



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT ELDORET

CAUSE NO. 37 OF 2020

JOSEPH KIPKEMEI KERONEI.....CLAIMANT

VERSUS

THE COUNTY GOVERNMENT OF UASIN GISHU.....1ST RESPONDENT

COUNTY GOVERNMENT OF UASIN GISHU

PUBLIC SERVICE BOARD.....2ND RESPONDENT

RULING

1. The Claimant in this matter filed a notice of Motion dated 26th October, 2021 seeking orders among others that: the claimant be allowed to file supplementary list of documents and further witness statements.

2. The application was supported by the affidavit of Joseph Kipkemei Keronei (the applicant) in which he deponed among others that:

a) That my claim relates to constructive dismissal induced by the respondent, unfair labour practice and breach of fair administrative action.

b) That after the close of pleadings but prior to trial obtained additional evidence demonstrating that the respondents had been able to revert an employee with a similar situation to mine to his initial position. Annexed hereto are the contract of Sila Boit dated 23/3/2017 and letter dated 26th/6/2020 marked as 'A' and 'B' respectively.

c) That this evidence is cardinal to buttress my claim for unfair labour practice.

d) That I have also documents to show that my resignation was due to the fact that I was compelled to undertake works that were in breach of procurement laws by requiring that I allow goods to be supplied by certain persons in breach of the tender requirements which I refused. Annexed hereto is the list of items, letter dated 5/6/2020 and 3 internal memos dated 29/6/2020 marked as 'C', 'D', 'E' and 'F' respectively.

e) That I also have an extra of the delivery book showing that I lodged an appeal against the decision declining to post me. Annexed hereto is the extract of the delivery book marked as 'G'.

f) That I pray that in the interest of saving on time during the trial I be allowed to also lodge a supplementary witness statement. **Annexed hereto is the supplementary witness statement marked as 'H'**

3. The respondent opposed the application and filed grounds of opposition dated 28th October, 2021 in which they stated among others that:

a) The Application has no merit, is bad in law and is an abuse of the Court process.

b) The applicant has not demonstrated the reason why he could not file the documents he now wishes to produce before close of pleadings. The unreasonable delay has not been explained.

c) The documents namely letter of Appointment dated 23rd March 2017 addressed to Sila Boit; letter of extension of contract dated 26th June, 2020 addressed to Sila Boit; letter dated 5th July, 2020; three internal Memos dated 29th June 2020 on the subjects of

Preparation of isolation Centers, preparation of Kipsigak Isolation Centre and submission of Reports – Reminder respectively, and copy of alleged delivery note are inadmissible for the following reasons;

i) The sources of the said documents has not been disclosed.

ii) The documents are confidential documents are not accessible to the general public but only to the authorized personnel of the 1st and 2nd Respondents and the persons to whom they concern.

iii) Without prejudice of the foregoing, the said documents are public documents, the same do not meet the threshold for production and/or admission of public documents pursuant to the provisions of Part IV of the Evidence Act, Cap 80 Laws of Kenya.

iv) The manner in which the said documents were obtained and/or procured is not disclosed thus it offends the provisions of the Access to Information Act, 2016 and particular Part III of the said Act as related to the Manner in which information held by the state can be accessed and or acquired.

v) The documents offends the provisions of Article 50(4) of the Constitution of Kenya 2010.

vi) The Circumstances on Sila Boit's employment are diametrically distinguishable from the circumstances of this case as related to the Applicants employment. Sila Boit's employment was on a term contract for three years with the effect from 3rd April 2017 which lapsed by effluxion of time on 3rd April 2020 and was renewed vide letter dated 26th June, 2020 with effect from 3rd April 2020. The applicant's case is different since his contract did not lapse by effluxion of time but by the own voluntary act of resignation.

d) The document marked as exhibit c as annexed to the affidavit in support of the Motion dated 26th October, 2021 is undated, unsigned and handwritten whose source and author are undisclosed and whose authenticity is in question hence it is of no probative value.

e) The Notice of Motion Application seeks to alter the entire substance of the suit from a simple case of unfair termination to a claim for constructive dismissal. The claimant in his plaint and the Witness statement has not in any way made any allegation that he was constructively dismissed hence the Application is an afterthought and an attempt to amend the plaint without actually doing so.

4. The court noted that only the respondent filed submissions in opposition to the application. The applicant/claimant though indicated on 17th January, 2022 that they would file submissions within seven days, never did so.

5. In his submissions, Mr. Mwangi for the respondent submitted among others that a cursory look at the documents sought to be produced revealed that they were public documents in the custody of 1st and 2nd respondent. Under article 35(1) of the constitution every citizen has the right of access to information held by the state and information held by another person required for the protection of any right or fundamental freedom. Further, section 5(1) of the Access to Information Act mandates public entities to facilitate access to information held by such entities. Section 7 of the same Act designates a Chief Executive officer of a public entity as an information access officer and may delegate this responsibility upon any officer of the public entity. Section 8 lays down procedure through which any citizen can obtain and access information from a public entity.

