



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION NO 37 OF 2013
PAUL MASINDE SIMIDI.....PETITIONER
VS
NATIONAL OIL CORPORATION
OF KENYA LIMITED..... 1ST RESPONDENT
SUMAYYA ATHMANI HASSAN.....2ND RESPONDENT

RULING

Introduction

1. On 4th November 2013, the Petitioner filed a petition seeking relief for violation of his rights under the Constitution and the law. The Petitioner subsequently filed a notice to produce documents directed at the Respondents which is the subject of this ruling.

The Notice to Produce

2. The Petitioner's notice is brought under Article 35(1)(b) of the Constitution, Sections 12(3) (viii) and 20(4)(a), (d), (5)&(7), (8)(a) of the Industrial Court Act, 2011, Rule 17 of the Industrial Court (procedure) Rules, 2010 and Section 69 of the Evidence Act.
3. By the said notice, the Petitioner sought production of the following documents:
- a. Certified copy of the 1st Respondent's Human Resources Manual (Grievance Handling and Disciplinary Procedures), 2010/2011;
 - b. Certified copy of Internal Audit Plan;
 - c. Certified copy of Corruption Prevention & Integrity Committee (COPIC) 2010/2011 plan;
 - d. Certified copy of Internal Audit Manager Performance Targets 2010/2011;
 - e. Certified copy of Minutes of the Meeting of the Board of Directors of the National Oil Corporation of Kenya Limited held on 15th December 2011;
 - f. Certified copy of Minutes of the Meeting of the Human Resources Committee of the Board

- of the National Oil Corporation of Kenya Limited held on 14th May 2012;
- g. Certified copy of the Minutes of the Board Audit Committee meeting held on 24th November 2010;
 - h. Certified copy of the minutes of the Board Audit Committee meeting held on 25th March 2011.

The Respondents' Reply

4. By its reply dated 13th November 2014, the Respondents produced the 1st Respondent's Human Resource Manual (Grievance Handling and Disciplinary Procedures) 2010/2011 with comments that document number (d) was in the Petitioner's possession and that the rest of the documents were not available.

5. Thereafter, the Respondents filed an affidavit sworn by the 1st Respondent's Legal Officer, Jude Ochieng on 21st January 2015 attaching the following documents:

- a. Certified copy of the Internal Audit Plan 2010/2011;
- b. Certified copy of the Corruption Prevention and Integrity (COPIC) Plan;
- c. Certified copy of the Internal Audit Manager Performance Targets 2010/2011.

6. In the said affidavit, Ochieng depones that the Respondents are opposed to production of certified copies of the minutes of 1st Respondent's Board of Directors meeting held on 15th December 2011, Human Resources Committee meeting held on 14th May 2012 and Audit Committee meeting held on 25th March 2011 because:-

a) The minutes sought are not necessary for the fair determination and disposal of this matter which can be heard and determined on the basis of the documents available to the Petitioner;

b) Producing the minutes sought will infringe on the rights of the Respondents to privacy secured under Article 31 of the Constitution.

7. With specific reference to the minutes of the Board Audit Committee meeting held on 24th November 2010, Ochieng depones that the Petitioner already has a copy of the said minutes which are annexed to the petition and the Respondents did not object to the Petitioner relying on the copy already produced.

The Petitioner's Submissions

8. Mr. Mungla for the Petitioner submitted that the documents sought were necessarily required for enforcement of the Petitioner's fundamental rights. According to Counsel, the Petitioner was forced to leave employment by the Respondents' refusal to lift an improper interdiction imposed on him.

9. In this regard, the minutes of the 1st Respondent's Board of Directors and Human Resource Committee meetings were required to demonstrate that recommendation for the Petitioner's reinstatement had been made. Further, the minutes of the Board Audit Committee meeting were required to show that the Petitioner's actions which led to his interdiction had been sanctioned by the 1st Respondent.

10. With respect to the minutes of the Board meeting of 24th November 2010, Mr. Mungla submitted that the copy produced by the Petitioner had missing pages and the full minutes which were in the custody of the Respondents were therefore required. The Petitioner further sought

signed copies of documents marked 'JO 1,2 and 3' attached to the replying affidavit sworn by Jude Ochieng on 21st January 2015.

The Respondents' Submissions

11. In opposition the Petitioner's notice, Mr. Nyaburi for the Respondents told the Court that the Respondents were opposed to production of the minutes of the 1st Respondent's Board, Human Resource Committee and Audit Committee meetings held on 15th December 2011, 14th May 2012 and 15th March 2011 respectively.

12. The Respondents' position is that the documents in issue are not necessary for the determination of the petition before the Court. This was informed by the fact that the termination and interdiction challenged by the Petitioner occurred on 15th June 2011 and 18th July 2011 respectively, before the meetings of the Board and Human Resource Committee whose minutes are sought by the Petitioner.

