



REPUBLIC OF KENYA



KENYA LAW
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**Maina v NCBA Bank Kenya PLC (Cause E193 of 2023)
[2023] KEELRC 1853 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1853 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E193 OF 2023**

**L NDOLO, J
JULY 27, 2023**

BETWEEN

STEPHEN WAINAINA MAINA CLAIMANT

AND

NCBA BANK KENYA PLC RESPONDENT

RULING

1. On March 9, 2023, the Claimant filed a Statement of Claim citing unlawful and unfair termination of employment as the issue in dispute.
2. Contemporaneously with the Statement of Claim, the Claimant filed a Notice of Motion dated March 8, 2023, seeking orders to compel the Respondent to furnish him with the following documents:
 - a. Certified copy of Collective Bargaining Agreement (CBA) covering the Claimant;
 - b. Certified copy of Group Human Resource Policy;
 - c. Certified copy of investigation report forming the basis of the disciplinary proceedings against the Claimant.
3. The Claimant further seeks an order directing the Respondent to immediately release his Certificate of Service.
4. The Claimant supports his application with his own affidavit and the application is premised on the following grounds:
 - a. That the Claimant was appointed by the Respondent as a Branch Operations Assistant effective 16th June 2014;
 - b. That the Claimant rose through the ranks to the position of Relationship Manager;



- c. That the Respondent, vide a letter dated December 16, 2022, unlawfully and unfairly terminated the Claimant's employment;
 - d. That the Claimant was not furnished with any notice nor was he provided with substantiated and fair reasons for the termination contrary to the provisions of Sections 35, 41, 43 and 45 of the Employment Act;
 - e. That the Respondent has failed to issue the Claimant with a Certificate of Service as required under Section 51 of the Employment Act, thus frustrating his chances of securing another job;
 - f. That the Respondent has not notified the Nairobi employment service office of the termination of the Claimant's employment as required by Section 78 of the Employment Act;
 - g. That the actions of the Respondent disclose malice, discrimination and unfair labour practices against the Claimant contrary to the law;
 - h. That it is in the interest of justice that the orders sought be granted.
5. The Respondent's response is contained in a replying affidavit sworn by its Principal Legal Counsel, Stephen Atenya on April 25, 2023.
 6. Atenya depones that the Claimant's entry position of Branch Operations Assistant was unionisable and was therefore covered under the applicable CBA.
 7. Atenya however adds that at the time his employment was terminated, the Claimant held the position of Assistant Relationship Manager, a managerial position and therefore non-unionisable. Atenya depones that there is no CBA applicable to the Claimant.
 8. Atenya avers that a copy of the relevant Human Resource Manual has already been supplied to the Claimant's Counsel by e-mail dated April 19, 2023.
 9. Regarding the investigation report sought by the Claimant, the Respondent takes the position that its production would violate the provisions of the Data Protection Act for the following reasons:
 - a. The investigations covered not only the Claimant but two other former employees;
 - b. As the offence was considered to be a conspiracy among all three of the Respondent's former employees, one report was compiled by the investigator;
 - c. The report contains personal and private data of the former employees and customers. The personal and private data includes; account numbers, names of children and transaction histories.
 10. The Claimant swore a further affidavit on 8th May 2023 in which he depones that the investigation report seems to involve him and his friend Chilumo Kaingu Ringa who is also represented by the Claimant's Advocate in Nairobi ELRCC/E206/2023: Chilumo Kaingu Ringa v NCBA Bank in which a similar application has been filed.
 11. The Claimant further depones that the report can only contain either information within the knowledge of the parties or information that is generally known to the public.
 12. Regarding the Human Resource Policy Manual, the Claimant states that the copy availed is not certified as a true copy of the original nor is it endorsed by the Respondent and does not bear any distinctive mark to prove it originated from the Respondent.



13. By his application, the Claimant seeks production of three documents by the Respondent. In addition, the Claimant asks for his Certificate of Service.
14. From his further affidavit, it appears that the Claimant is satisfied with the Respondent's response on the CBA. I will therefore take this prayer as spent.
15. On the Human Resource Policy Manual availed by the Respondent, the Claimant appears to doubt its authenticity because it is not certified and does not bear a distinctive mark to show it originates from the Respondent.
16. I think this is an unreasonable standard; first, there is e-mail evidence that the document originated from the Respondent and second, there is no requirement for policy documents to bear any distinctive mark. I therefore find that the Respondent has discharged its discovery and production duty in this regard.
17. The Respondent objects to production of the investigation report on the basis that it contains personal and private data belonging to third parties whose disclosure would violate the Data Protection Act.
18. In considering this issue, the Court is called upon to balance the Claimant's right to information that is relevant to his case against the right to privacy of persons who are not party to this dispute.
19. I am satisfied that this dilemma can be cured by production of an abridged and/or redacted version of the investigation report. I therefore direct the Respondent to avail such an abridged and/or redacted report within the next twenty-one (21) days from the date of this ruling.
20. The costs of this application will be in the cause.
21. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF JULY 2023

LINNET NDOLO

JUDGE

Appearance:

Mr. Wanyingi for the Claimant

Mr. Kongere for the Respondent

