



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muragu v Central Bank of Kenya & another (Cause 826 of 2019)  
[2023] KEELRC 3207 (KLR) (6 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3207 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 826 OF 2019  
JK GAKERI, J  
DECEMBER 6, 2023**

**BETWEEN**

**PROF. KINANDU MURAGU ..... CLAIMANT**

**AND**

**CENTRAL BANK OF KENYA ..... 1<sup>ST</sup> RESPONDENT**

**KENYA SCHOOL OF MONETARY STUDIES ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a Notice of Motion dated 9<sup>th</sup> August, 2023, the Claimant applied for orders that:-
  1. This Honourable Court be pleased to order the Respondent to produce, make discovery on oath and deliver and/or avail list of employees that the Central Bank of Kenya has engaged from December 1<sup>st</sup> 2016 to date and who are 60 years and above.
  2. The costs of this application be provided for.
2. The Notice of Motion is expressed under Article 35 of the *Constitution* of Kenya, 2010, Sections 68(1) of the *Evidence Act* and Rule 17 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 and is based on the grounds set out in its face and the Supporting Affidavit sworn by the Claimant/Applicant on 24<sup>th</sup> August, 2023.
3. The affiant deposes that he was an employee of 1<sup>st</sup> Respondent as the Executive Director of the 2<sup>nd</sup> Respondent.
4. It is the Claimant's case that by letter dated 1<sup>st</sup> December, 2016, the 1<sup>st</sup> Respondent purported to rectify and amend the Claimant's contract period to run from 2<sup>nd</sup> May, 2014 to 5<sup>th</sup> June, 2017 when he was to attain the age of 60 years, which was done unilaterally without consulting the Claimant or the Board of Directors of the 2<sup>nd</sup> Respondent.



5. The affiant deposes that he was discriminated as there were/are employees engaged by the Respondents on contractual terms who were beyond the age of 60 and thus his contract of employment was prematurely terminated.
6. That by letter dated 27<sup>th</sup> June, 2023, the affiant's advocate on record wrote to the Respondent's advocates for the information sought herein but it was not availed.
7. The affiant deposes that the information sought will assist this court in making a fair and just determination of the dispute.

### **Response**

8. By a Replying Affidavit sworn by Elizabeth Njogu, the Deputy Manager, Human Resource Legal Services of the 1<sup>st</sup> Respondent on 9<sup>th</sup> October, 2023, the affiant deposes that in response to the applicant's request, only three (3) people who having retired upon attaining the mandatory retirement age of 60 were engaged as advisors, namely; Mr. Mark Lessit, Anne Muoki and Mary Gathungu who were initially contracted on short-term contracts to facilitate a smooth transition due to institutional memory and the specific skill they possessed.
9. The affiant deposes that the Claimant's application is bad in law as it is a fishing expedition.

### **Applicant's submissions**

10. Counsel submitted that the Respondent's Replying Affidavit expressly admitted that there are 3 persons who after retirement were engaged as advisors to facilitate smooth transition and institutional memory and skills.
11. Counsel further submitted that the affidavit was silent as to when the 3 retired or left the Respondent(s) or were still on contractual engagements.
12. Reliance was made on the decision in *Oracle Productions Ltd v Decapture Ltd & 3 others* (2014) eKLR on the essence of discovery of documents as was the decision in *Muchiri v African Agricultural Technology Foundation (AATF) & another* (2022) KEELRC.
13. Counsel maintained that the Claimant's case was that he was discriminated as he was singled out for retirement.
14. Counsel urged that the Claimant possessed certain specific technical skills but for the unwarranted termination of employment and it was essential that particulars of the staff retained after attaining the age of 60 be revealed for purposes of the hearing.

### **Respondent's submissions**

15. In their submissions in opposition to application, the Respondents submitted that although the court has jurisdiction to order discovery under Section 22 of the *Civil Procedure Act*, the same ought not to be granted to enable a litigant to prop up his case as expressed in *Gideon Mwangangi Wambua V I.E.BC & 2 others* (2013) eKLR.
16. Counsel submitted that since the Claimant's case was based on discrimination at the formulation stage, he ought to have had a basis for the same and the application was bad in law.
17. It was submitted that the applicant had not demonstrated that the material was relevant and necessary as the information sought relate to persons aged 60 years who were engaged as advisors not as employees.



18. Reliance was made on the *Halsbury's Law of England, 4<sup>th</sup> Edition* 1975, Vol. 13, paragraphs 1 and 38 on the function of discovery as were the sentiments of the court in *Concord Insurance Co. Ltd V NIC Bank Ltd* (2013) eKLR to urge that the application was seeking information which was neither relevant nor necessary and the application was a fishing expedition.

