



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 232 OF 2016

(Consolidated with Cause No. 219, 338, 339 & 340 of 2016)

(Before Hon. Justice Hellen S. Wasilwa on 1st March, 2018)

CLEOPATRA KAMA MUGYENYI.....CLAIMANT

-VERSUS-

AIDSPAN.....RESPONDENT

RULING

1. The Application before the Court is dated 3rd July, 2017, brought Under Order 16 Rule 6 of the Civil Procedure Rules 2010 and Sections 22(a), 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law seeking for Orders that:

1. That this Honourable Court do issue an order directed to the Respondent (AIDSPAN) compelling it to produce all employment records for Kenyan staff, all consultants & Donor Grant agreements plus their monthly payments.

2. That costs of this application be provided for.

2. The Application is premised on the grounds that:

1. That the Claimant is a former employee of the Respondent and was unfairly and unlawfully dismissed in 2015.

2. That the Claimant wishes to rely on present and past employment records in the Respondent's custody and control.

3. That the Respondent will not be prejudiced by the said Orders as they may also rely on the said records during the trial.

4. That it is in the interests of justice that the said order be granted.

3. The Application is also supported by the Claimant's affidavit wherein she reiterates the grounds on the face of the application.

Submissions

4. The Claimant/Applicant submits that the main issue in controversy is whether the Respondent's practice was to automatically renew the contracts of its employees upon the expiry of the 2 year contract period. That the instant application will greatly assist the Court in determining the issue in dispute and in so doing the Court will also be able to determine whether the termination was lawful and procedural.

5. Counsel for the Applicant argues that the information sought will not infringe the rights of third parties who are not parties to the suit since the information is not sought out of malice or for public consumption but strictly for purposes of this suit.

6. That the request sought is accurate and specific as the Claimant states that during her testimony she will refer extensively to the past and present employment records of the Respondent for both Kenyan staff members as well as consultant contracts.

7. Further it is submitted that if the prayers sought are not granted the Claimants will be denied a chance to prove their case and that in any event the Respondent has not shown what prejudice they will suffer should the application be allowed.

8. Counsel cites the case of **Transport and Allied Workers Union (K) v Societe Internationale (2014) eKLR** where the Claimant sought for the production of settlement agreements of the former employees of the Respondent.. The Respondent argued that the said documents were confidential and protected under the constitution and could not be produced without the Respondent's consent, as this would be an infringement of its rights. The Court held that the admission of the documents was necessary for a fair determination of the case.

9. The Applicant urges the court to allow the application as drawn.

10. The Respondent on the other hand submits that the prayers sought are hinged on section 22(a) of the Civil Procedure Act which reads:

“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.”

11. It is submitted that the Applicant is obliged to prove to this Honourable Court that the production of documents is necessary and relevant to the matters in contention. The Respondent's Counsel contends that the Claim before the Court is for failure to renew the Applicant's fixed term contract of employment that ended on 31.12.2015 and she has failed to show the Court the necessity of the production of all the employment records for Kenyan staff, all consultants and donor grant agreements plus their monthly payments in supporting the claims before the Court.

12. Counsel also submits that the facts set out in the submissions were not deponed to in the Supporting Affidavit. Further that the claim is consolidated with four other claims which are evidence of non-renewal of contract at the end of the 2 year period.

13. It is the Respondent's contention that the Claimant has failed to set out her case with precision. That a party seeking to avail himself of Article 35(1) has to state what the right is that he wishes to exercise or protect, what information is required and how that information will assist him in exercising or protecting that right. This was the position in Timothy **Njoya vs Attorney General & Another (2014) eKLR**.

14. The Respondent's counsel submits that the Applicant comes to Court seeking information to prove his case. He cites the case of **Timothy Njoya V Attorney General & Another (supra)** where it was stated:

“I agree with the above reasoning, and with respect, the petitioner cannot come to Court to seek facts and information he intends to use to prove the very case that he is arguing before the Court.”

15. It is also submitted that the right to information is not absolute as envisaged under Article 24(1)(d) of the Constitution of Kenya 2010. That the information sought is the records of staff who are third parties to the Claim herein and are employees of the Respondent. Counsel urges that the threshold for the orders sought is high and relies on the case of **Leland I. Salano Vs Intercontinental Hotel (2013) eKLR**; where it held the employment relationship is grounded on mutual trust, confidence, good faith and fidelity. This position was restated in the case of **Moses Mukhwana Sitati Vs Mumias Sugar Company Limited (2013) Eklr**.

16. It is also the Respondent's submission that the right to privacy is non-derogable and cite the case of **Peris Nyambura Kimani V Dalbit Petroleum Limited (2015)Eklr**; where it was held:

“The right to privacy is non-derogable. It cannot be limited for any purpose and more so for an employee as defined under section 2 of the Employment Act. The rights due to an employee at the workplace include the respect to their right to privacy. Where this is violated, the impact of it is that the inherent dignity of the employee is left naked. Such a fundamental violation is contrary to Article 28 of the Constitution. Where done by any party against another and this is brought to the attention of the Court such as the case here, and there is no justification to the same, such an employee, where an unfair practice is provided is awarded damages. On the other hand, where there is a constitutional violation such as under Article 28, 31 or any other provision of the Constitution other than unfair labour practice, the court under the powers granted in section 12 of the Industrial Court Act is to award damages to such an employee.”

17. The Respondent pray for the Application to be dismissed with costs.

18. I have considered the averments of both parties. I note that the Applicants have sought production of certain documents to prove their case on non-renewal of the contract. The documents sought are employment records for other employees who are not before Court. Other documents are Consultants and Donor Grant Agreements.

19. Under Section 22 of the Civil Procedure Act; the Court has powers subject to such conditions and limitations as may be prescribed, at any time, either of its own motion or an application of any party 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 on other material objects producible as evidence.

20. Article 35(1) of the Constitution also provide that:

1) “Every citizen has the right of access to:

a) information held by the State; and

b) information held by another person and required for the exercise or protection of any right or fundamental freedom”.

21. The applicant is thus required to demonstrate to the Court what rights he wishes to safeguard as he seeks the information prayed for.

22. It is however apparent that the Court can on its volition order production of certain documents before it in order to appraise itself of the case and make informed decisions whilst disposing of the case. The production of such documents should however be limited to the issues in contention.

23. In the current case, the Claimants' case is based on non-renewal of the Claimants' contracts. The Applicants wish to rely on previous contracts/employment records in the custody of the Respondents to prove bad faith. Indeed, it will be in the interest of both parties for the Court to be properly in the know and have all the information being alleged in order to make a fair determination of this case.

24. The Respondent have not submitted what prejudice they stand to suffer if this application is granted. They only aver that the records being sought are for 3rd parties and that their documents cannot be produced in Court in their absence.

25. In view of that, this Court in an attempt to balance between the interest of the Applicants and the 3rd Party, makes an order that these documents be submitted before Court for scrutiny before both parties without revealing the actual identity of the 3rd parties concerned on a date to be agreed upon by the parties.

26. Costs in the cause.

Dated and delivered in open Court this 1st day of March, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties