



**Mark Busuru & another v IUCN & another (Employment and Labour Relations
Petition 44 of 2017) [2022] KEELRC 12724 (KLR) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12724 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION 44 OF 2017**

**L NDOLO, J
SEPTEMBER 29, 2022**

BETWEEN

PHILIP MARK BUSURU 1ST PETITIONER

WELDON KIBET KIRUI 2ND PETITIONER

AND

**INTERNATIONAL UNION FOR CONSERVATION OF NATURE 1ST
RESPONDENT**

HON. ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. By its application brought by notice of motion dated April 25, 2022, the 1st respondent asks the court to expunge the documents filed by the petitioners in support of their petition.
2. The motion is supported by an affidavit sworn by the 1st respondent's Regional Human Resources Manager, Nancy Njoki Ntinu and is based on the following grounds:
 - a) The following documents, sought to be relied upon by the petitioners are inadmissible:
 - i) Document at page number 152-Contract of Employment for Rosemary Mboya dated February 22, 2017;
 - ii) Document at page number 306-End of Contract payment for Aziza Buka;
 - iii) Document at page number 307-End of Contract payment for James Makunike;
 - iv) Document at page numbers 308 to 309- Deed of Confirmation of Settlement of Funds between IUCN and Aziza Buka;



- v) Document at page numbers 310 to 311- Deed of Confirmation of Settlement of Funds between IUCN and Amy Kyalo;
 - vi) Document at page numbers 312 to 313- Deed of Confirmation of Settlement of Funds between IUCN and Sheile Siteiya;
 - vii) Document at page numbers 314 to 315- Deed of Confirmation of Settlement of Funds between IUCN and Willys Nyakeri; and
 - viii) Document at page numbers 355 to 359- Contract of Employment for Aziza Buka dated April 20, 2012.
- b) The impugned documents sought to be relied upon by the petitioners in evidence at the trial belong to third parties that is; Ms Rosemary Mboya, Mr Aziza Buka, Ms Amy Kyalo, Ms Shiele Siteiya and Mr Willys Nyakeri who are not litigants in the instant proceedings and the documents were obtained by the petitioners without the consent, authority or permission of the said third parties, thus violating and infringing on the third parties' constitutional rights to privacy as guaranteed by article 31 of the Constitution;
- c) In addition, none of the witnesses sought to be called in evidence by the petitioners is a maker of, or is a party to, or had the personal knowledge of the matter dealt therein, or is a proper person to produce the impugned documents aforesaid;
- d) The following documents sought to be relied upon by the petitioners in evidence at the trial are inadmissible in court because they have been obtained by the petitioners unlawfully:
- i) Document at page number 151-Contract details extracted from approved budget 2015-Staff Head Count report;
 - ii) Document at page number 152-Contract of Employment for Rosemary Mboya dated February 22, 2017;
 - iii) Document at page number 157-Extract from Staff Head Count of Contracts renewed in periods 2017 to 2018;
 - iv) Document at page numbers 221 to 224-IUCN-ERASO Regional Staff Meeting Minutes No. 19, Monday December 5, 2016;
 - v) Document at page numbers 225 to 226-Management report for the year ended December 31, 2016;
 - vi) Document at page numbers 227 to 228-Management report for the year ended December 31, 2017;
 - vii) Documents at page numbers 237 to 238-Email correspondences on diverse dates in August 2016 between Lazarus and the Finance Department;
 - viii) Documents at page numbers 239 to 243-2016 Mid-Year Review report and notes on cost of Employment Analysis;
 - ix) Document at page number 244-IUCN-ESARO Finance Team, Nairobi, Kenya;
 - x) Document at page numbers 245 to 246-Analysis of Finance Department Cost of Employment compared to funding source 2014 to 2016;



