



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO. 426 OF 2019**  
**(CONSOLIDATED WITH CAUSE NO. 427 OF 2019 AND 428 OF 2019)**

KENNEDY KIMATHI NGONGO.....1<sup>ST</sup> APPLICANT

LUCY MARY ACHIENG OLERO.....2<sup>ND</sup> APPLICANT

WALTER WANJALA.....3<sup>RD</sup> APPLICANT

-VERSUS-

ROCHE KENYA LIMITED.....RESPONDENT

**RULING**

1. The Applicants filed separate applications dated 19.8.2020, 11.8.2020 and 25.8.2020 all seeking the following orders:

a. THAT the Respondent be ordered to furnish the Applicants and this Honourable Court with certified copies of its CR12 as at the time of declaration of the redundancy on 31.5.2018 and its CR12 as at the date of such order as may be made by this Honourable Court.

b. THAT the Respondent be ordered to furnish the Applicants and this Honourable Court with the organogram that it had on 28.2.2018 three months prior to the redundancy of the Applicants on 31.5.2018.

c. THAT the Respondent be ordered to furnish the Applicants and this Honourable Court with the organogram that it immediately introduced after declaring the Applicants redundant on 31.8.2018.

d. THAT the Respondent be ordered to furnish the Applicants and this Honourable Court with the organogram it relied on as at the time of filing this suit on 28.6.2019 as well as the organogram at the date such order is made by this Honourable Court.

e. THAT the Respondent be ordered to furnish the Applicant and this Honourable Court with the audited financial reports for the years 2015, 2016, 2017 and 2018.

f. THAT the Respondent be ordered to furnish the Applicant and this Honourable Court with particulars of its full list of employees.

i. it had on 28.2.2018 three months before the redundancy of 31.5.2018.

ii. another list of employees as at 30.11.2018 six months after the redundancy of 31.5.2018 disclosing their salaries benefits, allowances, qualifications, work permits where applicable as well as their nationalities; and

iii. a third list of all its employees as at the date of such order as may be made by this Honourable Court.

g. THAT the Respondent be ordered to furnish the Applicant and this Honourable Court with all the employment contracts of its employees;

i. three months prior to the redundancy of 31.5.2018 that is as at 28.2.2018;

**ii. all employment contracts of its employees six months after the redundancy that is at 30.11.2018;and**

**iii. all the current employment contracts of its employees as at the date of such order as may be made by this Honourable Court.**

**h. THAT the costs of this application be borne by the Respondent.**

2. The applications are based on grounds that:

- a. The Applicants are former employees of the Respondent and were unlawfully declared redundant on 31.5.2018 at the expense of expatriate employees
- b. The documents sought have been referred to in the Statement of Claim, are relevant and necessary for the fair trial of the main cause.
- c. Without these documents, this Honourable Court will be denied the chance to fully appreciate the case against the Respondent.
- d. The Applicants wish to rely on past and present employment records in the Respondent's custody and control.
- e. The Respondent will not be prejudiced by the said orders as it may also rely on the said documents/ records during trial.

3. The Respondent filed Grounds of Opposition dated 2.2.2021 and a Replying Affidavit sworn by Frank Loeffler, its Country Manager, on even date. The deponent contended that none of the documents sought is relevant to the determination of the issues before this Court.

4. He averred that the parties have produced lists and bundles of documents which are all necessary for the just determination of the suit by this Court. He further averred that a CR12 is issued by the Registrar of Companies and the Applicants are able to obtain such information by making a request to the Registrar; that the Respondent does not have a CR12 from 31.5.2018 in its records and the Registrar cannot generate a CR12 for previous years and in any event the shareholding structure and directors of the company have no bearing on the claim for unfair termination.

5. He averred that the Respondent does not have an organogram of 28.2.2018 which is 3 months before the redundancy was effected. He further averred that the Applicants have produced the organogram in their respective List and Bundle of documents. He averred that the Respondent at page 9 of its Index and Bundle of documents also produced an organogram showing the new structure following the redundancy.

6. He contended that the Applicants have failed to demonstrate the relevance of the CR12 to the proceedings and are attempting to access confidential information with respect to individuals who are not parties to the present suit. He denied the allegations that the Applicants were discriminated against and stated that the disclosure of confidential information such as salaries, allowances, benefits and nationalities of other members will be in violation of their right to privacy under the Constitution and the data protection laws.

7. In response to the Replying Affidavit, the 1<sup>st</sup> Applicant filed a Supplementary Affidavit sworn on 24.3.2021. He contended that the documents produced so far are not sufficient to prove the main cause. He contended that his advocate attempted to apply for the CR 12 but was unable to proceed as they did not have the Respondent's company registration number.

8. He further contended that the requests for contracts of employment after the redundancy is to show that the positions declared redundant were later filled; that the documents they wish to rely on are in the custody and control of the Respondent and that it is in the interest of justice that the application be allowed.

