



**Akinyi & 7 others v Shurie & 2 others (Cause 893 of 2017)
[2022] KEELRC 13364 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13364 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 893 OF 2017
SC RUTTO, J
DECEMBER 2, 2022**

BETWEEN

**LUCY AKINYI 1ST CLAIMANT
BARON OTIENO OLUOCH 2ND CLAIMANT
CAREY DUNCAN KARAN 3RD CLAIMANT
FRANK ONYANGO SUNGA 4TH CLAIMANT
REAGAN ONYANGO OKATCH 5TH CLAIMANT
SHADRACK OMULLO OKEYO 6TH CLAIMANT
BARRACK OCHIENG ODHIAMBO 7TH CLAIMANT
CAROLINE ANYOSO 8TH CLAIMANT**

AND

**MOHAMED MOULID SHURIE 1ST RESPONDENT
WATER RESOURCES MANAGEMENT AUTHORITY 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT**

RULING

1. The matter herein is part heard. The Claimants' witness, Mr. Baron Otieno was in the process of giving evidence in chief. As he was about to start producing the Claimants' documents as exhibits, Counsel for the 1st and 2nd Respondents, Mr. Olaha, moved to have certain documents contained in the Claimants' bundle, expunged from the record. Subsequently, Mr. Otieno was stood down and the Court directed that the Respondents file a formal Application. It is that Application that comes up for determination.



2. The Application which is dated 27th July, 2022, seeks to have the following documents expunged from the Court's record:
 - i. Minutes of the Special Board Consultative Meeting with the New Chief Executive Officer held on Monday 15th August 2016 at WARMA Boardroom (Appendix L3 page 56-67).
 - ii. Minutes of the 50th Full Board Meeting held on Wednesday 28th September, 2016 at WARMA Authority Board room (Appendix L3, page 68-72).
 - iii. Water resources Management Authority Internal Memo from Chief Human Resources to Chief Executive Officer dated 9th August, 2016, subject "Forwarding of list of all names of appointments, promotions, upgradings and transfers done in 2016" (Appendix L4, page 73-98).
 - iv. Water Resources Management Authority letter by Mohamed M. Shurie to the Commandant Administration Police dated 1st August, 2016 (Appendix L5, page 99).
 - v. Water Resources Management Authority Internal Memo from Chief Human Resources to Chief Executive officer dated 14th July, 2016, titled Request for Approval (Appendix L5, page 100-107).
 - vi. Water Resources Management Authority Internal Memo from Chief Human Resources to the Chief Executive officer dated 2nd August, 2016, titled Request for Approval (Appendix L5, page 108-113).
 - vii. Water Resources Management Authority Letter dated 2nd August, 2016 titled Deployment of WRMA PIU Members (Appendix L5, page 114).
 - viii. Water Resources Management Authority Letter dated 3rd August, 2016 to Mr. Shaban Ahmed Golicha (Appendix L5, 115).
 - ix. Water Resources Management Authority Letter dated 19th October, 2016 by Mohamed M. Shurie (Appendix L5, page 116-118).
 - x. Water Resources Management Authority Letter dated 3rd March, 2017 by Mohamed M. Shurie (Appendix L5, page 119-120).
 - xi. Water Resources Management Authority Letter dated 26th January, 2017 by Mohamed M. Shurie to Phylis Wachira together with employment particulars of James Muturi Mburu (Appendix L5, page 121-126).
 - xii. Water Resources Management Authority letter to Mohamed Moulid Shurie dated 24th June, 2016, Mohamed Moulid Shurie Application letter dated 22nd April, 2016, Hon. Eugene L. Wamalwa letter to Chair of the Board of WARMA dated 23rd June 2016, WARMA Handing Over Report dated 1st August, 2016 (Appendix L5, page 127-138).
 - xiii. Water Resources Management Authority Internship Policy (pages 199-285).
3. The Application is premised on the grounds appearing on its face and on the Affidavit of Mr. Mohamed Moulid Shurie who describes himself as the 1st Respondent and the Chief Executive Officer of the 2nd Respondent. Briefly, he avers that:



