



**Njenga v Dib Bank Kenya Limited (Cause E400 of 2020)  
[2023] KEELRC 1549 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1549 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E400 OF 2020  
BOM MANANI, J  
JUNE 15, 2023**

**BETWEEN**

**IRENE NJERI NJENGA ..... CLAIMANT**

**AND**

**DIB BANK KENYA LIMITED ..... RESPONDENT**

**RULING**

**Background**

1. Before me is the application dated 2<sup>nd</sup> March 2023 through which the Respondent (the bank) prays that a number of documents proposed for production in evidence by the Claimant be struck out on the ground that they were irregularly procured in contravention of the law, the bank's policies and terms of the contract of employment between the parties. It is argued that the Claimant got hold of the records by virtue of her employment with the bank. It is further contended that the bank's Human Resource Policy (HR Policy) which was infused into the Claimant's contract of employment and specific clauses of the said contract impose an obligation of confidentiality on the Claimant in relation to the impugned records with the consequence that she cannot produce them in evidence except with the concurrence of the bank or a court order.
2. The bank contends that the attempt by the Claimant to rely on these records in support of her case without first obtaining its concurrence or a court order in that regard violates its rights to property and privacy under the Constitution of Kenya 2010 and also the confidentiality clauses in the aforesaid instruments. Further, it is contended that such attempt flies in the face of article 50 (4) of the Constitution which prohibits the use of illegally obtained evidence to advance one's cause before a court of law. The schedule of the impugned records is set out in the body of the application.
3. The Claimant has opposed the application. The thrust of the opposition is that the impugned records came into the Claimant's possession lawfully. According to the Claimant, she accessed all the records when the same were shared with her through her email and in the course of her employment. As such,



the documents were lawfully obtained and have rightfully been presented to court in support of her claim.

4. In response to the bank's assertion that the Claimant has violated the confidentiality clause in her contract of service and HR Policy, the Claimant argues that she has only sought to use the records to advance her case in court and nowhere else. As such, there is no violation of the confidentiality clauses in the aforesaid instruments.

### Analysis

5. The law on the use of illegally and or irregularly obtained evidence is not without controversy. The extent to which a party may resort to this kind of evidence to advance his cause has been the subject of debate in a plethora of scholarly publications and as well judicial pronouncements.
6. In Kenya, the position on the matter prior to the enactment of the Constitution 2010 is as expressed in the decision of *R vs. Leatham* (1861) 8 Cox CCC 498 where the court observed as follows regarding admissibility of illegally obtained evidence:-

“It matters not how you get it, if you steal it even, it would be admissible in evidence.”

7. This common law position envisaged relevance as the sole test for admissibility of evidence. As long as it was relevant to the question at hand, evidence would be admissible irrespective of how it had been procured.
8. However, with the enactment of the Constitution of Kenya, 2010, this position has since changed. Specifically, article 50 (4) of the Constitution limits the right to rely on illegally obtained evidence in advancement of one's cause before court. The article provides as follows:-

“Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.”

9. My understanding of this constitutional edict is that it circumscribes rather than prohibits the use of irregularly obtained evidence. The provision does not so to speak constitute an absolute bar to the use of such evidence. What it does is to bar the admissibility of this evidence if it is demonstrated that its admission will prejudice the fair trial of the cause or will otherwise be detrimental to the administration of justice.
10. This is the position expressed in *David Ogolla Okoth v Chief Magistrate Court, Kiibera & 2 others* [2016] eKLR when the learned Judge stated as follows:-

“It is true evidence ought to be obtained in accordance with the provisions of both the Constitution and of the law. Obtaining evidence and indeed, as in this particular case, seizing the same without first obtaining appropriate warrants violates Constitutional norms. The right to property as well as the right to privacy will be violated. Likewise, the right to have a person's dignity respected will also be violated not forgetting security of person and of a person's property. In such instances, Article 50(4) provides “evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice”.

There is inherently an exclusionary rule under Article 50 (4).



I do not however agree with the position adopted by the Petitioner which is seemingly an unqualified one that all evidence not properly obtained lead[s] to some form of prejudice and therefore the automatic termination of a criminal trial. Such an approach negates and dilutes, invariably, the words of the *Constitution* emphasized above. There has to be established that a right in the Bill of rights was unjustifiably violated whilst obtaining the evidence in question. Secondly, there must then be shown that the admission of such evidence would render the trial unfair or be detrimental to the administration of justice.”

11. Indeed, in the Supreme Court decision of *Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others* [2017] eKLR, the court agreed with this interpretation of the constitutional provision when it observed as follows in respect of the foregoing commentary: -

“Again that is the correct interpretation of the issue at [of] hand generally but in the instant matter, the *Constitution* provides for the right of access to information which has been operationalized through two pieces of legislation, the *Independent Electoral and Boundaries Commission Act* and the *Access to Information Act*.”

12. I have also studied the Court of Appeal decision in *Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others* [2020] eKLR. The position expressed by the court on the subject is that evidence that is irregularly obtained will be excluded from a trial if its admission will prejudice a fair trial or if such admission will be otherwise detrimental to the administration of justice. The court observed as follows:-

“In our view, under Article 50(4) if a court determines that admission of evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights would be detrimental to the administration of justice, the court may reject it irrespective of whether it is in connection with a civil or criminal trial.”

13. The court emphasized that with the promulgation of the *Constitution* of Kenya 2010, the adage that all relevant evidence was admissible irrespective of how it was obtained was no longer reflective of the legal position on the matter in Kenya. Such evidence should be excluded if it is shown to be prejudicial to a fair trial or detrimental to the administration of justice.
14. What I understand the law on the matter to currently be is that there is a general revulsion for irregularly obtained evidence. When faced with a scenario where evidence of this kind is sought to be presented, the court must consider whether its admission is likely to prejudice the fair trial of the case before it or if admission of such evidence will otherwise be detrimental to the administration of justice.
15. Put differently, the fact that evidence is shown to have been acquired irregularly is not an automatic and absolute bar to its admission if it is relevant. The party seeking to exclude the evidence needs to demonstrate that admission of the evidence will prejudice the fair hearing of the case or that it will otherwise be detrimental to the administration of justice.
16. This approach to handling of irregularly obtained evidence is informed by the court’s duty to balance between two competing public interests: the need to ensure protection of the rights to privacy and property; and the need to ensure that the administration of justice is not unnecessarily hindered by exclusion of relevant evidence on account of how it was procured. Speaking to this concern, the Court



of Appeal in the case of *Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others* (supra) stated as follows:-

“This issue brings to the fore the tension between the need for the court to be able to consider and have access to evidence which would enable it to fairly and effectively determine a dispute on the one hand and the need to avoid irregularity or impropriety in the way in which evidence is obtained or secured. In an article titled, *The Court’s Discretion to Exclude Evidence in Civil Case and Emerging Implications in the Criminal Sphere* (2016) 28 SAclJ, Professor Jeffrey Pinsler, SC put it this way: “...the court must try to give effect to two conflicting public interests: the need for the court to have access to the evidence in the interest of fair and just adjudication and the avoidance of misconduct in the manner of securing evidence. The outcome of the balancing operation depends on the circumstances.”

