



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

CAUSE NO. 4 OF 2012

(FORMER LY ELRC CAUSE NO. 1146 OF 2010 AT NAIROBI)

MOSES K. ANAMPIU.....CLAIMANT

VERSUS

KATHERI DAIRY FARMERS CO-OPERATIVE SOCIETY LIMITED..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 30th June, 2017)

RULING

The respondent filed a notice of motion on 02.11.2015 through Carlpeters Mbaabu & Company Advocates. The application was pursuant to section 1A, 1B, and 3A of the Civil Procedure Act, Cap.21, Laws of Kenya and Articles 10, 25(c) and 159 of the Constitution of Kenya, 2010. The respondent prayed for orders:

1. That the claimant / respondent be compelled to disclose the source of the following documents, listed in his additional list of documents dated 21.10.2015: Audit reports from January 2008 to January 2009; a letter dated 17.11.1999 for registration of the CBA; and minutes of 14.02.2006.
2. That the claimant / respondent be compelled to return to the respondent / applicant the following documents:
 - i. payroll for November and December 2006 and staff master roll;
 - ii. register for members and register for shareholders;
 - iii. share certificates issued by Co-operative Bank;
 - iv. receipt books for the period between January, 2006 and April 2008;
 - v. vouchers for the period between January 2006 and April 2008;
 - vi. financial statements for the period January 2006 and April 2008;and
 - vii. minutes for the period between January 1999 and April 2008.
3. That costs of the application be provided for.

The application was based on the attached supporting affidavit of Wilson Gichuru Mburugu together with the supplementary affidavit and further supporting affidavit by the said Wilson Gichuru Mburugu filed on 16.12.2015 and on 24.03.2016 respectively. The application is urged upon the following grounds:

- a. The claimant quit employment in April, 2008 but he is still in possession of the said documents some of which he has revealed when he filed the supplementary list of documents.
- b. That the claimant should not be in possession of the Applicant's said documents.
- c. That the said documents are crucial in defending the present case.
- d. The application is in the best interest of justice.
- e. The claimant was the applicant's secretary manager and in that position he was the custodian of the applicant's documents which the claimant took away without permission or authority and the applicant has pleaded as much in the amended response to the claim.
- f. The claimant is illegally in possession of the respondent's crucial documents subject of the application.
- g. From November 2006 to April 2008 the claimant had been in office alone and the applicant had not been operational due to the claimant's mismanagement.
- h. That there is no evidence that the claimant obtained the documents in prayer 1 from the Ministry of Co-operatives.

The claimant opposed the application by filing grounds of opposition and his replying affidavit on 04.12.2015 and through Leonard K.Ondari & Company Advocates. It was urged for the claimant as follows:

- a. That he did not take the documents as listed and alleged for the applicant.
- b. That there was no evidence that he was in possession the documents as was alleged for the applicant.
- c. That the documents he filed in court were obtained from the Ministry of Co-operatives where every copy of transaction by the respondent is kept by the Ministry.
- d. That the documents are available to the public subject to payment of the inspection fee. The claimant relied upon section 57 of the Co-operative Societies Act as amended in 2004 and Rule 45(1) of the Co-operative Societies Rules, 2004.
- e. There was no report to the police by the applicant about the documents said to be missing for appropriate investigation and action in criminal law.
- f. There was no evidence that the applicant had failed to undertake annual audits on account of the documents alleged to be missing.
- g. The application was designed at delaying the hearing and determination of the suit.
- h. Section 80 of the Evidence Act applied.

The court has considered the material on record and the matters in dispute and makes findings as follows:

- a. The court finds that the claimant has made a disclosure as prayed for in prayer 1. The applicant appears to dispute the veracity of the disclosure as made by the claimant but in so far as the

claimant has disclosed his source, the court finds that it would be superfluous to make orders in terms of prayer 1. The disputes about the disclosed source of the documents clearly go beyond the prayer and such dispute could find its appropriate place at full hearing of the suit or elsewhere as may be necessary or appropriate.

b. The claimant has denied being in possession of the documents in prayer 2 and so far there is no evidence by the applicant establishing that the claimant took away the documents as alleged for the applicant. The court will not make orders in vanity. So far as it has not been established that the claimant took away the documents as alleged and in so far as it is speculative that he must have taken the documents at the time the claimant is said to have worked alone, the court returns that in so far as it has not been established by the applicant that the claimant took away the alleged documents and that they are in his possession, prayer 2 will fail.

c. In so far as facts are disputed on the affidavits on record as filed for or against the application, the court considers that the parties will be at liberty to probe and seek clarifications at the full hearing and in the final submissions towards ends of justice in the suit.

In conclusion, the application filed for the respondent in the suit on 02.11.2015 is hereby dismissed with orders that costs of the application will be in the cause and parties are invited to take directions on the further steps in the suit.

Signed, dated and delivered in court at **Meru** this **Friday, 30th June, 2017.**

BYRAM ONGAYA

JUDGE