



**Nguru v Co-operative Bank of Kenya Limited (Cause E044 of 2022)  
[2022] KEELRC 1715 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1715 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E044 OF 2022**

**B ONGAYA, J**

**JULY 22, 2022**

**BETWEEN**

**JEPHTA ODHIAMBO NGURU ..... CLAIMANT**

**AND**

**CO-OPERATIVE BANK OF KENYA LIMITED ..... RESPONDENT**

**RULING**

1. The applicant (respondent in the suit) filed on July 05, 2022 an application by way of a notice of motion through Murui Mungai & Company LLP Advocates. The application was under section 12(3) of *Employment and Labour Relations Court Act* and rules 17(1) and 18 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016. The applicant prays for:
  1. The claimant be compelled to supply to the court, and the respondent, copies of statement of account numbers 12xxxx and 12xxxx, operated at KCB Bank Kenya Limited in the name of the claimant, for the period between July 10, 2021 and July 20, 2021
  2. In default of compliance with (1) above within fourteen (14) days, or within such other period as the court may appoint, the statement of claim be dismissed with costs.
  3. In the alternative to (1) or (2) above, KCB Bank Kenya Limited to provide to the court, and the respondent, certified copies of statement of account numbers 12xxxx and 12xxxx, operated at KCB Bank Kenya Limited in the name of the claimant, for the period between July 10, 2021 and July 20, 2021.
2. The application is based on the supporting affidavit of Florence Njuguna, the legal manager of the applicant, and exhibits thereto. The grounds in support of the application are urged as follows:
  1. The claimant has sued the applicant for, *inter alia*, compensation for alleged unlawful termination.



2. The suit revolves around whether the applicant had a reasonable basis to suspect that the claimant received some money from Musti Investment Limited, the vendor who sold title no Kajiado/Kitengela/107019 to the claimant
  3. The applicant's entire defence is that there was in fact a reasonable basis for the suspicion that the claimant received money to another account outside the respondent.
  4. The applicant's suspicion was informed by ongoing investigations conducted by the law enforcement agencies. However, because those investigations are ongoing, and because they involve many people, the findings are not yet accessible to the public.
  5. The applicant, from its participation in the aforesaid investigations, is aware that the claimant received kshs 500,000.00 and kshs 468,300, on July 13, 2021 and July 15, 2021 respectively, into his account number 12xxxx held at KCB Bank Kenya Limited.
  6. Further, in the disciplinary hearing on March 18, 2022, the claimant flatly denied having any other account outside the applicant bank.
  7. However, in the notification of exit form dated April 12, 2022, the claimant indicated that he operates account number 12xxxx at the KCB Bank Kenya Limited.
  8. The information sought in the application is therefore relevant and necessary for the applicant to sustain its defence. It is also relevant and necessary for the claimant to demonstrate that he in fact did not receive any money from the vendor.
  9. Unless the information sought is produced, the applicant will be significantly hindered in resolving the case in a fair and just manner.
3. The claimant opposed the application by filing his replying affidavit on July 12, 2022 through Muriithi & Masore Law. It is stated and urged as follows:
1. That to start with, the motion seeks discovery of statement of account number 12xxxx operated at KCB Bank Kenya Limited yet the applicant's statement of response dated July 4, 2022 upon which the applicant's defence is built does not allude to that account number anywhere.
  2. That the applicant in its letter terminating his employment unequivocally stated that it had established all the charges against him to its satisfaction hence the decision to dismiss him summarily.
  3. That in declining his appeal the applicant stated that it had undertaken thorough investigations into the issues, the charges preferred against him and reviewed the documents presented to therein.
  4. That through this motion, the applicant seeks to fish for material to legitimize its impugned decision to terminate him long after that decision was made. This no doubt contravenes the principle of fair hearing.
  5. That on the score alone, he will be unduly prejudiced because the documents being called for whether they exist or not, were never availed to him during the disciplinary hearing for him to state his case before he was terminated.
  6. That looked at keenly, this motion impermissibly seeks to convert the court into the applicant's disciplinary hearing panel to retry him based on material thought long after his termination.