17. What constitutes improperly obtained evidence has been defined by Steve Ouma in his publication titled “*A Commentary on the Evidence Act Cap 80*, Second Edition, LawAfrica Publishing (K) Ltd, Nairobi.” In the publication, the author describes irregularly obtained evidence as evidence that has been obtained in contravention of the law or in disobedience of a command whether expressed in a statutory or non-statutory instrument. Impropriety in this respect covers not just criminal or unlawful acts but any other act that is inconsistent with the minimum standards that society expects.
18. In the case before me, the bank states that the HR Policy and the contract of service between the parties imposes a duty on the Claimant not to disclose to third parties information of a proprietary and confidential nature belonging to the bank, its employees and customers which came into her possession by reason of her employment. This obligation, according to the bank, became operative upon the Claimant’s employment and continues even after closure of the relation.
19. I have looked at the instruments that the bank has relied on to advance its position on the matter. Clause 9 of the contract of employment between the parties contains a confidentiality and non solicitation clause. Under clause 9(1), the Claimant pledged not to disclose to third parties information on and by the bank, its employees and customers which came into her possession by virtue of her employment. This vow of privacy was expressed to bind the Claimant both during the currency and after termination of her employment.
20. Clause 6.1.9 of the HR Policy prohibits the bank’s employees from sharing with third parties any information concerning its affairs or information on its other employees. Again, this bar applies both during and after the employment relation.
21. The information that is contested is one which the Claimant obtained by virtue of her employment with the bank. Certainly, this is the kind of information that was required to be kept in confidence under the aforesaid clauses of the employment contract and HR Policy.
22. The Claimant argues that because she accessed the information in the course of employment, she obtained it lawfully. Therefore, the information does not fall in the category of information that would comprise irregularly obtained evidence under article 50(4) of the *Constitution*.
23. With respect, I do not agree. Except for letters and emails that were addressed to her as shall be alluded to later, any other information that the Claimant received in the course of her employment and which she was to hold in confidence ought not to be divulged without permission of the bank or a court order. To do otherwise is to breach the obligation on confidentiality of such information thus rendering the information shared as unlawfully and or irregularly obtained evidence.



24. The Claimant does not deny that prior to presenting the several documents to court, she neither had the permission of the bank nor a court order allowing her action. In the premises, I am convinced that most of the impugned records have found their way onto the court record in breach of the confidentiality obligation between the parties and therefore irregularly.
25. The foregoing being the case, the court must then consider whether admission of the impugned documents into evidence will prejudice the fair hearing of the case or otherwise be injurious to the administration of justice. This calls for scrutinizing the documents individually.
26. I must however hasten to add that the party asserting that admission of such information into evidence will prejudice a fair trial or otherwise be detrimental to the administration of justice bears the burden of demonstrating how the evidence will prejudice a fair hearing or injure the administration of justice. In other words, it is not sufficient for a party to merely allege these matters without providing cogent evidence on them.
27. I have considered the affidavit and submissions by the bank in this respect. Besides indicating that the attempt to introduce the impugned records will infringe on the rights to privacy and property not only for the bank but also its employees and customers, I have generally (apart from a few exceptions) not seen cogent evidence tending to demonstrate that the admission of the records into evidence will jeopardize the fair trial of the case or otherwise be detrimental to the administration of justice. The mere fact that the evidence has been obtained irregularly does not necessarily imply that it qualifies to be excluded on the aforesaid grounds without more. Proof of irregularity in procuring the information is not evidence that admission into evidence of the impugned information will prejudice a fair trial or otherwise be detrimental to the administration of justice.
28. The best that the bank did in this respect is to assert that the records, if produced, will injure its business secrets. However, there was little evidence to demonstrate how this was going to be so. Further, although the bank submitted on what may amount to detrimental administration of justice, this was not tied to the case before me.
29. Be that as it may, I have considered the documents individually to determine whether their admission into evidence portends a threat to the fair trial of the case or the administration of justice. The document appearing at pages 124 to 125 on the Claimant's bundle of documents dated 17<sup>th</sup> August 2020 (bundle A) comprises of handover notes between the Claimant and one Vincent Kihara who was serving as Head Corporate Banking for the bank. The document describes the Claimant as Acting Head Corporate Banking. The document appears to simply indicate to the Claimant the action points in her new position. Outside this, there is no information that touches on the bank's business secrets. According to the schedule accompanying the Claimant's replying affidavit dated 17<sup>th</sup> March 2023, the purpose of introducing this document is to demonstrate that the Claimant actually took up the position of Head Corporate Banking in an acting capacity.
30. I have considered whether the document will prejudice the fair disposal of the case. I note that one of the issues that is for determination is whether the Claimant is entitled to claim payments for acting in the position of Head Corporate Banking for the bank. To the extent that the document is intended to establish that the Claimant held this position, it is relevant to one of the issues under consideration. The fact that the document tends to establish that the Claimant served as Head Corporate Banking for the bank does not render its admission into evidence prejudicial to a fair trial. There is no indication how admission into evidence of this document will be detrimental to the administration of justice. In the premises, I decline to strike it out.