6. According to Mr. Mwangi, nowhere in the application has the applicant alleged that he followed the above procedure in obtaining the public documents he seeks to produce. It was therefore only safe to conclude that the documents were obtained irregularly and illegally.

7. Counsel relied on the case of **Njonjo Mue & Another v- Chairperson of Independent Electoral and Boundaries Commission & 3 others [2017] eKLR** where the Supreme Court stated that:

[22] 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. We also recognize that information held by the state or state organs, unless for very exceptional circumstances, ought to be freely shared with the public. However, such information should flow from the custodian of such information to the recipients in a manner recognized under the law without undue restriction to access of any such information.

[23] further, a duty has also bene imposed upon the citizen(s) to follow the prescribed procedure whenever they require access to any such information. This duty cannot be abrogated or derogated from, as any such derogation would lead to a breach and/or violation of the fundamental principles of freedom of access to information provided under the Constitution and the constituting provisions of the law. It is a two-way channel where the right has to be balanced with the obligation to follow due process.

[24] The petitioners, using the above test, do not show how they were able to obtain the internal memos showing communication between employee of the 2nd Respondent. Further it has been alleged that these memos have only been shown in part, and taken out of context to advance the Petitioner's Case against the 1st and 2nd Respondents and to an extent, the 3rd Respondent. No serious answer has been given to that contention. The use of such information before the Court, accessed without following the requisite procedures, not only renders it inadmissible but also impacts on the probative value of such information. This is the point of divergence between the instant matter, and the case of Nicholas

Randa Owano Ombija -v- judges and Magistrates Vetting Board (supra). In the present instance, there has been a clear violation of laid out procedures of law attributable to access of information, and violation of the rights of privacy and protection of property that the 2nd Respondent is guaranteed under the Constitution and Section 27 of the IEBC Act. This is because the limitation imposed by both Article 50(4) and Section 27 of the IEBC Act. This is because the limitation imposed by both Article 50(4) and Section 27 aforesaid squarely apply to the matter before us.

8. In conclusion, counsel for the respondent submitted that for all intents and purposes, the applicant ought to have requested the said documents in writing upon payment of any such fees as may be prescribed by the 1st and 2nd respondents. There was no record that a request was made to the 1st and 2nd Respondent regarding access and consequent production of the said documents and neither was there any evidence that the said request for supply of documents was unlawfully denied. Counsel therefore submitted that the documents were inadmissible hence leave to produce the same should be denied and the documents expunged from record.

9. The state of the law as regards access to public information has been very ably set out by counsel for the respondents and the Court fully concurs with the position as stated.

10. This suit was filed on 14th September, 2020. Concurrently therewith, the claimant filed an application under certificate of urgency dated 10th September, 2020. This application was considered by the Court and a ruling delivered by the Court on 26th February, 2021. In that ruling, the Court observed in material part that:

“...The claimant herein alleges that by failing or neglecting to redeploy him and his removal from the respondent’s payroll amounted to unfair termination of employment. The respondent on its part maintains that the claimant voluntarily resigned and his resignation having been accepted, his claim for redeployment was an afterthought. At the trial this issue would have to be resolved. The claimant does not deny resigning. He further stated that he paid one month’s salary in lieu of notice which he now claims back. He does not allege he was put under any undue influence or pressure to make the payment...”

11. Most of the documents sought to be introduced were authorized or made around June and July, 2020. Therefore, if they were relevant, the claimant could have either filed them with the suit or if not in his possession, then, he could have at least alluded to them in his statement of claim. By not doing so one may safely assume the claimant never considered them material to his claim.

12. The Court understands the purpose of seeking to introduce these documents to be mainly to demonstrate that the respondents had been able to revert an employee with a similar situation to his initial position. The Court has perused the letter of appointment dated 23rd March, 2017 issued to one Sila Boit and another date 26th June, 2020 attached to the application as part of the documents sought to be produced. Whereas the letter dated 26th June, 2020 indicated that Mr. Boit had been reverted to his former position upon expiry of his appointment to the post of Director Alcoholic Drinks Control Board, the letter does not reveal more on the circumstances under which Mr. Boit was reverted. The applicant before me, it is hotly contended by the respondent, resigned and therefore there was nothing to revert to.

13. Further, the handwritten list which the applicant has attached to the application as one of the documents he seeks to produce to show his resignation was due to the fact that he was compelled to undertake works that were in breach of procurement laws, does not disclose who authored it and the date when it was made. Besides, the applicant in his statement of claim never made reference to circumstances under which he resigned. That is to say whether he did so to avoid undertaking works that were in breach of procurement laws as he now claims in the application or not.

14. In conclusion, the Court has carefully considered the present application before it and the submission by Counsel and seems not persuaded that the application has merit and intended to enrich the claimant’s case against the respondents. It is as it were, an afterthought and purposely intended to unruffle the respondents. The application is therefore disallowed and the documents’ expunged from record.

15. Cost in the cause.

16. **It is so ordered.**

DATED AND DELIVERED AT ELDORET THIS 30TH DAY OF MARCH, 2022

Abuodha Nelson Jorum

Judge ELRC