



**Kiandiko v Teachers Service Commission (Petition E154 of 2022)
[2023] KEELRC 617 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 617 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E154 OF 2022
BOM MANANI, J
MARCH 16, 2023
IN THE MATTER OF ARTICLES 2(1), 3, 10, 22, 31, 35, 47 & 50
OF THE CONSTITUTION OF KENYA 2010
AND
IN THE MATTER OF RULES 4(1), 10(1) & 23 AND 24 OF THE
CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE
RULES 2013
AND
IN THE MATTER OF THE EMPLOYMENT ACT 2007 LAWS OF
KENYA
AND
IN THE MATTER OF ACCESS TO INFORMATION ACT (NO 31
OF 2016)
AND
IN THE MATTER OF THE TEACHER SERVICE COMMISSION
ACT 2012
AND
IN THE MATTER OF TSC HUMAN RESOURCE POLICIES &
PROCEDURE MANUAL FOR SECRETARIAT STAFF 2018
AND
IN THE MATTER OF ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES**



10, 22, 35, 47 AND 50 OF THE CONSTITUTION OF KENYA

2010

BETWEEN

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PAULINE MBITHE KIANDIKO APPLICANT

AND

TEACHERS SERVICE COMMISSION RESPONDENT

RULING

Introduction

1. The application before me seeks for orders to compel the Respondent to provide the Petitioner with records which the Petitioner believes are necessary for the proper conduct of her case. It is indicated that the said records are in the custody of the Respondent. The Petitioner states that despite asking for the records from the Respondent, the Respondent has declined to supply them without just cause.
2. The Respondent has resisted the application. According to the Respondent, the application is unmerited and ought to be disallowed.

Petitioner's Grounds for the Application

3. The Petitioner states that the Respondent denied her access to records which the Petitioner believes were critical to her defense in the disciplinary process that led to her dismissal from employment. As a result, the Petitioner argues that she was deprived of the opportunity to prepare her defense at the disciplinary session.
4. It is the Petitioner's case that the Respondent's refusal to share the records in question with her has violated her rights. The Petitioner now requires the Respondent to furnish her with these records in order for her to prosecute her pending constitutional Petition challenging the legitimacy of the disciplinary process against her.
5. The Petitioner has listed the records as:-
 - a. The Respondent's Mpesa statements for the year 2018 for mobile phone number 072132XXXX.
 - b. The Respondent's bank statements for the year 2018 in respect of A/C No 3010328XXXXXX at Mwalimu Sacco Society, Nairobi branch.
 - c. The Investigation Report prepared and submitted to the disciplinary panel on October 22, 2019 by David Ngetich, Deputy Director (Security).
 - d. The Auditors' Report in respect of the case relating to fake bank accounts of Samuel Wandai TSC No 23XXXXX, Peter Mwangi TSC No 190XXXX, Joseph Ongoti TSC No 18XXXXX and Humphrey Mberia TSC No 14XXXXX.



- e. The certified minutes of the meeting of the Vetting Committee held on January 11, 2019.
- f. The Investigations Report of the Vetting Committee which met on January 11, 2019.
- g. The appointment letter and letters of promotion for David Ngetich, Deputy Director (Security).
- h. The proceedings of the Applicant's Appeal heard on January 25, 2021.
- i. The witness statements of Mr J G Mutwiri, Harriet Mathiu and Meshack Okong'o recorded in November 2018.
- j. The salary structures and grades of all senior positions of the Respondent for the years 2018, 2019 and 2020.
- k. A copy of the letter Ref: EPN/I/92/10/VOL P(1) from Treasury dated 31.10.2018.
- l. A copy of the Petitioner's statement recorded with DCI (Banking Fraud Investigations Unit).
- m. The DCI (Banking Fraud Investigation Unit) investigation report of January 27, 2019.

The Respondent's Grounds of Objection

- 6. The Respondent has resisted the application on the grounds that some of the documents the Petitioner is seeking to be supplied with originated from her. Further, the Respondent suggests that the Petition does not meet the threshold of a constitutional Petition. As a consequence and in the Respondent's view, it cannot provide a basis for the orders sought in the application.
- 7. The Respondent asserts that the Petition does not disclose a cause of action against it. It is the Respondent's position that the issues in the Petition are matters associated with an ordinary employment relation dispute which have no constitutional dimension.
- 8. The Respondent denies that it has the custody of some of the documents that the Petitioner seeks that she be supplied with. These documents, the Respondent argues, are with third parties.
- 9. In the alternate, the Respondent argues that it has a statutory mandate to keep records of employees which arise from processes that the Respondent executes. That the Petitioner has not laid a basis to justify issuance of orders to compel the Respondent to share these records with her.
- 10. Further the Respondent argues that it has in any event supplied the Petitioner with all the disciplinary proceeding records that are within its powers. It is submitted that the Respondent cannot share confidential information relating to other employees.