7. That the motion unacceptably invites the court to usurp the role of the investigating agencies deposed at paragraph 5 and 6 of the supporting affidavit whom it said are seized of some form of investigations.
  8. That at any rate, if the documents called for would be among the findings to be availed at the end of the investigations alluded to, and are relevant and necessary as alleged, then the applicant ought to have shelved the decision to terminate him until it was satisfied of his wrong doing.
  9. That there was no reason, in that case, for the applicant to hurriedly terminate him then later shop for evidence to validate its actions as it seeks now only after he lodged his complaint to the court expressing his displeasure with the termination.
  10. That the applicant claims that they terminated him based on reasonable suspicion. That suspicion is what he is calling upon the Court to probe to establish whether my termination was fair or infirm in the circumstances of this case.
  11. That to his mind, resolution of that question does not require discovery of the documents sought by the applicant.
  12. That on advice of his advocates on record, this court, based on the material before it presently, possesses the wherewithal to probe whether his termination was above board in line with section 43 and 45 of the [Employment Act](#), 2007.
4. Parties filed their respective submissions on the notice of motion. The court has considered the parties' respective positions and makes findings on the notice of motion as follows.
  5. The only issue for determination is whether the court should allow the prayers for production of the bank statements as urged for the applicant.
  6. First, as submitted for the claimant, in [Chase Bank \(Kenya\) Limited Vs Cannon Assurance \(K\) Limited](#) [2019] eKLR the Court cautioned that all evidence produced or intended to be produced in Court must always be in line with the pleadings and where the evidence is not aligned to the pleadings, the said evidence cannot be looked into or relied upon by the Court. The claimant's advocate submitted that the applicant's request of statements of the bank accounts at this point, is new material. The Court has perused the statement of response as well as the statement of claim. The Court returns that the accounts subject of the orders as prayed for in the application were not mentioned at all. Upon that ground, the discovery is clearly outside the parties' pleadings.
  7. Second, it is submitted for the applicant that it terminated the claimant's employment because it held the reasonable suspicion that the claimant had caused a property to be over valued and as a result received a kickback from the vendor. Further, it is submitted that the kickback was deposited to the claimant's bank account at KCB Bank Limited. [Kenya Power & Lighting Company Limited V Aggrey Lukorito Wasike](#) [2017] eKLR, is cited for the applicant for the Court of Appeal holding that the test is, however, a partly subjective one in that all an employer is required to prove are the reasons that the employer 'genuinely believed to exist', causing him to terminate the employee's contract of service and, 'it is improper for a court to expect that an employer would have to undertake a near forensic examination of facts...'. For the applicant, [Barclays Bank of Kenya Limited v Christopher Orina Kenyariri & another](#) [2017]eKLR, is cited as a vivid description of a claim brought without fundamental information which information was subsequently sought through discovery.
  8. For the claimant it was submitted that the claimant was terminated on suspicion that he engaged in a fraudulent loan application. Further, the summary dismissal letter is unequivocal that all charges levelled against the claimant were established to the satisfaction of the disciplinary hearing panel.



Further, the applicant in its letter dated May 09, 2022 rejected the claimant's administrative appeal restating that the Bank followed due process by undertaking thorough investigations into the issues, preferred charges against the claimant, and reviewed the documents presented in the disciplinary proceedings. The claimant relied on the case of *Peter Wachira Ngunga v Kirinyaga District Farmers Society Limited* [2014]eKLR for the holding that the respondent therein as an employer was required to establish the misconduct or poor performance before or at the time of the dismissal during the administrative disciplinary process. Further, it was submitting for the claimant that the respondent's burden under section 43(1) of the Employment Act will be to demonstrate genuine belief in the existence of the matters for which it terminated the claimant – as at the time of the termination. The claimant relied on *Peter Wachira Ngunga –V- Kirinyaga District Farmers Society Limited* [2014]eKLR for the holding that the parties to employment disputes shall not convert the court into the employer's administrative disciplinary tribunal or disciplinary committee. Further, in that case the court held thus, 'It is the opinion of the court that the court's investigation into the validity or genuineness of the reasons for termination accrues only where it is shown that the employer invoked due process as per section 41 of the Act and the parties' agreement to establish the reason and if that precondition test is not passed, the termination is unfair. If the precondition is satisfied, in the opinion of the court, the court's investigation at the hearing then takes the direction that the employer established a reason but which the employee disputes and the court has to resolve the dispute one way or the other.

