



**Kimalit v Laikipia University (Cause 44 of 2019)
[2023] KEELRC 30 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 30 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 44 OF 2019
HS WASILWA, J
JANUARY 19, 2023**

BETWEEN

ERICK KIBICHUM KIMALIT APPLICANT

AND

LAIKIPIA UNIVERSITY RESPONDENT

RULING

1. Before me for determination is the Claimant/ Applicant Notice of Motion dated July 19, 2022, filed pursuant to Sections 3 and 12 of the *Employment and Labour Relations Court Act*, 2011 and Rules 17 of the *Employment and Labour Relations Court Rules, 2016*, seeking the following Orders;-
 - a. That this Honourable Court be pleased to compel the Respondent to comply with the notice to produce dated June 20, 2022.
 - b. That the costs of this Application be provided for.
2. The application is based on the grounds that the Claimant filed a notice to produced dated June 26, 2022 seeking for the Respondent to produce the following documents;
 - i. Profit and loss accounts for the years 2012 to 2017.
 - ii. Collective bargaining agreement for the years 2016, 2017.
 - iii. Consolidated financial report for submission to the council for the year 2012 to 2017.
 - iv. Employment records including contract and payslips of Joseph Sang (Former farm manager).
 - v. Employment records including contract and payslips of David Cheruiyot.
 - vi. Employment records of Simon Muchendu (Post graduate department)
 - vii. Employment records of Irene Odhiambo (Personal Assistant to vice chancellor)



- viii. Employment records of Damaris Waiharo (Audit Department).
 - ix. Employment records of Magdalene Kanjogu (Registrar Academics office)
 - x. Employment records of Agnes Nduku (ICT Department)
 - xi. Employment records of Violet Mideva (Procurement Department)
3. It is averred that the Applicant intends to rely on the requested documents in prosecuting its matter and in respect of the prayer sought on discrimination practices against the Claimant, which documents the Respondent has declined to produce despite request.
 4. The application is further supported by an affidavit sworn on July 19, 2022 which reiterated the grounds of the application and in addition stated that the Respondent was served with the notice to produced dated June 21, 2022 and in response averred that the documents requested are irrelevant to the suit and declined to produce the same.
 5. He maintained that the documents requested are to demonstrate the discriminatory practice against him. Further that the said documents will show instances where he sought for grade review and to be confirmed on permanent and pensionable terms which was not allowed unlike his colleagues.
 6. The application is opposed by the Respondent who filed a replying affidavit deposed upon by Imelda Wanjau, the Respondent's legal officer, on the September 8, 2022. In the said affidavit the affiant avers that the matter herein was filed on October 29, 2018 with pre-trial scheduled for July 21, 2022 when both parties indicated their compliance and the matter was certified ready for hearing and the pleadings closed.
 7. It is averred that this matter was fixed for hearing on several occasions including the October 5, 2020, October 26, 2021, March 24, 2021 and June 7, 2022 where advocates for the Claimant was ready to proceed on all those occasions.
 8. It is contended that the profit and loss accounts requested by the applicant are not available because Laikipia University is not a profit making organization but a government learning institution which information had been relayed to the applicant.
 9. It is averred that the said Irene Odhiambo, Damaris Waihero, Magdalene Kanjogu, Agnes Nduku, Violet Mideva and Simon Muchendu whose employment records including payslips have been requested are strangers in suit as such their information is irrelevant herein. Furthermore, that the Applicant has not proved the existence of the documents sought therefore that the notice is simply a fishing expedition and a further attempt to delay the hearing of this suit.
 10. It is averred that the documents sought are not in possession of the Respondent as such the Orders sought will be issued in vain if made.
 11. The Application was disposed of by way of written submissions with the Applicant filing on the November 3, 2022 and the Respondent on the December 5, 2022.

Applicant's Submissions.

