



Republic v Oigara, Chief Executive Officer of KCB Bank Limited & 3 others; Inyangu (Exparte Applicant); Commission on Administrative Justice (Interested Party) (Miscellaneous Application 002 of 2023) [2023] KEELRC 1535 (KLR) (15 June 2023) (Ruling)

Neutral citation: [2023] KEELRC 1535 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION 002 OF 2023**

BOM MANANI, J

JUNE 15, 2023

**IN THE MATTER OF ARTICLES 22, 35 AND 41 OF THE
KENYAN CONSTITUTION, 2010, SECTIONS 7, 14 AND 23 (5)
OF THE ACCESS TO INFORMATION ACT, 2016, RULES 2, 4
(1), 5 AND 19 OF THE CONSTITUTION OF KENYA
(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)
PRACTICE AND PROCEDURE RULES, 2013, RULE NO. 7 (3)
OF THE EMPLOYMENT AND LABOUR RELATIONS COURT
(PROCEDURE) RULES 2016 AND ALL ENABLING
PROVISIONS OF LAW**

BETWEEN

REPUBLIC APPLICANT

AND

**JOSHUA NYAWEYA OIGARA, CHIEF EXECUTIVE OFFICER OF KCB BANK
LIMITED 1ST RESPONDENT**

**PAUL RUSHDIE RUSSO, CHIEF EXECUTIVE OFFICER OF KCB BANK
KENYA LIMITED 2ND RESPONDENT**

**JAPHETH OCHIENG ACHOLA, GROUP HUMAN RESOURCE DIRECTOR OF
KCB BANK KENYA LIMITED 3RD RESPONDENT**

KCB BANK KENYA LIMITED 4TH RESPONDENT

AND

DAVID MUGASIA INYANGU EXPARTE APPLICANT



AND

THE COMMISSION ON ADMINISTRATIVE JUSTICE ... INTERESTED PARTY

RULING

Background

1. The *ex-parte* applicant wrote to the 4th respondent asking to be supplied with certain information relating to his previous employment with the said respondent. From the record, the information requested for relates to the following:-
 - a. Copies of employment contracts for 2015, 2016, 2017, 2018 and 2019.
 - b. Signed off copies of all Job Descriptions (JDs) from 2015.
 - c. Signed off copies of all end year Balance Score Cards (BSCs) from 2015.
2. The record shows that the *ex-parte* applicant wrote email reminders to the 4th respondent asking for these documents. The emails are dated April 15, 2021, April 23, 2021 and April 28, 2021. According to the *ex-parte* applicant, the request did not elicit the response of the 4th respondent.
3. Aggrieved by this development, the *ex-parte* applicant invoked the provisions of the [Access to Information Act](#), 2016 by writing to the interested party to request for its intervention in the matter. The record shows that the interested party wrote to the 4th respondent through its Human Resource Manager on June 11, 2021 asking the 4th respondent to supply the *ex-parte* applicant with the information in question.
4. On July 23, 2021, the 4th respondent wrote to the interested party basically intimating that the information requested for was supplied to the *ex-parte* applicant as and when the various documents were generated and executed between the parties. In effect, it was the 4th Respondent's position that there was no further information it was obligated to supply to the *ex-parte* applicant in this respect.
5. On August 11, 2021 the interested party wrote to the 4th respondent reiterating the statutory duty on the 4th respondent to supply the *ex-parte* applicant with the information under discussion. By the same communication, the interested party asked the *ex-parte* applicant to react to the position expressed by the 4th respondent in its letter of July 23, 2021. It would appear that the *ex-parte* applicant never reacted to the Interested Party's letter of August 11, 2021.
6. On May 5, 2022, the interested party issued its determination on the dispute by directing the 4th respondent to supply the *ex-parte* applicant with the information under inquiry. From the record it appears that the 4th Respondent did not act on the interested party's order of May 5, 2022. It is this inaction by the 4th respondent that triggered the filing of this application.

The Application

7. The application is filed pursuant to the various provisions of law that are cited on the face of the Chamber Summons. The application is supported by the affidavits that have been filed by the *ex-parte* applicant. The averments in the affidavits reiterate the facts that I have set out in the background section of this ruling.