- xi) Documents at page number 252-Email correspondences on diverse dates between August 2016 and September 2016;
- xii) Documents at page numbers 254 to 255 -Email correspondences on diverse dates in November 2016;
- xiii) Documents at page numbers 298 to 302-Contract Staff positions abolished as a result of restructuring 2012 to 2016 & paid redundancy package;
- xiv) Document at page number 303-Omissions in significant end of contract payment certificates;
- xv) Document at page number 306-End of Contract payment for Aziza Buka;
- xvi) Document at page number 307-End of Contract payment for James Makunike;
- xvii) Document at page numbers 308 to 309-Deed of Confirmation of Settlement of Funds between IUCN and Aziza Buka;
- xviii) Document at page numbers 310-311-Deed of Confirmation of Settlement of Funds between IUCN and Amy Kyalo;
- xix) Document at page numbers 312-313-Deed of Confirmation of Settlement of Funds between IUCN and Sheile Siteiya;
- xx) Document at page numbers 314-315-Deed of Confirmation of Settlement of Funds between IUCN and Willis Nyakeri;
- xxi) Documents at page numbers 316-317-Contract Staff Departures in IUCN Newsletter of April, 2017 & Extract from ESARO Newsletter released in April 2017;
- xxii) Documents at page numbers 331-337-Email correspondences on diverse dates between September 2015 and March 2017;
- xxiii) Document at page numbers 340-343-Terms of Reference, Finance Officer Programme;
- xxiv) Documents at page numbers 345-349-Email correspondences on diverse dates between August 2016 and January 2017;
- xxv) Document at page numbers 355-359-Contract of Employment for Aziza Buka dated April 20, 2012;
- xxvi) Documents at page number 360-Email correspondences on diverse dates in May 2015;
- xxvii) Document at page numbers 361-362-IUCN-ESARO Finance Team, Nairobi, Kenya and in Country Officers and Project Officers;
- xxviii) Document at page number 363-Staff Headcount;
- xxix) Document at page number 364-Approved Structure, 2015;
- xxx) Document at page number 365-ESARO Organogram, 2015;
- xxxi) Document at page number 366-ESARO Organogram, 2012;
- xxxii) Documents at page numbers 367-371- Email correspondences on diverse dates between October 2016 and December 2016, 2015;



- xxxiii) Documents at page numbers 379-385- Job vacancy and Email correspondences on diverse dates between September 2018 and November 2018;
 - xxxiv) Document at page numbers 389-390- Balance sheets;
 - xxxv) Document at page numbers 392-393- Balance sheets;
 - xxxvi. Documents at page number 395- Email correspondences on April 14, 2014; and
 - xxxvii) Document at page number 399-Balance sheet.
- e) The impugned documents sought to be relied upon by the petitioners consist of private and confidential documents originating from the 1st respondent, its employees and former employees and the information contained therein is protected under the Constitution of Kenya, 2010, the Evidence Act (Cap 80, Laws of Kenya), General Conditions of Service for Eastern and Southern Africa Region (ESARO) (2012) and the petitioners' Contracts of Employment dated February 27, 2014 and the petitioners have no right to them;
- f) The impugned documents aforesaid sought to be relied upon by the petitioners were obtained illegally, further the said documents are privileged and are private and confidential in nature and were not at any time either during or after the continuance of the petitioners' employment with the 1st respondent meant to be used to the detriment or prejudice of the 1st respondent;
- g) The following documents sought to be relied upon by the petitioners during the trial are inadmissible:
- i) Documents at page numbers 237-238 - Email correspondences on diverse dates in August 2016;
 - ii) Documents at page numbers 254-255 - Email correspondences on diverse dates in November 2016;
 - iii) Documents at page numbers 334-337 - Email correspondences on diverse dates between September 2015 and March 2017;
 - iv) Documents at page numbers 343-349 - Email correspondences on diverse dates between August 2016 and January 2017;
 - v) Document at page number 360 - Email correspondences on diverse dates in May 2015;
 - vi) Documents at page numbers 367-371 - Email correspondences on diverse dates between October 2016 and December 2016;
 - vii) Documents at page numbers 379-385 – Job vacancy and Email correspondences on diverse dates between September 2018 and November 2018;
 - viii) Documents at page numbers 389 to 390 – Balance sheets;
 - ix) Documents at page numbers 392 to 393 – Balance sheets;
 - x) Document at page 395 – Email correspondences on April 14, 2014; and
 - xi) Document at page number 399 – Balance sheet.
- h) The impugned documents sought to be relied upon by the petitioners violate the provisions of section 106(B) of the Evidence Act given that the said documents ought to have been accompanied by a certificate of electronic evidence;