9. The application was canvassed by way of written submissions.

#### **Applicants' submissions**

10. The Applicants relied on Article 35 (1) (b) of the Constitution and section 22 (a) of the Civil Procedure Act and reiterated that without the documents sought, they will be denied a chance at a fair trial and the Court will be denied a chance to appreciate the case against the Respondent.

11. They submitted that the certified copies of the CR12 are to show the shareholding and directorship of the Respondent; that the organograms will show the various positions before and after the redundancy and if the structure was altered; and that the financial reports for the years 2015, 2016, 2-17 and 2018 will show the profits or losses made by the Respondent.

12. They further submitted that the particulars of the Respondent's list of employees and employment contracts will compare the changes in terms of the restructure, show that the positions were filled out and the conditions of employment of the new employees.

13. They relied on **Concord Insurance Co. Limited v NIC Bank Limited [2013] eKLR** where the Court cited the definition of discovery in the Black's Law Dictionary and further held that in an application for discovery a party has to ensure that documents sought are necessary to the cause of action before or pending trial before the court.

14. They submitted that the documents sought will prove the extent to which the termination was unjustified, unlawful and marred with discrimination. They submitted that once discovery is allowed, the Respondent will not be prejudiced and it may rely on the said documents.

15. They relied on **Rafiki Microfinance Bank Ltd v Zenith Pharmaceuticals Ltd [2016] eKLR** where the Court held that discovery will not be ordered on an irrelevant allegation in the pleadings and cannot be allowed to enable a party 'fish' for witnesses or a new case. They further relied on **Oracle Productions Limited v Decapture Limited & 3 others [2014] eKLR**.

16. They submitted that the right to privacy under Article 31 of the Constitution is not absolute as Article 35 of the Constitution provides for the right of access to information.

17. They relied on **Alfred Crompton Amusement Machines Limited v Commissioner of Customs and Excise (No.2) 1973 2 All ER 1169** that privilege against disclosure cannot be claimed on grounds that the documents were confidential or belonged to a third party. They further relied on **Vincent Muema Mutuku v Rift Valley Railways (Kenya) Limited [2015] eKLR** where the Court ordered the labour commissioner to visit the Respondent's premises and be provided with employment records.

18. They submitted that they have framed their case on the basis of unlawful termination marred with discrimination and the documents are relevant for fair trial of the claim.

### **Respondent's submissions**

19. The Respondent relied on the definition of discovery under the Black's Law Dictionary [6<sup>th</sup> edition] and emphasized that disclosure by the defendant is with respect to disclosure of facts, titles and documents that are in his exclusive knowledge or possession and part of the action pending or brought in another court. It relied on the decision in **Laiser Communications Limited & 5 Others v Safaricom Limited [2019] eKLR** that discovery should be limited to matters in contention.

20. It argued that it does not have the CR 12 from 31.5.2018 thus the request of it or as the date of the order of the court fails the test of exclusive possession and custody. It further argued that the directorship and shareholding of the respondent are not issues in dispute of relating to the issue before the court.

21. It submitted that the redundancy was not based on financial considerations and its audited accounts have no bearing on the claim. It further argued that it has never stated that the reorganization was necessitated by financial constraints.

22. It submitted that the reorganization is a business decision based on operational requirement of an employee. In support of this position, it relied on the decision in **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR** as cited in **Juma Onyango William v Kipepeo Group of Hotels [2020] eKLR**.

23. It argued that particulars of employees sought relate to the period before and after redundancy yet the claim is for discrimination at the time of redundancy.

24. It further argued that the particulars of its employees are confidential information that should not be unnecessarily disclosed. It relied on **Vincent Muema case [supra]** and submitted that the court held that allowing production of documents such as pays slips and academic credentials relating to a third party who is not a party to the claim would be prejudicial to the 3<sup>rd</sup> party and would be tantamount to infringement of the third party's right to privacy.

25. It distinguished this case from the **Vincent Muema case [Supra]** by stating that in that case the documents sought were in relation to pay disparity between the claimant and an identified individual and the documents were not granted to the Claimant but to the labour officer.

26. It submitted that the attempt to access confidential documents which are not relevant to the fair determination of this suit and which production will prejudice the right to privacy of its employees which is against the text and spirit of Article 24 (1) of the Constitution of Kenya.

27. It submitted that in **JLN & 2 others v Director of Children Services & 4 others [2014] eKLR** the Court cited **W v Edgell [1990] 1 All ER 835** where the principles under which confidential information may be disclosed were set as follows; a real and serious risk of danger to the public must be shown; the disclosure must be to a person who has legitimate interest to receive the information and the disclosure must be confined to that which is strictly necessary.

28. It submitted that the present application has only delayed the hearing of the matter and increased costs and that the Respondent has demonstrated that none of the documents sought is relevant to the matters in dispute. It urged the court to dismiss the application with costs.