12. The Applicant submitted that the application for production of documents is hinged on Section 69 of the [Evidence Act](#) which provides as follows;

“Notice to produce a document. Secondary evidence of the contents of the documents referred to in section 68(1)(a) of this Act shall not be given unless the party proposing to



give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such a notice to produce it as is 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 he 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 it appears or is proved that the adverse party has obtained possession of the original by fraud or force.
- v. when the adverse party or his agent has the original in Court.
- vi. when the adverse party or his agent has admitted the loss of the document.
- vii. when the person in possession of the document is out of reach of, or not subject to, the process of the Court.
- viii. in any other case in which the Court thinks fit to dispense with the requirement.

13. The applicant then cited the case of [*Jibril Konse Ali v Aig Kenya Insurance Company Limited \[2021\] eKLR*](#) where the Court relied on the case of [*Concord Insurance Company Limited v NIC Bank Ltd \[2013\] eKLR*](#) the Court defined discovery as follows: -

“The disclosure by the defendant of facts, titles documents, or other things which are in his exclusive knowledge or possession, and which are necessary to the party seeking the discovery as a part of a case or action pending or to be brought in another Court, or as evidence of his rights or title in such proceedings”.

14. Also the case of [*ABN Amro Bank NV v Kenya Pipeline Company Ltd \[2019\] eKLR*](#) as follows: -

“The purpose of discovery is mainly to ensure that all documents or information necessary for the just determination of the suit are made available to the parties as well as the Court”

15. Based on the above, the applicant submitted that the documents he is seeking from the Respondent will aid him in demonstrating the discrimination issue the Respondent had against him. Furthermore, that the law under Article 35(1)(b) of the [*Constitution*](#) provides for the right to access information held by another person required from the exercise or protection of any right or fundamental freedom.

16. It was his argument that the documents in question are employment records of the Respondent’s employees which are ordinarily in possession of the Respondent. In this he relied on the case of [*Paul Masinde Simidi v National Oil Corporation of Kenya Limited and Another \[2015\] eKLR*](#) where the Justice Ndolo held that;

“The relationship between the Petitioner and the 1st Respondent which gives rise to the dispute now before the Court is one of employer/employee. In an employment relationship, the employer would ordinarily have in its possession information that is not available to



an employee and when a dispute such as the present one arises, the Court must balance the employee's right of access to information with the employer's right to privacy. The Respondents contend that production of the minutes sought by the Petitioner will be injurious because these minutes contain other information relating to the 1st Respondent's accounts, strategic plans and third party involvement. Both the Petitioner's right under Article 35 and the Respondents' right under Article 31 are not absolute rights as defined in Article 25. They are subject to limitation under Article 24. With this in mind, I have weighed the Petitioner's right to information which the Court deems necessary for the fair determination of the dispute before it against the Respondents' right to privacy and have formed the opinion that the ends of justice will best be served if the information sought by the Petitioner is produced."

17. It was also argued that the Respondent, through its vice chancellor declared the Claimant redundant and closed the farm when the department that the farm was heavily supplying its produce was the catering department which failed to pay for the produce making the farm to operate at a loss and the said catering department was not closed when they were making more losses and incapable of paying for the farm produce. It was argued further that it is only on production of financial records that all these allegations can be ascertain and the matter decided fairly.

Respondent's Submissions.

18. The Respondent submitted from the onset that the evidence sought by the Applicant is not secondary evidence as stated under Section 69 of the *Evidence Act*. It defined secondary evidence as captured in the *Black's Law Dictionary 8th Edition* to mean;

“evidence that is inferior to primary evidence or best evidence and that became admissible when the primary evidence is lost or inaccessible.”