- i) The impugned documents aforesaid are computer generated but the petitioners have not taken steps to comply with the provisions of section 106(B) of the Evidence Act which governs production and admissibility of electronic records; particularly by confirming the source, process, custody and delivery of the said electronic record before admission;
 - j) The impugned documents were obtained in a manner that is unfair, oppressive and violates the rights and fundamental freedoms of third parties and in breach of article 50(4) of the Constitution and must be expunged from the court record;
 - k) Unless the orders sought herein are granted, the protection envisaged under articles 31 and 50(4) of the Constitution will be of no value because admission of the said documents into evidence would render the entire process herein unconstitutional and as a result, reliance on the impugned documents would be injurious to third parties;
 - l) The admission of the impugned documents will certainly affect the fairness of the trial, prejudice the 1st respondent's right to fair trial and will otherwise be detrimental to the administration of justice;
 - m) No prejudice will be occasioned to the petitioners in the event the orders sought herein are granted since most if not all of the impugned documents are not relevant to the issues for determination in the petition;
 - n) It is in the interest of justice that this application be allowed.
3. The petitioners oppose the application by a replying affidavit sworn by the 1st petitioner, Philip Mark Busuru on May 27, 2022.
- 4. Busuru terms the application as misguided and accuses the 1st respondent of seeking to dictate how the petitioners should conduct their case.
 - 5. Busuru points out that it has taken five (5) years after filing of the subject documents for the 1st respondent to raise its objection.
 - 6. The petitioners contend that none of the documents they wish to rely on were obtained illegally; they add that most of the documents were shared to all staff members by the 1st respondent and some of the documents were published online for public consumption.
 - 7. The petitioners further contend that the documents in issue consist of their evidence to demonstrate discrimination and to illustrate the background to their tribulations in the hands of the 1st respondent.
 - 8. It is the petitioners' assertion that the move to lock out the documents is a self-protection and preservation attempt by the 1st respondent.
 - 9. The petitioners deny that they are using the documents to the detriment or prejudice of the 1st respondent and state that they are using the said documents to prove violation of obligations rightly due to them under their terms of engagement with the 1st respondent.
 - 10. According to the petitioners, the impugned documents form substantive evidence in an internal dispute between them and the 1st respondent as their employer and they ought not to be expunged from the court record.
 - 11. The petitioners add that all the documents were obtained lawfully and no rights had been infringed.



12. Regarding the issue of electronic evidence, the petitioners urge that they will be seeking leave of the court to file the attendant certificate.
13. In its decision in *SBI International Holdings Ag (Kenya) v Amos Hadar [2015] eKLR* this court held that confidential information accessed by an employee in the course of employment is protected from disclosure as long as the said information is proprietary in nature.
14. As to what constitutes confidential information, the South African case of *Advtech Resourcing (Pty) Ltd v Kubn 2007(4) ALL SA 1386, C para [51]* is persuasive. In that case it was held that for information to qualify as confidential the following requirements must be fulfilled:
 - a) The information must involve and be capable of application in trade and industry; that is, it must be useful;
 - b) The information must not be public knowledge and public property; it must be known to a restricted number of people or to a closed circle;
 - c) The information must be of economic value to the person seeking to protect it.
15. By its application, the 1st respondent seeks to bar the petitioners from producing all manner of documents, including documents that would ordinarily be in the public domain, such as balance sheets and organograms. No evidence was led to place any of the subject documents within the confidential category nor was there evidence of any of them having been accessed through unlawful means.
16. What emerges from the present application is a party seeking to lock out evidence from the court under the guise of privacy. The application must therefore fail and is dismissed with costs in the petition.
17. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 29TH DAY OF SEPTEMBER 2022.

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JUDGE

Appearance:

Mr Namada for the petitioners

Mr Kimani for the 1st respondent

No appearance for the 2nd respondent