### **Issues for determination**

29. The main issue for determination is whether the Applicants are entitled to an order for discovery.

30. The application is brought under section 22 (a) of the Civil Procedure Act which provides:

***“Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party—***

***(a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;”***

31. The Applicants seek production of the various documents on the basis that they are relevant and necessary for the fair trial of their case. The 1<sup>st</sup> Applicant in his supplementary affidavit confirms that the documents already produced by the Respondent are relevant but states that they are not sufficient.

32. The test to be applied in applications for discovery was set out by Gikonyo J in **ABN Amro Bank N.V v Kenya Pipeline Company Limited [2014] eKLR** as follows:

***“...It, therefore, serves a higher objective as the enabler of fair hearing. Needless to state the primary devices of discovery are interrogatories, depositions, request for admissions, inspection of documents and requests for production of documents etc. But such application seeking information and documents is measured on a new yardstick; the Applicant must; a) identify the information and or documents; and the person holding the information; and b) show that the information and or documents are required for the exercise or protection of a right or fundamental freedom. The latter enjoins the Applicant to show the information is relevant and necessary to determination of the suit. This constitutional test must be met before orders of discovery are issued.” [Emphasis Added]***

33. Before delving into the documents sought by the Applicants, it is worth pointing out that none of the applications was supported by an affidavit to explain the necessity of these documents to the trial.

34. First, the Applicants admit that they were employed by the Respondent as medical representatives. However, they do not address what is the nexus between the Respondent’s shareholding and directorship with the suit. Needless to say, those persons have separate legal personality with the Respondent with whom they have an employment relationship.

35. I do agree with the Respondent that a CR 12 can be obtained from the Companies Registry through the Registrar of Companies and not necessarily through the Respondent. Consequently, the said documents are not in the sole custody of the respondent. I also do not find the CR 12 to have any relevance to the suit.

36. Second, on the organograms the Respondent averred that it does not have an organogram of 28.2.2018 and that the parties have produced an organogram. The Applicants produced an organogram/ structure that was applicable before 2.5.2018 while the Respondent produced what it described as the new structure. It would be pointless for this Court to issue an order to produce a document whose existence is unknown and the other is said to have been already produced. I therefore find that the court has no need to order that the 3 organograms be produced in court.

37. Third, the Applicants sought audited financial reports for the years 2015, 2016, 2017 and 2018 to show the profits or losses made by the Respondent. The Respondent contended that the redundancy was based on operational requirements and that the redundancy was not based on financial considerations.

38. The Applicants averred in their Statement of Claim that there was growth of business and that the May 2018 redundancy was for self-preservation of the expatriate community who held dubious qualifications. The notice of intention to terminate dated 2.5.2018 stated that the company was undergoing restructuring due to operational requirements. It did not state that the redundancy was occasioned by recurrent financial downturns from the years 2015 to 2018. Therefore I find that the audited reports are irrelevant to the suit.

39. I gather support from the case of **Concord Insurance Case [Supra]** was that:

***“Discovery is therefore limited solely to the matter in contention. The Court, in exercise of its discretion to issue such orders as to discovery, will be guided by the relevance of the documents that the applicant seeks, in relation to the pleadings.”***

40. Fourth, the Applicant submitted that the list of employees and the employment contracts of its employees would be used to compare the changes that happened in terms of the restructure and the different terms and conditions of work.

41. The Respondent submitted that this would amount to an infringement of the employees’ right to privacy. The Applicants dispute this by stating that the right under Article 31 of the Constitution is not absolute.

42. The common ground is that the said Respondent’s employees are not parties to this suit. Despite the fact that the Applicants have a right to access to information under Article 35 (1) (b) of the Constitution, the Respondent and its employees also have a right to privacy, under Article 31 (a) not to have information relating to their family or private affairs unnecessarily required or revealed.

43. Although discovery is expected to ensure that the right to fair hearing is achieved, it cannot be ordered where it shall result to a violation of another’s constitutional right. Consequently, I find that it would be unlawful to allow discovery by production of contracts of employees who are not parties because it violates the said employees rights to privacy. I also do not believe that the applicants can only be able to establish their case if the said contracts for the other employees are produced in court.

44. However, I see no harm in ordering the Respondent to produce the lists of employees sought because they are necessary in establishing whether or not there was discrimination. The order is also necessary because it is only the Respondent with the exclusive custody of the same.

45. In the end, I find that the Applicants have not demonstrated their right to discovery under section 22 (a) of the Civil Procedure Act and Rule 25 (7) of the Employment and Labour Relations Court (Procedure ) Rules 2016 except with respect to lists of employees. The application is therefore dismissed save for prayer (f) (i)-(ii) above. Costs in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF SEPTEMBER, 2021.**

**ONESMUS N. MAKAU**

**JUDGE**

**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 15<sup>th</sup> April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**