9. The claimant also relies on *Mathew Kipchumba Koskei V Baringo Teachers Sacco* [2013]eKLR, where while appreciating that the employer is at liberty to institute administrative disciplinary processes as well as involve criminal justice agencies, the court stated that to avoid the complexities and likely inconveniences of concurrent administrative disciplinary process and criminal justice process, where in the opinion of the employer the employee's misconduct amounts to a criminal offence, the employer should consider staying the administrative disciplinary process pending the outcome of the criminal process by the concerned criminal justice agency - in which event of such stay, it is open for the employer to invoke suspension or interdiction or leave of the affected employee upon such terms as may be just pending the outcome of the criminal process.
10. The court has considered the parties' respective submissions. The court finds as follows:
  - a. The court finds that the applicant was satisfied with its investigations at the disciplinary hearing stage as stated in their statement of response.
  - b. The court finds that the documents the applicant is seeking to be produced in the suit by the claimant were not part of the documents that were presented to or by the claimant at his disciplinary hearing and were not relied upon at any given time in the disciplinary process so that the prayers in the application are an afterthought coming belatedly after the fact of termination of the contract of service.
  - c. The court finds that the applicant cannot shift the 'burden of proof' of the reason of termination to the claimant. The applicant terminated the claimant upon investigations that it fully relied on. Under section 43(1) of the Employment Act, 2007 the applicant as an employer is required to prove the reason for termination. Under section 43(2) of the Act, the reason for termination of the contract of service are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee. Further, under section 47 (5) of the Act, the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer. The court returns that the applicant as the employer cannot shift that burden to the claimant. It is also not said that the information sought being bank statements as prayed for existed as at termination, were relied upon, and have ceased to be in the applicant's possession



and the applicant now is seeking the claimant to produce the same. It appears to the court the Bank statements for the two accounts in issue were never relied upon at the disciplinary hearing and have no relevance on whether the applicant will establish the fairness of the dismissal or termination as required under sections 41, 43, 45 and 47 (5) of the Act.

- d. In any event the applicant has confirmed there are on-going investigations which appear to be in the province of criminal justice system. It appears to the court that granting the orders will infringe the claimant's right to remain silent and not to offer self-incriminating evidence. Article 50 (2) (i) and (l) of the Constitution respectively provide that an accused person has the right to remain silent and not to testify during the proceedings; and, to refuse to give self-incriminating evidence. Article 50 is on the right to fair hearing and under article 25 (c) of the Constitution, the right to a fair trial cannot be limited. The Supreme Court in *Shollei versus Judicial Service Commission & Another* [2022]eKLR has held that the safeguards in article 50 of the Constitution on the right to a fair hearing apply to criminal matters as much as to civil matters. The court therefore finds that granting the orders as prayed for will seriously prejudice the claimant and in the circumstances, undermine his constitutional right to fair hearing or trial as may issue, has issued, or is threatened to issue by reason of the investigations said to be underway.
11. Accordingly, the application by the notice of motion filed on July 05, 2022 and dated July 04, 2022 is hereby dismissed with costs in the cause and parties to take steps towards the expeditious hearing and determination of the main suit.

**Signed, dated and delivered by video-link and in court at Mombasa this Friday 22<sup>nd</sup> July, 2022.**

**BYRAM ONGAYA**

**JUDGE**