13. Additionally, production of the documents sought would infringe on the Respondents' right to privacy under Article 31 of the Constitution. While conceding that this right was subject to limitation, Mr. Nyaburi submitted that the limitation should be reasonable and justifiable under Article 24. Counsel told the Court that the minutes sought relate to many other matters relating to the 1st Respondent's accounts, strategic plans and third party involvement. He observed that once documents are filed in Court, they become public and available to third parties, including the 1st Respondent's competitors.

14. Mr. Nyaburi further submitted that there was a less restrictive option of limiting the Respondents' right under Article 31 since the Respondents were required by law to prove justification for the termination of the Petitioner's employment. In the event of failure by the Respondents to discharge this obligation, the Court could invoke Section 47(5) of the Employment Act, 2007 alongside Section 119 of the Evidence Act to draw an adverse inference against the Respondents. This, according to Counsel, was a less restrictive means of limiting the Respondents' right under Article 31 of the Constitution.

Ruling by the Court

15. The issue for determination before the Court is whether the Petitioner has made out a case for production of the following documents:

a) Certified copy of Minutes of the Meeting of the Board of Directors of the National Oil Corporation of Kenya Limited held on 15th December 2011;

b) Certified copy of Minutes of the Meeting of the Human Resources

Committee of the Board of the National Oil Corporation of Kenya Limited held on 14th May 2012;

c) Certified copy of the minutes of the Board Audit Committee meeting held on 25th March 2011;

d) Certified copy of the Minutes of the Board Audit Committee meeting held on 24th November 2010.

16. The Petitioner's notice is based on Article 35 (1) of the Constitution which provides as follows:

35. (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.

17. It is the Petitioner's case that the minutes cited above are necessarily required for the fair determination of his case pending before this Court. The Court was referred to the decision by **Lenaola J** in **Timothy Njoya v Attorney General and another [2014]** in which my learned brother Judge held that an applicant seeking to avail himself of the provisions of Article 35(1) **"has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right."**

18. The Respondents state that the Petitioner has not met the criteria set under Article 35(1)(b) of the Constitution to warrant an order for production of the documents sought.

19. I have had occasion to look at the Petitioner's petition which complains of violation of his rights under several provisions of the Constitution and in particular Article 41(1) which secures fair labour practices.

20. In his replying affidavit sworn on 12th May 2015, the Petitioner makes bold statements on proceedings at the meetings of the 1st Respondent's Board and its committees. He depones that his case was discussed in these meetings and he therefore needs the minutes to advance his claim for unlawful and unfair termination.

21. The Court notes that the Respondents do not deny existence of these minutes nor the Petitioner's deponement on the proceedings thereat. It seems to me therefore that the documents sought are necessary for the fair determination of the case before the Court and the criterion set under Article 35(1)(b) has been satisfied.

22. The Respondents also submit that production of the documents sought would be in contravention of their rights under Article 31 (c) & (d) which provides that:

31. Every person has the right to privacy, which includes the right not to have-

(c) information relating to their family or private affairs unnecessarily required or revealed; or

(d) the privacy of their communications infringed.

23. The relationship between the Petitioner and the 1st Respondent which gives rise to the dispute now before the Court is one of employer/employee. In an employment relationship, the employer would ordinarily have in its possession information that is not available to an employee and when a dispute such as the present one arises, the Court must balance the employee's right of access to information with the employer's right to privacy. The Respondents contend that production of the minutes sought by the Petitioner will be injurious because these minutes contain other information relating to the 1st Respondent's accounts, strategic plans and third party involvement.

24. Both the Petitioner's right under Article 35 and the Respondents' right under Article 31 are not absolute rights as defined in Article 25. They are subject to limitation under Article 24.

25. With this in mind, I have weighed the Petitioner's right to information which the Court deems necessary for the fair determination of the dispute before it against the Respondents' right to privacy and have formed the opinion that the ends of justice will best be served if the information sought by the Petitioner is produced.

26. In the circumstances I direct that the Respondents shall, within the next seven (7) days from the date of this ruling, produce certified copies of the following documents:

a) Certified copy of Minutes of the Meeting of the Board of Directors of the National Oil Corporation of Kenya Limited held on 15th December 2011;

b) Certified copy of Minutes of the Meeting of the Human Resources

Committee of the Board of the National Oil Corporation of Kenya Limited held on 14th May 2012;

c) Certified copy of the minutes of the Board Audit Committee meeting held on 25th March 2011;

d) Certified copy of the Minutes of the Board Audit Committee meeting held on 24th November 2010

27. The Respondents shall, within the same period, also produce signed copies of documents marked 'JO 1, 2 and 3' attached to the replying affidavit sworn by Jude Ochieng on 21st January 2015.

28. The costs of this application shall be in the petition.

29. It is so ordered.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 26TH DAY OF JUNE 2015

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JUDGE

Appearance:

Mr. Mungla for the Petitioner

Mr. Nyaburi for the Respondents