



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Gichura v Armchair Insurance Brokers Ltd (Cause 150 of 2019)  
[2023] KEELRC 759 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 759 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 150 OF 2019  
AN MWAURE, J  
MARCH 28, 2023**

**BETWEEN**

**LYDIA WAMBUI GICHURA ..... CLAIMANT**

**AND**

**ARMCHAIR INSURANCE BROKERS LTD ..... RESPONDENT**

**RULING**

1. The applicant filed an application hereto *vide* notice of motion dated July 15, 2022.
2. The prayers sought are as follows
  1. That this honourable court be pleased to issue an order directing the respondent to procure and avail to the claimant all the documents particularized in the claimant's notice to produce dated June 14, 2022 within 7 days from the date hereof being.
    - a. The duly filed brokers and MIPS annual returns of the respondent for the period between July 2015 and November 2018.
    - b. The respondent's financial statements for the period between July 2015 and November 2018
    - c. The respondent's audited annual accounts for the period between July 2015 and November 2018.
3. The applicant by her notice to produce dated June 14, 2022 seeks the production of the following documents:-
  - a. Duly filed brokers & MIPS annual returns of the respondent for the period between July 2015 and November 2015.



- b. The respondent's financial statements for the period between July 2015 and November 2018
  - c. The respondent's annual accounts for the period between July 2015 and November 2018.
4. The applicant is suing the respondent for its net profit for the period between 2015 and 2018 being compensation for unauthorised use of her testimonials.
  5. The claimant sates she was retained by respondent's sister company OPS Health Insurance Agency Ltd in the year 2015 as an underwriting officer and later absorbed by the respondent in the year 2017 as a principal officer.
  6. She says in March 2018 she came to discover the respondent was using her testimonials without her consent and asked for compensation. The respondent did not compensate her but instead gave her a letter of termination.
  7. She says respondent informed her they were facing financial challenges and could not retain her any longer and because of the way she was terminated she could not retrieve her documents and it is only the respondent who can give her those documents.
  8. The respondent in his grounds of opposition dated September 27, 2022 says the application lacks merit as it is not an employment matter and this court's jurisdiction is to deal with employment matters.
  9. He says there are two issues raised by the claimant being on termination and claim of 100% commission of respondent's profits. He says there was a partial mediation agreement dated June 14, 2022 where respondent agreed to pay claimant damages for unlawful termination and it means the employment dispute has been settled.
  10. He says the unfounded claim for 10% profit is on a commercial pedestal and so cannot be justified. He therefore says that application is an abuse of the court's process.

### **Claimant's Submissions**

11. The claimant's submissions are that the claimant and respondent entered into a partial mediation agreement on March 29, 2019 and respondent agreed to pay 6 months' salary for unfair termination and charges for a bounced bank.
12. He avers that what is in issue now is compensation for use of unsanctioned use of her testimonials @10% of the net profits of company between the year of 2015-2018 which she says got her documents fraudulently and secretly from her former employer OFS health Insurance Agency and used them to get an operating licence from the insurance regulatory authority.
13. The claimant disputes that this is a commercial dispute as alleged by the respondent but instead avers is an employment dispute as defined in section 12 of the *Labour Relations Court Act* which states:  
The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to in accordance with article 162(2) of the *constitution* and the provisions of this act or any other written law which extends jurisdiction to the court relating to employment and labour relations including:-
  - (a) disputes relating to or arising out of employment between an employer and an employee."
 The claimant therefore submits this matter is in the armbit of Employment and Labour Relations Court and court has jurisdiction to deal with the same.



14. The claimant as well submits that section 22 of the Civil Procedure Act and order ii rule 3 of Civil Procedure Rules empower court to compel party to produce documents or information which is deemed relevant for the determination of the case but which the other party has failed to produce.
15. The claimant depones on the Lustman & Company 1990 Ltd vs Corporate Business Centre Ltd & 4 Others KEHC 42 and depended on principles set out in the case of ABNAMRO Bank NO VS Kenya Pipeline Company Ltd [2014] eKLR where court observed.
 