31. The record appearing at pages 126 and 143 of bundle A are emails forwarding minutes of meetings to several individuals including the Claimant. In my view, the moment the emails were received by the Claimant, they became her documents. This is in the same way a letter posted to an addressee is considered. Once the letter is received by the addressee, it becomes the addressee's document.
32. The bare emails in question do not contain any details of the bank's secrets or confidential information. According to the Claimant's explanatory notes in the schedule to her affidavit dated 17<sup>th</sup> March 2023, the intention of producing the emails is to demonstrate that she was participating in the bank's management meetings as acting Head Corporate Banking.
33. I have looked at the emails in order to discern the prejudice that will arise from their admission into evidence and I see none. On the contrary, the documents are relevant in respect of one of the issues for determination in the cause. Therefore, I do not see any detriment that will befall the administration of justice if the said emails are admitted into evidence. As such, I decline the request to strike them off the court's record.
34. The documents at pages 127 to 140 and 144 to 153 of bundle A comprise of minutes of various meetings of the bank's management. The minutes contain details of discussions on management of the bank's business. These minutes have information which delves into the bank's business secrets.
35. Besides demonstrating that the Claimant was party to the sessions, I have not seen the relevance of the said minutes to her claim. To allow the said minutes to be disclosed to third parties including the court is to expose the bank's business secrets which would be unnecessary considering that the Claimant can rely on other evidence in her possession to establish the fact of serving in the position of acting Head Corporate Banking. Consequently, I arrive at the conclusion that to permit production of these minutes in these proceedings will be detrimental to the bank and will not serve the greater ends of justice. Accordingly, I strike out all the aforesaid minutes.
36. The document appearing at pages 141 to 142 of bundle A is a facility processing turnaround time template. The information the document gives relates to the maximum time a facility by the bank should take to be processed. It is signed by those intended to be bound by the timelines including the Claimant as Head of Corporate Banking facilities. Outside this, there is no information in the document tending to disclose the bank's business secrets. I see no prejudice to the fair conduct of the case that will flow from admission of the document. I see no likelihood of any detriment to the administration of justice that will be occasioned by admitting the document into evidence. None has been demonstrated by the bank. As a result, I decline to strike out the document.
37. The document at pages 154 to 155 of bundle A is an executive summary of the bank's Fraud Risk Management Policy. It has no information apart from subheadings of the topics covered in the primary policy document. The Claimant is shown to have signed the document. According to the explanatory notes in the schedule accompanying the Claimant's replying affidavit dated 17<sup>th</sup> March 2023, the document is intended to demonstrate that the Claimant was serving as Head of Corporate Banking for the bank, a matter that is the subject of determination in the cause. I see no prejudice that will be occasioned to the fair adjudication of the case by allowing the document to be presented as evidence. Consequently, I decline to strike out the said document.
38. The document appearing at pages 173 to 208 of bundle A is a business report for the bank. The report contains information on the bank's business trends mainly in the year 2020. The document addresses several matters including the impact of Covid 19 on business.