19. Also that section 66 of the *Evidence Act* defines secondary evidence to include; certified copies, copies made from original by mechanical process which ensure the accuracy of the copy, copies made from the original, counterparts of documents as against the parties who did not execute them and oral account of contents of documents given by someone who has himself seen it.
20. On that note, the Respondent argued that secondary evidence is ordinarily in possession of the party seeking for production of the same, though not in their original form. On that basis it was argued that the applicant doesn't not have or has he produced copies of the documents he is seeking to be produced to prove the existence of the alleged the documents.
21. On the relevance of the listed documents, the Respondent cited the case of *Rafiki Microfinance ank Limited v Zenith Pharmaceuticals Limited [2016] eKLR* where the Court held that;

“As illustrated by the learned authors in *Halsbury's Laws of England, Volume 13 at para 38*, the Court will not make any orders for documents which have no significance or relevance to the matter. The learned authors state:“Discovery will not be ordered in respect of an irrelevant allegation in the pleadings, which, even if substantiated, could not affect the result of the action nor in respect of an allegation not made in the pleadings or particulars nor will discovery be allowed to enable a party to “fish” for witnesses or for a new case, that is to enable him frame a new case. Each case must be considered according to the issues raised; but where there are numerous documents of slight relevance and it would be oppressive to produce them all, some limitation may be imposed.”



22. The Respondent submitted further that the claim before Court is on allegation of unfair termination which onus lie with the Claimant to prove that fact. In this the Respondent relied on the case of *Nyangiry O' Kambaga Bwonditi v Ecobank (K) Limited [2016] eKLR* where the Court held that ;

“in essence the onus will be mainly on the Respondent to show that it was justified in dismissing the Claimant. It will be expected of the Respondent to produce evidence to support these allegations contained in its memorandum of defence failure to which the Claimant’s allegations will become vindicated and a finding of unfair dismissal made. The Court has perused through the “notice to produce” dated January 28, 2015 and does not think the documents sought to be produced are critical to the Claimant in showing that the Respondent had no valid reason to terminate his services. In any event as already said the burden of proof that the reasons for termination were justifiable and valid rests with the Respondent. If these documents be key to proving this, it is the Respondent who should deem it necessary to produce them. As a result the Court declines to make the orders sought in the motion dated May 27, 2015 for the reason that it has not met the threshold required for making the orders sought therein.”

23. Accordingly, that the Claimant was employment on contract basis as an assistant farm manager and seeking for records of employees in other department such as ICT or academic department will not be of any benefit because the said department are different.

24. It was then argued that the application is an afterthought because the said application was merely filed after the matter had been set down for hearing about six times. Furthermore, that the Claimant’s left work voluntarily after expiry of contract and is now merely borrowing time not prosecute his case for fear of the inevitable outcome.

25. I have examined the averments and submissions of the parties herein. The applicant sought to be supplied with certain documents as per the law.

26. The Respondent in their response averred that the documents sought are not in their possession and that in respect of payslips requested they are for strangers and irrelevant.

27. In view of the response of the Respondents, I note that the purpose of discovery of documents is mainly to ensure all documents or information necessary for the just determination of the suit are available to the parties and the Court.

28. Indeed when a party seeks production of documents, the other cannot say they are irrelevant. It is the person who seeks them to demonstrate how relevant they are and the Respondent cannot state that they are irrelevant.

29. The Respondent also averred that the other documents are not in their possession. In that case the law at Section 69 of the *Evidence Act* cap 80 Laws of Kenya States as follows;

“6.

Notice to produce a document.

9.

Secondary evidence of the contents of the documents referred to in section 68(1)(a) of this Act shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to



his advocate, such a notice to produce it as is 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 he 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;
- (vii) in any other case in which the court thinks fit to dispense with the requirement”.

30. Given that the Respondents contend that these documents are not in possession, the applicants are allowed as per Section 69 above if they have the documents to produce them in evidence and demonstrate their relevance.

31. Costs of this application will be in the cause.

RULING DELIVERED VIRTUALLY THIS 19TH DAY OF JANUARY, 2023.

HON LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Mr Wachira for Claimant - present

Ndichu for Respondent – Absent

Court Assistant – Fred