“The documents sought to be discovered need not be admissible in evidence in the enquiry or proceedings. It is sufficient if the documents would be relevant for the purpose of throwing light on the matter in controversy. Every document which will throw light in the case is a document relating to a matter in dispute in the proceedings though it might not be admissible in evidence.”
16. The claimant also submits he has identified the documents required and the said are necessary for protection of right of fundamental freedom as provided in article 35(1)(b) of the Constitution of Kenya which states:
 

”Every citizen has the right to information held by another person required to exercise our protection of any right or fundamental freedom.”
17. The claimant therefore request the court to compel the respondents to produce the required documents.

### **Respondents Submissions**

18. The respondent avers the claimant is misguided in averring claimant has jurisdiction over the current suit. He submits that at all material time the relationship was regulated by the employment contracts where claimant was employed as principal officer. This is a requirement in brokerage firms as provided in paragraph 9 of respondent’s response.
19. They submit that in the employment contract it was not provided that claimant was entitled to other monetary benefits apart from her salary. They claim that the contention that claimants’ credentials were used fraudulently is misguided as at all times during the time of her employment she knew the requirements of Insurance Act. He says claimant signed the Fit & Proper Form of the respondent and the former employer.
20. She says even the claim that she was a shareholder was erroneous as she was not a shareholder and the record showing she was a shareholder was an error which will be rectified.
21. The respondent depend on the case of Samuel Kamau Macharia & Another vs Kenya Commercial Bank Ltd & 2 Others [2012] eKLR where the principle holding was
 

“A court’s jurisdiction flows from either the Constitution or the Legislature or both. This court of law can only exercise jurisdiction as conferred by the Constitution or any other written law. The court cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.
22. The respondent says this suit is not covered by section 12 of the labour relations court which sets out the jurisdiction of ELRC court and article 162(2)(b) of Constitution of Kenya 2010.
23. The respondent has also averred that the claimant signed a discharge voucher on November 6, 2018 where she acquiesced to the tabulation therein and confirmed she had no other claim against the



respondent. The respondent referred to Court of Appeal case *Coastal Bottlers Limited vs Kimathi Mithika* [2018]eKLR where it was held:

” in our minds it’s clear that the parties have agreed that payment of the amount stated in the settlement agreement would absolve the appellant from any further claims under the contract of employment and even in relation to the claimant’s termination...”

24. As it stands the agreement was a binding contract between the parties. The respondent avers that upon signing the discharge voucher the respondent was fully discharged.
25. Further the parties reached a mediation agreement which respondent says was equivalent to a consent order. The respondent states the signing of discharge voucher divests the court of jurisdiction to hear and determine this suit.
26. The respondent therefore buttresses the fact that this is a commercial suit and is not under employment relationship. They therefore submit that since claimant is not entitled to respondent’s profits it automatically nullifies any argument forwarded in respect of obtaining financial records to ascertain any financial viability as these records are immaterial.
27. They further claim the documents being sought are confidential in nature as observed in the case of *Lelan 1 Salano vs Intercontinental Hotel* [2013] eKLR where  

“ confidential documents in an employment relationship were said to be documents regarded by an employer to contain secret information or information generally known to contain secret information...” which avail the employee improper gain or advantage to impede the effective management of the enterprise”
28. The respondent submits that the claimant wants to use the court to obtain respondent’s financial records to gain improper advantage. The respondent prays the application be dismissed with costs to the respondent.

### **Determination**

29.
  - (a) The issues for determination is whether the court has jurisdiction to hear and determine this suit.
  - (b) Should the court make an order for the respondent to produce the documents set out in the application dated July 5, 2022.
30. The respondent submits that the ELRC has no jurisdiction to determine this suit because:
  - i. This is a commercial dispute and is not covered under section 12 of *ELRC Act*.
  - ii. The claimant by signing a discharge voucher on November 6, 2018 divested the suit from being litigated again.
31. The court guided by article 162(2)(a) and section 12 of *ELRC* at which provides:  

“ the court shall have exclusive original and appellate jurisdiction in all disputes referred to it in accordance with article 162(2) of the *Constitution* and provisions of this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations including:-



i. disputes relating to or arising out of employment and employee.”