39. Apart from a few sections that mention the Claimant's performance, the report is largely on the bank's performance in areas where the Claimant is not the subject. If the report were to be exposed to all and sundry in its entirety, it will threaten the bank's business secrets and interests. I will therefore permit its production in a redacted form. Only portions of the report that speak to the impact of the Covid pandemic on the business environment and the Claimant's performance will be produced in evidence. Thus, the rest of the report is expunged from the record. For the avoidance of doubt, only the following portions of the report as set out in bundle A are to be produced in evidence: pages 173 to 179 of bundle A and pages 183 to 185 of bundle A. I see no prejudice to a fair trial or detriment to the administration of justice that will arise from these portions of the report being admitted in evidence.
40. The documents at pages 248 to 265 of the Claimant's bundle of documents dated 15<sup>th</sup> February 2022 (bundle B) are job descriptions for employees who were allegedly reporting to the Claimant. The documents have information indicating who the employees were to allegedly report to within the structure of the bank. The document at page 266 of bundle B has a table of the individuals who were allegedly reporting to the Claimant. It has not been indicated how information in these documents will be prejudicial to a fair trial if the documents are produced in evidence.
41. The Claimant's case is that she was moved from one position in the bank to another in a move that allegedly signified her demotion. In her explanatory notes attached to her replying affidavit dated 17<sup>th</sup> March 2023 and her evidence during her examination in chief, the Claimant indicates that the reason for seeking to provide these records is to demonstrate that as a result of her movement, the individuals who were initially reporting to her ended up reporting to the same individual as her. This, according to her signified a demotion.
42. This information is relevant in determining one of the issues in dispute. Therefore, its introduction will go towards ensuring a fair trial as opposed to prejudicing the process. In my view, there is no evidence that introduction of the evidence will be detrimental to the administration of justice. As such, I decline to strike out these documents.
43. The documents at 267 to 271 of bundle B contain data relating to performance evaluation of employees who were allegedly working under the Claimant's supervision. The information contains private data on the affected employees' performance. These employees are not party to this action. There is no evidence that they gave their consent for the data to be used in this litigation where they are not involved. The use of the data has the potential of exposing the employees' performance to the industry thereby jeopardizing their employability should they elect to move on. In the premises, I think that exposure of the information will be detrimental to the administration of justice. This data (pages 267 to 271 of bundle B) is thus struck out.
44. The documents at pages 280 to 287 in bundle B relate to the schedule of induction activities for incoming employees who were allegedly serving under the Claimant. Apart from providing an itinerary of induction timeframes, the documents have no information evidencing confidential information or trade secrets of the bank. There is no indication how introduction of the information will prejudice the trial or be detrimental to the administration of justice. Absent this information, I decline to strike out these set of documents.
45. The document at page 288 to 295 of bundle B is a performance setting contract between the bank and one of its employees. The performance setting was discussed between the said employee and the Claimant on behalf of the bank. The information in the document, in my view goes towards showing part of the performance projection strategies by the bank. This information goes to the core of the bank's business which ought to be protected. Sharing it out in whatever form may give away the bank's