8. The interested party has filed an affidavit supporting the *ex-parte* applicant's position. It is the interested party's position that it lawfully issued the order dated May 5, 2022 requiring the 4th Respondent to issue the *ex-parte* applicant with the information that had been sought. That in view of the failure by the 4th respondent to act on the order, it is proper that this court intervenes under section 23 (5) of the [Access to Information Act](#) to have the order implemented.
9. The respondents have filed an affidavit opposing the *ex-parte* applicant's request. In their response, the Respondents assert that the Interested Party acted outside its statutory mandate as it purported to instigate investigations into a matter that was already pending before the Ministry of Labour and this court for resolution. To that extent, the order issued by the Interested Party on May 5, 2022 is invalid and incapable of adoption for purposes of enforcement.

Analysis

10. I have considered the application and the objections to it. The provision of law that entitles the *ex-parte* applicant to apply for enforcement of the interested party's order of May 5, 2022 is section 23 (5) of the [Access to Information Act](#). It provides as follows:-

“If no appeal is filed under subsection (3), the party in favour of whom the order is made by the Commission may apply *ex-parte* by summons for leave to enforce such order as a decree, and the order may be executed in the same manner as an order of the High Court to the like effect.”

1. The above provision refers to section 23 (3) of the Act. This section provides as follows:-

“A person who is not satisfied with an order made by the Commission under subsection (2) may appeal to the High Court within twenty-one days from the date the order was made.”

2. From the above provision, it is clear to me that if a person is unhappy with the decision of the Interested Party under section 23 of the [Access to Information Act](#), the option available to him to challenge such decision is to file an appeal to the High Court. This appeal has to be lodged within 21 days of the decision.
3. The record does not show that the 4th Respondent invoked section 23 (3) of the [Access to Information Act](#) to challenge the Interested Party's decision of May 5, 2022. Instead, the 4th respondent has sought to challenge the validity of the order through these adoption proceedings. That is not what the law contemplates. It is not open to the respondents to try to use these proceedings as a forum for challenging the validity of the interested party's order of May 5, 2022 after the 4th Respondent failed to challenge the decision by way of appeal as provided for in the law.
4. The issues that the Respondents raise may have merit. However, they have been raised in the wrong forum. They ought to have been the subject of an appeal under section 23 (3) of the [Access to Information Act](#).
5. The other matter that is critical is that an application under section 23 (5) of the [Access to Information Act](#) is expressed to be *ex-parte* and by the party in whose favour the order that is sought to be enforced was issued. The party against whom the order issued has no role in the proceedings at this stage. He



is neither expected to file the application nor oppose it. As a matter of fact, the application being *ex-parte*, the attendance by the respondent in the matter is not expected by law.

6. In view of the foregoing, the filing of responses by the Respondents was both unnecessary and outside the law. Accordingly, the replying affidavit and submissions by the Respondents in the cause are amenable for striking out.
7. That said, I note that the order of 5th May 2022 was issued against the 4th respondent. therefore, institution of the cause against the 1st, 2nd and 3rd respondents was without basis in law. The fact that the three respondents hold office in the 4th respondent institution was no reason to unnecessarily drag them into these proceedings. Accordingly, the application in so far as it relates to the 1st, 2nd and 3rd respondents is liable for striking out.

Determination

11. The upshot is that the following orders are issued:-
 - a. The replying affidavit by the respondents together with their submissions filed in the cause are struck out, the nature of the proceedings being *ex-parte* by law.
 - b. The interested party's order of May 5, 2022 having been directed against the 4th respondent, the current application in so far as it is filed against the 1st, 2nd and 3rd respondents is incompetent. Accordingly, the portion of the application bringing on board these three Respondents is struck out.
 - c. The *ex-parte* applicant's application dated January 3, 2023 is allowed as against the 4th respondent with the consequence that the order of the interested party contained in the letter dated May 5, 2022 is adopted as the order of this court. Accordingly, the 4th respondent is ordered to supply the *ex-parte* applicant the documents set out in the interested party's Order of May 5, 2022 within seven (7) days of this order.
 - d. There shall be no order as to costs.

DATED, SIGNED AND DELIVERED ON THE 15TH DAY OF JUNE, 2023

B. O. M. MANANI

JUDGE

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