The suit did arise from a dispute related to employment since there is a consensus from both the claimant and the employer (respondent) that there was an employment relationship as there is a contract of employment between the claimant and the respondent. The dispute clearly arose from an employment relationship.

32. The court is convinced the suit herein did arise from an employment relationship and therefore this court has jurisdiction in this dispute.
33. As to whether the claimant was a Director of the respondent at least from the form the companies Act form 2015 dated February 20, 2019 the claimant was described as a Director but the form showed she had no shares. On or around April 12, 2016 the claimant had transferred some 300 shares to one Bhavesh Chandulal Luhar but it is not explained by any of the parties what was the logistic of the relationship or what purpose it was to serve. The only clear point is that when claimant was terminated by the termination letter dated November 6, 2016 she was terminated from employment as well as removed as a Director and principal officer.
34. The respondent as well argued that the claimant signed a discharge voucher dated November 6, 2018 and therefore divested herself from any other claim from the respondent. In that case respondent argues that as well meant this court had no jurisdiction to hear this case.
35. The court finds this line of argument is contradicted by the fact that the respective parties met for mediation and came up with a partial mediation agreement dated June 14, 2022. If at all the claimant had taken away any further power of this court to proceed with this suit by signing the discharge voucher then even the mediation should not have taken place. In that case this argument also fails.
36. The partial mediation agreement dated June 14, 2022 is not a consent and is not conclusive of the suit. The mediation agreement provide that the court will have to determine:-
  - a. Severance pay for fifteen days a month
  - b. Compensation for use of testimonials
  - c. One month salary payment in lieu of notice.
37. Clearly the parties were in agreement there were some pending issues which still needed to be determined either by the court or by consent of the parties.
38. The issue now to determine is whether the claimant has proved a case for production of the financial statements of the respondent. The claimant is claiming 10% commission of the respondent’s profits from the year July 2015 to November 2018. The court finds there is no such provision of a 10% commission of the respondent’s profit in her contract. The court finds that parties in an employment relationship can only abide by their contract of employment. The court as has been said time and again cannot re write contracts between the parties but can only enforce the same. The parties are mutually bound by their contracts unless they prove the same were obtained fraudulently or under coercion.
39. Furthermore the remedies in employment contract are as provided in section 49 of Employment Act. The court would however not stop a party from pursuing any suit it may feel is entitled but cannot aid a party for issues that are not supported in law.
40. In view of the request in which the claimant is praying for the production of the respondent’s financial documents the court finds no support why the same can be justified. The said documents are confidential documents and considering the claimant left employment of the respondent on



November 6, 2018 it would be unfair to order her be availed financial statements of her former employer. And seeing there was no provision of payment of commission in her contract then the claimant will have to depend on other avenues.

41. The court agrees with the authority cited by the respondent of the confidentiality of documents in the case of *Leland I Salano vs Intercontinental Hotel* [2013] eKLR where court stated:

“confidential documents in the employment relationship are documents regarded by the employer to contain secret information, or information which is not generally known, or readily accessible to other person, other than the employer. They are confidential if their unauthorized disclosure, could damage the essential interests of the employer’s business... the commonly used criteria in determining where documents at the employment place are confidential is where their release, would damage the employer’s business; breach undertakings to respect confidentiality; breach statutory restrictions on disclosure of information; cause financial loss to the employer; or avail the employee improper gain or advantage or impede the effective management of the enterprise.”

42. Flowing from the above and having considered the pleadings, submissions and authorities hereto and the law the court finds the claimant has not established valid grounds why she is entitled to the respondent’s financial statements as prayed in the application dated July 5, 2022 and so the application is dismissed and costs are in the cause but can proceed with the other unresolved issues as per the referred partial mediation agreement.

43 Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 28<sup>TH</sup> DAY OF MARCH 2023.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