- business secrets as relate to its performance management strategies. This will prejudice the bank's position and therefore the administration of justice. Accordingly, the document is struck out.
46. The document appearing at page 296 of bundle B is a handover note which has detailed information on the bank's customers who have applied for facilities, the kind of facilities applied for and the stage of approvals for the said facilities. This information relates to third parties. There is no indication that these third parties have consented to the use of the data in this litigation. The use of this data in the action has the potential of exposing the business dealings of the affected third parties without their concurrence. This will be detrimental to the administration of justice. As such, this document is struck out.
  47. The information at pages 302 to 308 and 340 to 341 of bundle B relates to performance data of employees who are not party to this action. The data provides details of the employees' rating including the fact that one of them was placed on a performance improvement plan following his poor performance. Such data is personal to the affected employee and could prejudice his career growth if shared with third parties particularly without his knowledge and consent. This will certainly be detrimental to the administration of justice. As such, the documents are struck out.
  48. The document at page 320 to 334 of bundle B is the bank's financial performance report dated 14<sup>th</sup> January 2020. The report contains details about the bank's financial performance. There is no cogent nexus between the Claimant's case and the report. Although the Claimant asserts that she intends to rely on the report to debunk the bank's argument that she was a poor performer, my understanding of the law on termination of an employee on account of poor performance is that the employer bears the burden of demonstrating how the employee failed to meet her performance targets. It is therefore not necessary for the Claimant to dig up information on her excellent performance.
  49. In the premises, to allow the bank's financial report to be exposed is to expose its business secrets to third parties. If it elects, the bank will be at liberty to share the evidence when justifying its decision to terminate the Claimant on account of poor performance. For now, to allow the sharing of the information is detrimental to the bank's business interests and therefore detrimental to the administration of justice. The report is therefore struck out.
  50. The documents at page 344 and 346 of bundle B are an email and letter addressed to several employees of the bank including the Claimant. As stated earlier, once the email and letter got to the Claimant, the intended recipient, they became part of the documents within her power to keep and utilize. The bank could no longer claim exclusive ownership and control of the two documents. Therefore, it is within the power of the Claimant to produce the two documents in these proceedings. The request to strike out these two documents is thus declined.
  51. The document appearing at pages 381 to 382 in bundle B is an executive summary of the bank's Operating Manual. Whilst the summary does not disclose the meat of the actual manual, it is arguable that it gives highlights on the bank's business procedures, a matter the bank may be entitled to protect as part of its business secrets. Although it is indicated that the purpose of producing the summary is to demonstrate that the Claimant was serving as acting head of the bank's corporate banking division, the document does not bear the Claimant's name. Consequently, the basis of attempting to produce it is unclear. As the document speaks to the bank's business procedures, it will be unnecessary to expose it to third parties without cogent reasons. As such, the document is struck off the list of possible exhibits by the Claimant.
  52. The documents appearing at pages 1 to 15 of the Claimant's list of documents dated 15<sup>th</sup> July 2022 (bundle C) are all evaluation forms for various employees of the bank supposedly working under the Claimant's supervision. The documents contain information on the respective employees'



performance ratings. As mentioned earlier in respect of other performance data, these are details belonging to employees who are not parties to this action. Their consent and knowledge is required before the Claimant can use their data. Absent this, there is every risk of the information prejudicing the affected employees' employability rights if it is rendered public.

53. There is no evidence that the employees whose data the Claimant has exposed are aware of the Claimant's actions in this regard. There is no evidence that the employees have consented to their data being used in this litigation. As such, the data at pages 1 to 15 of bundle C is struck off the court's record.
54. The documents appearing at pages 16 to 18 of bundle C contain general information on request for change of certain Information Technology (IT) particulars. The information in the three request forms is neither shown to be confidential nor is it shown to comprise the bank's trade secrets. I have not been shown the prejudice that will flow from admitting the documents into evidence to enable me exclude them under article 50 (4) of the Constitution. As a result, the request to strike out these set of documents from the court's record is declined.
55. The document appearing at pages 19 to 23 of bundle C is the bank's terms of reference for the Country Management Committee. The document lays down the rules of engagement for the committee in which the Claimant was serving. It has not been demonstrated how admission of the document into evidence will prejudice the fair hearing of the case or otherwise occasion a detriment to the administration of justice to enable me exclude it from evidence in terms of article 50 (4) of the Constitution. As a consequence, I decline to strike out the document.
56. The document appearing at pages 24 to 25 of bundle C is of no evidential value in so far as it is not signed. It is a printout of an unauthenticated record rendering its probative value doubtful. It will therefore serve no useful purpose to keep the instrument on the court's record. I strike it out.

#### **Determination**

57. The upshot is that the bank's application only partially succeeds with some of the impugned records expunged from the court's record as detailed in the body of the ruling.
58. There is no order on costs.

**DATED, SIGNED AND DELIVERED ON THE 15<sup>TH</sup> DAY OF JUNE, 2023**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

..... for the Claimant

.....for the Respondent

#### **ORDER**

In light of the directions issued on 12<sup>th</sup> 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**