- i. the documents submitted contained in the list and bundle and documents filed by the Claimant are private and confidential in nature that ought only to be ordinarily in possession of the Respondent;
 - ii. the documents touching on the private employment particulars of employees who are not parties to the suit;
 - iii. the unauthorised access to the said documents by the Claimants flies in the face of Section 8 of the [Access to Information Act](#), No. 31 of 2016 as no request for the same was made by the Claimants either to the affected employees or to the Respondents;
 - iv. the production of and admissibility of the said documents are contrary to the 2nd Respondent's Confidentiality Policy;
 - v. the production of and admissibility of the said documents will cause a grave injustice to the 2nd Respondent and would further prejudice its right to fair trial as the Respondent runs the risk of facing legal consequences for divulging private and confidential information.
4. The Claimants opposed the Application through a Replying Affidavit sworn on 7th September, 2022 by Mr. Baron Otieno Oluoch. He avers that:
- i. he has authority to swear the Affidavit on behalf of the other Claimants;
 - ii. the documents sought to be expunged from the record by the Respondents were and are public documents used in a different matter, being ELRC Cause Number 561 of 2017 involving the 1st and 2nd Respondents;
 - iii. copies of the appointment letters, identity cards and reporting letters were officially pinned on the notice board of the 2nd Respondent's offices for purposes of identifying who was posted where and when they were expected to report to their specific stations of engagement as had been the practice of the 2nd Respondent;
 - iv. the documents annexed in its pleadings do not in any way violate the privacy of the 1st and 2nd Respondents' employees nor is the information confidential in nature;
 - v. the Respondents have given the subject a narrow interpretation of the provisions of [Access to Information Act](#) and confidentiality policy as read together with Article 50(4) of [the Constitution](#);
 - vi. they did not need to comply with the provisions of section 8 on the need to make a request for information as the same was readily available on the Notice Board hence in public domain;
 - vii. the Application herein is belated and is an afterthought as the documents were filed in 2017 and the Application is being made 4 years 3 months yet the Respondents had indicated that they were ready to proceed with the case as it was and pre-trial directions had already taken place.
 - viii. the documents found their way into the hands of the Claimants in a proper and authorised manner;
 - ix. expunging crucial documents which form part of the intrinsic evidence supporting their claim would amount to a grave violation of their right to a fair trial and the Claimants stand to be seriously prejudiced to the advantage of the 1st and 2nd Respondents;



- x. the documents sought to be expunged strongly demonstrates nepotism and discrimination which is practised undeterred at the 2nd Respondent's establishment;
 - xi. confidential documents in an employment relationship amount to those that contain secret information or which information is not generally known or readily accessible to other persons;
 - xii. the 1st and 2nd Respondents have not demonstrated how the Claimants who have been their employees have damaged their interest;
 - xiii. confidential documents are deemed confidential when the owner has taken reasonable steps to limit access of such documents to employees and other unauthorised persons. In the present case, the Respondents have not demonstrated such.
5. The Application was canvassed through written submissions. At the time of writing this Ruling, the Respondents/Applicants were yet to file their submissions as the same were not on the Court's physical record and could not be traced on the online portal.

Claimants' Submissions

6. The Claimants submitted that the documents annexed to the Memorandum of Claim do not in any way violate the privacy of the Respondents. To this end, they placed reliance on the case of *John Muriithi & 8 Others vs Registered Trustees of Sisters of Mercy (Kenya) t/a "Mater Misericordiae & Another* (2018) eKLR.
7. It was further submitted that the Court's power to admit or reject documents or evidentiary materials, is a matter of discretion and which should be exercised in favour of the Claimants. That the Respondents did not demonstrate in what way the alleged breaches were allegedly committed. That the Respondents have not exhibited a confidentiality policy which they allege to have been breached. That there was also no proof that the documents exhibited are confidential.
8. It was further argued by the Claimants that the Respondents have given the issue a very narrow interpretation of section 8 of the *Access to Information Act* as read together with Article 50 (4) of *the Constitution*. That the documents sought to be expunged do not fall in the category of evidence that is not admissible being that the evidence is illegally obtained by way of torture, coercion and entrapment. That Article 50(4) of *the Constitution* envisages exclusion of evidence that is illegally obtained. The Claimants buttressed their submissions on the case of *Nicholas Randa Owano Ombija vs Judges and Magistrates Vetting Board* (2015) eKLR.
9. The Claimants further submitted that their right to fair trial will be grossly violated in the event the Application is allowed. That the documents sought to be expunged strongly demonstrates nepotism and discrimination which is practised undeterred at the 2nd Respondent's establishment.

Analysis and Determination

10. From the Application, the response thereto and the submissions on record, the main issue for determination is whether the Application is merited thus warranting the Court to expunge the documents cited by the Respondent, from the record.
11. At the outset, it is important to point out that this Court has the duty to balance both the right of the Respondents to privacy and that of the Claimants to adduce evidence and prosecute their case in the manner they deem fit. Further it is worth noting that this Court's ultimate determination of the dispute largely depends on the evidence adduced by both sides.



12. On this score, I wish to echo the sentiments of the Court of Appeal in *Okiya Omtatah Okiiti & 2 others v Attorney General & 4 others* [2020] eKLR where the learned Judges held as follows:

“We have considered the rival arguments. This issue brings to the fore the tension between the need for the court to be able to consider and have access to evidence which would enable it to fairly and effectively determine a dispute on the one hand and the need to avoid irregularity or impropriety in the way in which evidence is obtained or secured. In an article titled, The Court’s Discretion to Exclude Evidence in Civil Case and Emerging Implications in the Criminal Sphere (2016) 28 SAclJ, Professor Jeffrey Pinsler, SC put it this way: “...the court must try to give effect to two conflicting public interests: the need for the court to have access to the evidence in the interest of fair and just adjudication and the avoidance of misconduct in the manner of securing evidence. The outcome of the balancing operation depends on the circumstances.” (emphasis mine).