Analysis

- 11. I understand the current application to be asserting the Petitioner's right to information. She argues that the records required are necessary to enable her effectively protect her other rights. The Petitioner relies on article 35 of the *Constitution* to advance her argument. The relevant portion of the article states as follows:-

"Every citizen has the right of access to information held by another person and required for the exercise or protection of any right or fundamental freedom."

- 12. The right to access information undergirds the process of pre-trial discovery in civil proceedings which is essential in facilitating a fair trial process. As is indicated in *Halsbury's Laws of England* Vol 13



- paragraph 1, pre-trial discovery plays the critical function of providing parties to a cause with the relevant documentary material before trial in order to assist them appraise the strength or weakness of their case and thus provide the basis for the fair disposal of the trial.
13. Commenting on the significance of this pre-trial process the Court of Appeal in [*ABN Amro Bank NV v Kenya Pipeline Company Limited*](#) [2019] eKLR expressed itself 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 all the parties as well as to the court.”
 14. It is appreciated the right to information is not absolute. However, as article 24 of the [*Constitution*](#) indicates, no right in the Bill of Rights ought to be limited except by law and only to the extent that the limitation imposed on the right is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Importantly, the burden of demonstrating that the limitation imposed on the right meets the constitutional prescription on limitation to a right lies with the person alleging the limitation (see [*Cyprian Andama v Director of Public Prosecutions & 2 others; Article 19 East Africa \(Interested Party\)*](#) [2021] eKLR).
 15. The Respondent has raised a number of grounds in opposition to the application. Some of the grounds question the merits of the Petition. It is noteworthy however that the Respondent elected not to raise the objections on oath through an affidavit. Being matters of fact, it would perhaps have been more appropriate for the Respondent to have responded to the Petitioner’s plea (which is supported by a statement on oath) by way of affidavit evidence.
 16. In determining the current application, the court is not entitled to interrogate the merits of the Petition. All that is required at this stage is to consider whether the information sought is relevant to the dispute and whether the information is within the power of the Respondent to produce. The question of relevance of the information is determined through a cursory interrogation of the pleadings on record against the documents that are sought to be accessed (see [*Cooperative Bank of Kenya Limited v Samuel Musau Ndunda*](#) [2021] eKLR).
 17. The mere plea of confidentiality of the information sought may not be sufficient ground to decline to provide the information if it is demonstrated to be necessary for the just resolution of the dispute. In commenting on the issue, the Court of Appeal in the case of [*ABN Amro Bank NV v Kenya Pipeline Company Limited*](#) (*supra*), stated as follows:-

“We are not persuaded that confidentiality, by itself is a reason for denial of discovery orders for documents that would aid the court in determining a matter before it. confidentiality is not a basis for the refusal for an order of discovery.”
 18. I have combed through the Petition that has been filed. The pleadings disclose that the records that the Petitioner seeks to access have been at the centre of the controversy between the parties to this action. They were at the centre of the disciplinary case against the Petitioner. Indeed, the records are specifically referred to in the Petition. They are therefore relevant and necessary for the just resolution of the dispute between the parties (see [*Jibril Konse Ali v Aig Kenya Insurance Company Limited*](#) [2021] eKLR and [*Tourism Promotion Services \(Management\) Limited v Charles Otieno Ogada*](#) [2020] eKLR).
 19. Although the Respondent asserts that: some of the records are in the custody of third parties; and that it has supplied the Petitioner with some of the records, no specifics are supplied to support these assertions. Besides, the assertions were not made on oath. Therefore, their probative value is greatly diminished.



20. Save for the limitations indicated below, the records in issue are, prima face, either within the custody of the Respondent or within the Respondent's power to procure. Therefore, an order of disclosure can legitimately issue against the Respondent.

Determination

21. In view of the views expressed in the ruling, I order the Respondent to provide the Petitioner with certified copies of the records referred to in paragraph five (5) above subject to the following limitations:-

- a. In respect of the salary structures and grades of all senior positions of the Respondent for the years 2018, 2019 and 2020, the Respondent to provide information on the salary structures and grades under consideration without disclosure of details of specific officers serving in the positions.
- b. In respect of the Petitioner's statement recorded with DCI (Banking Fraud Investigations Unit), the Respondent to provide the statement as recorded and shared with them at the time.
- c. In respect of the appointment letter and letters of promotion for David Ngetich, Deputy Director (Security), the Respondent to provide the records but with information on the salary of the said officer redacted.

22. The aforesaid records to be supplied to the Petitioner within 14 days of this order.

23. Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED ON THE 16TH DAY OF MARCH, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... **for the Applicant**

.....**for the 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

