



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO E086 OF 2021

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER
ARTICLES 41 & 47 OF THE CONSTITUTION OF KENYA**

KENNEDY NJOGU MUGO.....PETITIONER

VERSUS

CMC HOLDINGS LIMITED.....RESPONDENT

RULING

1. On 9th June 2021, the Petitioner filed a Petition alleging violation of his rights by the Respondent. Alongside the Petition, the Petitioner filed several documents, including transcripts of conversations with persons identified as TW and RW as well as email communication accessed by the Petitioner.
2. It is these transcripts and email communication that triggered the present application dated 31st August 2021, by which the Respondent seeks the following orders:
 - a) That the Petitioner's exhibit marked KNM-10 producing a transcript of an alleged recorded phone conversation between the Petitioner and R.M be struck out from the record;
 - b) That the Petitioner's exhibit marked KNM-11 producing a transcript of an alleged recorded phone conversation between the Petitioner and T.W be struck out from the record;
 - c) That the Petitioner's exhibit marked KNM-18 producing copies of emails dated 2nd February 2021 and 3rd February 2021 be struck out from the record.
3. The application is supported by an affidavit sworn by the Respondent's Group Human Resources Manager, Margaret Wachira and is based on the following grounds:
 - a) The exhibits marked KNM-10, KNM-11 and KNM-18 produced by the Petitioner were obtained illegally;
 - b) The Petitioner has admitted to secretly recording conversations without the consent of RM and TW and acted in violation of their right to privacy as guaranteed under Article 31 of the Constitution of Kenya;
 - c) The emails dated 2nd February 2021 and 3rd February 2021 were not addressed or copied to the Petitioner, who could not have accessed or acquired the same lawfully;
 - d) Admitting the said evidence would render the trial unfair and will be detrimental to the interest of justice.
4. The Petitioner opposes the application by his replying affidavit sworn on 1st November 2021.
5. The Petitioner depones that the subject conversations were not secretly recorded and denies making such an admission in his affidavit sworn on 3rd June 2021.

6. The Petitioner further depones that the conversations were held with the full consent of both TW and RM, as they are the ones who initiated the correspondence as they believed that the Respondent, through the Group Human Resource Manager, Margaret Wachira, had a vendetta against the Petitioner, in which they were not willing to participate.
7. The Petitioner states that TW and RW voluntarily forwarded the emails dated 2nd February 2021 and 3rd February 2021, to him.
8. The Petitioner denies violating the rights of TW and RM and maintains that the subject transcripts are properly before the Court.
9. The Petitioner concludes that the evidence in question is fundamental to his Petition and it would be detrimental to the interest of justice if the orders sought by the Respondent are granted.
10. The Petitioner adds that it is only TW and RM who can complain of violation of their rights and not the Respondent's Group Human Resource Manager, Margaret Wachira, who has no *locus standi* to raise these issues before the Court.
11. In their written submissions on the application, the parties appeared to mix the issue of probative value of the subject exhibits with their admissibility. To my mind however, what is before the Court at this interlocutory stage is whether the exhibits are admissible in the first place.
12. In objecting to production of the exhibits, the Respondent fronts the right to privacy.
13. Article 31 of the Constitution of Kenya, 2010 provides as follows:

31. Every person has the right to privacy, which includes the right

not to have—

(a) their person, home or property searched;

(b) their possessions seized;

(c) information relating to their family or private affairs unnecessarily required or revealed; or

(d) the privacy of their communications infringed.

14. As held in *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others [2018] eKLR*, the right to privacy is not absolute.
15. In raising its objection, the Respondent takes the position that the conversation captured in the transcripts filed by the Petitioner was recorded without the consent of participants in the conversation. These individuals are however not the ones complaining; it is their employer, the Respondent who has raised an objection.
16. This begs the question as to what injury the Respondent would suffer if the evidence is admitted. A party to a dispute cannot use the right to privacy to lock out evidence that would be useful in adjudication of the dispute.
17. Regarding the emails dated 2nd February 2021 and 3rd February 2021, the Court did not find any evidence that they were unlawfully obtained by the Petitioner. What is more, these emails, much like the conversation in the transcripts, appear to be central to the dispute now before the Court.
18. Overall, I find and hold that the Respondent's application dated 31st August 2021, is aimed at locking out important evidence from the eye and mind of the Court.
19. In the result, the said application is disallowed with costs to the Petitioner.
20. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 10TH DAY OF MARCH 2022

LINNET NDOLO

JUDGE

Appearance:

Mr. Mbabu for the Petitioner

Ms. Songok for the Respondent