



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1739 OF 2015

JOSHUA RODNEY MARIMBAH.....CLAIMANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

RULING

1. The subject matter of this ruling caught the attention of the Court in a somewhat unusual manner. In the course of the Claimant's testimony in chief, it emerged that he had filed some documents which on the face of them, appeared to be internal communication among officers of the Respondent. The Claimant declined to disclose how he had come into possession of the documents and the Respondent's Counsel objected to their production.

2. It turned out that on 23rd March 2016, the Claimant had filed a notice, requiring the Respondent to produce the said documents, alongside others. The notice sought production of the following documents:

- a) The Kenya Revenue Authority Code of Conduct;
- b) Government Guidelines from the Head of Public Service on handling cases of public officers suspected of involvement in corrupt practices dated 24th May 2010;
- c) Disciplinary Committee Rules of Business dated 1st August 2008;
- d) Letter dated 17th April 2008 from Commissioner General appointing Commissioners to Disciplinary Committees;
- e) Memo dated 9th March 2015 on fast tracking of disciplinary cases signed by C.N Agata;
- f) Memo dated 27th April 2015 forwarding recommendations to the Commissioner General titled disciplinary cases;
- g) Specific findings and recommendations by a taskforce seated in Njoro;
- h) The handwritten recommendations by the Commissioner General dated 7th May 2015;
- i) Minutes of the Disciplinary Committee dated 21st July 2015;

j) Statements by Peter Muiruri, Prudence Sayo, Daniel Sitawa Ouma and the Police;

k) Investigation report by Julius Chege Macharia;

l) Investigation report by Peter Moffat Muiruri.

3. For some reason that was not clear to the Court, the Respondent did not respond to the Claimant's notice and it would appear that the Claimant made the decision to rely on the documents filed together with his claim.

4. In the interest of justice, the Court allowed the Respondent to respond to the Notice to Produce at this stage. In its response, the Respondent states that the listed documents were filed in court together with the Response to the Claim on 21st October 2015, save for the following:

a. Memo dated 9th March 2015 on fast tracking of disciplinary cases signed by C.N Agata;

b. Memo dated 27th April 2015 forwarding recommendations to the Commissioner General titled disciplinary cases; and

c. The handwritten recommendations by the Commissioner General dated 7th May 2015.

5. The Respondent submits that the three documents were by nature and definition private and administrative and could not therefore be produced in court. In an affidavit sworn by May Magomere, it is deponed that the said documents were communication at the deliberative stage and did not constitute official documents within the Respondent's possession.

6. It is further deponed that the documents fall within the scope of confidential correspondence between the Commissioner General and the Human Resource Department, without prejudice to the Claimant. The Respondent submits that production of the said documents would be a breach of its right to privacy.

7. The issue for determination before the Court is whether the Court can admit and rely on the three documents, whose source the Claimant chose not to disclose. The Respondent takes issue with the manner in which the Claimant seeks to introduce the documents as evidence in his case.

8. The Claimant first filed the documents in court and thereafter filed a Production Notice. I think this is the wrong procedure. Further, I must agree with the Respondent's submission that once the Claimant failed to get a response from the Respondent, he ought to have moved the court for compelling orders. To allow the case to proceed to the point where the Court was forced to inquire into the source of the documents in the course of trial was, in my view, improper.

9. The Respondent referred to the decision in ***Baseline Architects Ltd & 2 others v National Hospital Insurance Fund Board Management [2008] eKLR*** where it was held that in order to allow public servants to communicate freely in the course of their work, commonplace communication between them ought to be privileged from production.

10. If this is true in the realm of public law, it is also true in employment, which ordinarily resides in private law. In ***Nicholas Muturi Okemwa & 8 others v Judicial Service Commission [2016] eKLR***, this Court held that employees are not at liberty to use the employment relationship to clandestinely acquire documents from their employer. To rule otherwise would be to throw the key components of any employment relationship being; mutual trust and good faith, out of the window. In my view, there is no room for 'self-help' in an employment relationship.

11. The Court was further referred to the decision in ***Okiyah Omtatah Okoiti & 2 others v Attorney General [2014] eKLR*** where the Court rendered itself as follows:

“...if litigants choose to use clandestine means to procure information such actions would heavily compromise the need for Article 35 of the Constitution and would obviously violate the other parties’ fundamental right to privacy under Article 31 of the Constitution.”

12. Neither the right to information under Article 35 nor the right to privacy under Article 31 is absolute. Both are subject to limitation within the parameters established under Article 24. In determining admissibility of contested documents, the Court is called upon to balance the dual rights. In this case, however, the Court did not have the opportunity to do so as the Claimant went ahead of himself and filed the documents even before serving a Notice to Produce. The Claimant himself appears to have been fully aware that his action falls within the province of ‘*self-help*’ because he declined to disclose his source.

13. The Court, being the bastion of the rule of law, will not participate in actions whose legality is questionable. The Claimant had adequate legal means at his disposal to pursue information relevant to his case. Having chosen to sidestep the legal path, the Court cannot aid him in his alternative path of ‘*self-help*’

14. For the foregoing reasons, the Court finds that the impugned documents, having been illegally obtained, are inadmissible. The result is that the said documents are expunged from the record.

15. The Claimant will bear the costs of this part of the proceedings.

16. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 13TH DAY OF OCTOBER 2017

LINNET NDOLO

JUDGE

Appearance:

Mr. Olonde for the Claimant

Miss Mburugu for the Respondent