### **Determination**

19. The singular issue for determination is whether the Claimant/Applicant's Notice of Motion is merited.
20. It is common ground that the Claimant/Applicant filed a suit against the Respondent on 9<sup>th</sup> December, 2019 alleging wrongful and/ unfair termination of employment and discrimination.
21. The law governing discovery and access to information is well settled.
22. Article 35 of the *Constitution* of Kenya, 2010 provides;
1. Every citizen has the right of access to –
    - a. information held by the state; and
    - b. information held by another person and required for the exercise or protection of any right or fundamental freedom.
23. This article is given effect by the provisions of the *Access to Information Act*, 2016 and as the Respondents are public entities, the provisions of the Act are applicable to them. Under Section 6(2) of the Act, a person who desires access to information held by a public entity is required to make a written application or make the request known to the Chief Executive Officer of the public entity or the person to whom such authority has been delegated.
24. In addition, Section 6 of the *Evidence Act* provides for notice to produce evidence in possession of the other party.
25. Relatedly, Order 11 Rule 11 of the *Civil Procedure Rules*, 2010 provides as follows;
1. Any party may request any other party to the suit to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question in the such.
  2. If the party so requested refuses or neglects within fourteen days to make a discovery as aforesaid, application may be made to the court for an order directing such discovery; and at the hearing the court may either refuse or adjourn the application if satisfied that such discovery is not necessary, or is not necessary at that stage of the suit, or make such order either generally or limited to certain classes of documents as it thinks fit;
- Provided –
- i. that discovery shall not be ordered when and so far as the court is of the opinion that it is not necessary either for disposing fairly of the suit or for saving costs.
  - ii. that on an application by one party, the court may make an order for discovery against that party.
26. Under Order 10, Rule 11(3), the person to whom the request to produce is made may specify the documents he or she objects to produce.



27. According to the *Halsbury's Laws of England, 4<sup>th</sup> Ed.* Volume 13;
- “The function of discovery is to provide the parties with the relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases and thus to provide the basis for the fair disposal of the proceedings before or after the trial. Each party is therefore enabled to see before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprises at or before the trial relating to the documentary evidence and to reduce the costs of litigation.”
28. In *ABN Amro Bank NY v Kenya Pipeline Co. Ltd* (2019) eKLR the court held that;
- “The purpose of discovery is mainly to ensure that all documents necessary for the just determination of the suit are made available to the parties as well as the court.”
29. Finally, in *Rafiki Microfinance Bank Ltd V Zenith Pharmaceuticals* (2016) eKLR, the court observed that;
- “Discovery will not be ordered in respect of an irrelevant allegation in the pleadings, which even if substantiated, could not affect the result of the action nor in respect of an allegation not made in the pleadings or particulars nor will discovery be allowed to enable a party to “fish” for witness of for a new case, that is to enable him frame a new case. Each case must be considered accordingly to the issues raised; but where there are numerous documents of slight relevance and it would be oppressive to produce them all, some limitations may be imposed.”
30. The issue was also considered by the Court of Appeal in Omar Shariff t/a *Kemco Auto V Freight Forwarders Ltd & another* (2008) eKLR where the court overturned the High Court decision to dismiss the Claimant’s case for failure to produce documents, but had explained the circumstances of the failure.
31. In this case, although the Claimant/Applicant’s Memorandum of Claim dated 7<sup>th</sup> December, 2019 particularises the alleged particulars of duress and/or misrepresentation under paragraph 12, particulars of the alleged discrimination were not provided.
32. However, to his credit, the applicant alleges, in paragraph 11 that he was discriminated against other employees who were engaged or were in employment even though they had attained the age of 60 and moreso indicates his desire to have the Respondent provide information on those employees as he was singled out for premature termination.
33. Although the applicant has not laid a solid basis for the allegation, possibly on account of the absence of documentary evidence, which is difficult to access as it is under lock and key of the Human Resource Department, the Replying Affidavit by Elizabeth Njogu appears to lend credence to the applicant’s allegation that there were or are persons who were serving or served the Respondent’s in some capacity even after attaining the age of retirement.
34. Documentary evidence on the capacities in which the three persons were serving before attaining the age of 60 and the circumstances and capacity in which they were retained and for how long would have laid bare the issue.



35. It is trite that pre-trials discovery is central to litigation as encapsulated in Order 11 of the *Civil Procedure Rules*, 2010.
36. Needless to belabour, the material to be discovered must be relevant and necessary to disentangle the issues in contention as it enables a party to access essential documents or materials in the custody of the other party and ultimately facilitates substantive justice. However, discovery must not be used as a fishing expedition as correctly submitted by the Respondent's counsel.
37. Is the Claimant engaged in a fishing exercise?
38. The court is not so persuaded as the discovery sought is relevant and necessary to vindicate or disprove whether the Respondents could have treated the Claimant in a discriminatory manner.
39. It is the finding of the court that the materials are relevant and necessary in the determination of the instant suit.
40. In the upshot, the Respondents shall make discovery on oath and deliver to the Claimant/Applicant within 14 days copies of all relevant documents relating to the engagement of any person in any capacity by the Respondents, after that person had attained the age of 60, at least 3 persons.
41. Costs shall abide the outcome of the main suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 6<sup>TH</sup> DAY OF DECEMBER 2023**

**DR. JACOB GAKERI**

**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 Civil 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.

**DR. JACOB GAKERI**

**JUDGE**

