

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 772 OF 2019

PETER NJAU KANGETHE.....CLAIMANT

VERSUS

BIC EAST AFRICA LIMITED.....RESPONDENT

RULING

1. Objection is taken by learned Counsel for the Respondent Mr. Obonyo to documents appearing at pages 52 to 67 and pages 87 to 101. Mr. Obonyo argues that these documents being undated and unsigned are of doubtful provenance and given the imprimatur under Section 69 of the Evidence Act are incapable of admission. He thus urges they be expunged from the record.

2. Mr. Gatore learned Counsel for the Claimant is opposed. He argues that the objection taken is misplaced as the documents relate to the case and that he thought the Respondent would not object to the production. He submits that unless a document is a forgery the Court has wide discretion to admit documents to allow the Court reach a just determination. He asserts that it is needless to demonstrate that Article 159(2) frees the Court from the shackles of technicality and that the documents ought in the interest of justice, be admitted.

3. Mr. Obonyo in a brief reprise asserts that the objection he has taken for the Respondent is not baseless. He submits that Sections 67, 68 and 69 of the Evidence Act meticulously set out the procedure on admission of documents and that goes to the root of the provenance of the documents he has objected to. He argues that this is not a technicality and is actually substantial as it relates to procedure.

4. The objection taken on the documents is articulated to be on one on Section 69 of the Evidence Act. It is said the provenance of these documents impugned are doubtful as they lack signature and are undated. Section 69 of the Evidence Act being impacted in this case provides in *parri materria* as follows:-

“Secondary evidence of the contents of the documents referred to in Section 68(1)(a) of this Act shall not be given unless the party proposing to give such secondary evidence has previously given the party in whose possession or power the document is, or his advocate, such a notice to produce it as is required by law.....”

5. It is not in controversy – no notice to produce is shown to have been given. The shield by Claimant is that technicalities should be eschewed by the Court in keeping with the spirit of Article 159 of our constitution.

6. The Respondent is correct on the scope that the documents being objected to are not being objected to on a mere technicality as would be cured by the spirit of Article 159. Instead, the documents being at pages 52 to 67 and pages 87 to 101 of the Claimant’s bundle are correctly objected to and I uphold the objection raised and strike these specific documents from the Court records. They are hereby expunged. As there was no issue on the rest of the bundle, the case will proceed on the basis that the impugned documents are not admitted and they are not produced.

It is so ordered.

Dated and delivered at Nairobi this 3rd day of November 2021

Nzioki wa Makau

JUDGE