13. The Respondents have argued that the documents contain confidential information touching on the private employment particulars of some of the 2nd Respondent’s employees. They aver that the same is contrary to the Confidential Policy of the 2nd Respondent and that their production will cause a grave injustice to its organization which will face legal consequences for divulging the information.
14. In the case of *Leland I. Salano vs Intercontinental Hotel* [2013] eKLR the Court had this to say with regards to what may be deemed as confidential documents:

“Confidential documents in the employment relationship are documents regarded by the employer to contain secret information, or information which is not generally known, or readily accessible to other persons, other than the employer. They are confidential if their unauthorized disclosure, could damage the essential interests of the employer’s business. Such documents may contain signs, or paragraphs, identifying them to be confidential. They are protected from misuse and improper disclosure. The documents are deemed confidential when the owner of those documents has taken reasonable steps, to limit access of the documents to employees and other unauthorized persons.” Emphasis mine.

15. Turning to the instant case, it is noteworthy that the Respondents have not exhibited the Confidential Policy it has alluded to. Therefore, there is no evidenced obligation imposed on the Claimants against disclosure of the 2nd Respondent’s documents. Further, some of its internal documents, for instance, the Board Minutes, internal memoranda and the internship policy, which would ordinarily be identified and marked as “confidential” have not been identified as such. Besides, the Respondents have not demonstrated the reputational damage or the prejudice it will suffer by having the said documents on record.
16. It is also notable that the documents are to be used for purposes for litigation within the confines of the Claimants’ case and in a setting that can be termed as privileged.
17. To this end, I am not persuaded that the minutes, internal memoranda and the internship policy which appear at pages 56-74 and 199-285 of the Claimants’ bundle, are confidential documents as to be expunged from the record. Over and above, this Court is mindful of the need to do substantive justice and its principal objective which is to facilitate the just, expeditious, efficient and proportionate resolution of disputes.
18. With regards to the documents appearing at pages 75-96, 121-126, I note that the same contain information and particulars in regards to several employees of the 2nd Respondent. Some are



appointment letters, pay change advice forms and pay slips. They contain personal particulars of certain employees, for instance, names, bank account numbers, Personal Identification Numbers (PIN) numbers and National Identity Card numbers.

19. It is noteworthy that the Claimants have accused the Respondents of practicing nepotism and discrimination. Supposedly, it is in that regard that they have annexed the said documents in reference to the other employees of the 2nd Respondent. Evidently, this is meant to bolster their claims along those lines.
20. As I have stated herein, the information contained in the documents is to be used for purposes of this case and in a setting that can be termed as privileged.
21. Therefore, I will admit the said documents save that they will be redacted to exclude the personal details such as the names and other particulars identifiable to the concerned employees of the 2nd Respondent, who are notably, not parties to this case. This way, the Claimants will still have the substance of the evidence they intend to rely on at the trial whereas the identities of the persons named in the specified documents will be protected.
22. Having perused the claim alongside the documents appearing at pages 97-120, 127, 129-138, I have struggled to find their relevance at this preliminary stage. The claim does not disclose how the case turns on these documents which relate to the 1st Respondent's application to his current position, his letter of appointment, list of staff recommended for promotion, list of staff in acting positions, list of staff for redesignation, list of staff transfers and postings. Therefore, the Court is not persuaded that these documents should be retained on record.
23. Be that as it may, the Claimants are at liberty to file a Notice Produce in the event they deem the said documents as being so pertinent as to have a significant bearing on their claim.

Orders

24. It is against this background, that the Court makes the following orders:
 - a. The Application dated 27th July, 2022 is partially allowed to the extent that the documents appearing at pages 98-120, 127, 129-138 are hereby expunged from the record. Nonetheless, and as stated herein, the Claimants are at liberty to file a Notice Produce as may be appropriate.
 - b. The Application partly fails as the documents contained at pages 75-96, 121-126, are admitted, save that they are to be redacted to exclude the personal particulars of the concerned employees.
25. To this end, the Claimants shall furnish the Court and the Respondents with a fresh bundle of documents in compliance with this order.
26. The Respondents shall meet the costs of this Application for having brought the instant Application too late in the day.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2022.

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STELLA RUTTO

JUDGE

Appearance:

Mr. Jaoko for the Claimants



Mr. Olaha for the Respondents

Court Assistant Abdimalik Hussein

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 15th March 2020 and subsequent directions of 21st 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 had 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.

STELLA RUTTO

JUDGE

