated in paragraph 43 of the ruling.
12. In the upshot the application for review is allowed as follows:-
 - a. The last sentence of paragraph 45 of the Ruling dated 2nd September 2021 be and hereby corrected to read; “The Application is therefore dismissed save for an order that the Respondent do supply the Applicant with a list of the Respondent’s employees before 28th February 2018 and a further list of the Respondent’s employees as at 30th November 2018”
 - b. The Orders issued on 8th September 2021 are hereby corrected by deleting the following words in Paragraph 2(ii) of the said Order; “...disclosing their salaries, benefits, allowances, qualifications, work permits where applicable as well as their nationalities.”
 - c. The respondent’s Supplementary List and Bundle of Documents dated 9th October 2023 is deemed to have been in full compliance of the Orders issued by this court vide the Ruling dated 2nd September 2021 and the consequent Orders issued on 8th September 2021.
 - d. Costs in in the cause
13. Mention on 20th January 2025 for pre-trial directions.
14. It is so Ordered.

READ, DELIVERED AND SIGNED IN OPEN COURT AT NAIROBI THIS 25th DAY OF NOVEMBER, 2024.

JEMIMAH KELI

JUDGE

IN THE PRESENCE OF:

C/A- Caleb

A applicant / respondent – Mwendwa h/b Kirimi

Claimant /Respondent – Oduor

