



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC CAUSE NO. 1149 OF 2017

(Before Hon. Justice Hellen S. Wasilwa on 20th May, 2019)

DAVID M'ITI MAKWACII.....CLAIMANT

-VERSUS-

KENYA DEFENCE FORCES.....RESPONDENT

RULING

1. The Application before Court is the one dated 29th January, 2019. The Application was filed through a Notice of Motion filed under Section 3A of the Civil Procedure Act, Section 137 of the Evidence Act and all enabling provisions of the Law.
2. The Application seeks the following Orders that:-
 1. *The documents titled 'Brief for CDF' dated 10th April 2017 and letter done to the acting chairperson of the Commission on Administrative Justice dated 16th of May, 2017, filed in the Claimant's additional list of documents be struck out from the Claimant's list of documents and the Court record entirely.*
 2. *The costs of this Application be in the cause.*
3. This Application is premised on the grounds that:-
 - a) *The said document is a legal opinion generated out of an advocate- client relationship and the information contained therein is protected under the Evidence Act, Cap 80 Laws of Kenya and the same is not admissible in Court.*
 - b) *The Claimant obtained the said document illegally, the original of the same is titled restricted and was not at any time meant for consumption of the Claimant.*
4. The Application is supported by the Affidavit of **LILLIAN SHIGOLI** sworn on 29th January, 2019, in which she reiterates the averments made in the Notice of Motion Application.
5. The Claimant/Respondent on the other hand opposed the instant Application vide a Replying Affidavit sworn by **DAVID M'ITI MAKWACII** on 21st March, 2019 and filed in Court on 22nd March, 2019 in which he (the Claimant), avers that the said documents that the Respondent/Applicant seeks to expunge from the Court record are not confidential or secret documents as they are not kept under secret documents and can easily be obtained from his record file at the Ministry of Defence.
6. He further averred that the letter dated 16th May, 2017 was issued to him by the Commission on Administrative Justice when he visited the office to check on the progress report having lodged a complaint therein against the Respondent in the main Claim.
7. He further averred that he is entitled to the said letter as he lodged the complaint and as such the Commission on Administrative Justice were obligated to disclose all material facts pertaining to the complaint with the Claimant/Respondent.
8. The Claimant/Respondent averred that his Advocate on record got the documents through him after he obtained the same from his file at the Defence Headquarters through the right channels.

9. The Claimant/Respondent further averred that the said document referred to in the Application do not fall under documents prescribed under Section 137 of the Evidence Act. He urged the Court to dismiss the instant Application with costs, as the same is frivolous, vexatious and lacks merit and is only meant to delay the fair hearing of the main Claim.

10. The Application was canvassed orally in open Court on 25th March, 2019.

Respondent/Applicant's Submissions

11. Counsel on record for the Respondent/Applicant stated that the instant Application has been brought under Section 134 & 137 of the Evidence Act and Article 50 (4) of the Constitution of Kenya, 2010 which guard against evidence illegally obtained.

12. The Respondent/Applicant urged the documents filed in the Claimant's additional documents comprising of the letter dated 16th May, 2017 as well as a brief to the Chief of Defence Forces expunged as the said documents are privileged.

13. It was further argued that the letter to the Ombudsman from Kenya Defence Forces (KDF) dated 16th May, 2017 was not copied to the Claimant and he obtained the same through dubious means.

14. The Respondent/Applicant urged the Court to expunge the said documents. To fortify their argument the Respondent/Applicant cited the Authority of **Jackline Chepkemoi Kimeto Vs Shafi Grewal Kaka & 3 Others (2019) eKLR** where the Court ruled against the production of privileged documents.

Claimant's/Respondent's Submissions.

15. It is submitted on behalf of the Claimant/Respondent herein that the documents the Respondent/Applicant seeks to expunged are not private documents and that the Claimant obtained the same from his personal file and are therefore not private.

16. It is further submitted that the Applicant has not proved by way of evidence that the documents were either marked 'Confidential' or 'Private'. Further, that the said documents referred to in the Application do not touch on the security of the Country. He stated that the documents will be vital in assisting the Court to determine the issues pending in the main claim.

17. In conclusion, the Claimant/Respondent urged the Court to dismiss the instant Application as the same is only meant to delay the speedy hearing and determination of the main claim and deny him a fair trial.

18. I have examined all the averments from both parties. The Applicant seeks to be expunged certain documents from the record indicating that they were obtained illegally.

19. The documents in question relate to a Brief for CDF dated 10th April 2017 and a letter dated 16.5.2017 filed by the Claimant in his list of additional documents. The Claimant indicated that the letters were availed to him from his personal file. He did not explain how he got access to his personal file.

20. The Brief to CDF is indeed a brief by Counsel to his client. This is a confidential document under Section 137 of the Evidence Act.

21. The Claimant does not explain how he got the said letters from his personal file. I therefore agree with the Applicants that the documents in question were illegally acquired and I therefore expunge the 2 impugned documents from the record.

22. Costs in the cause.

Dated and delivered in open Court this 20th day of May, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Captain Miss Mjomba for the Respondent/Applicant – Present

No appearance for the Respondent