



**Adan v Premier Bank Kenya (Cause E455 of 2024)
[2025] KEELRC 613 (KLR) (28 February 2025) (Ruling)**

Neutral citation: [2025] KEELRC 613 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E455 OF 2024
AK NZEI, J
FEBRUARY 28, 2025**

BETWEEN

MARIAM MOHAMUD ADAN CLAIMANT

AND

PREMIER BANK KENYA RESPONDENT

RULING

1. The Court's record herein shows that the suit herein was instituted by the Claimant on 13th June, 2024 vide an evenly dated Memorandum of Claim. The Respondent entered appearance and on 17th September, 2024 and filed a Statement of Response. Subsequently, the Respondent filed a witness statement and a list and bundle of documents, both dated 28th October, 2024.
2. On 7th November, 2024, the Respondent filed an urgent Notice of Motion dated 29th October, 2024 seeking the following Orders:-
 - a. That the application be certified urgent, and be heard and determined before the hearing reserved for 9th December, 2024.
 - b. That the Court strikes out and expunges from the Court record:-
 - i. Paragraph 13 of the Statement of Claim dated 13th June, 2024.
 - ii. Paragraph 12 of the Witness statement of Miriam Mohamed Aden dated 13th June, 2024, and
 - iii. The Audio recording of 11th January, 2024 annexed and marked as "MAR-9" in the witness statement of Miriam Mohamed Aden dated 13th June, 2024.
 - c. That costs of the application be provided for.



3. The application, expressed to be brought under Articles 31 and 50(4) of the Constitution of Kenya, Sections 1A and 3A of the Civil Procedure Act, Section 29(b) of the Data Protection Act and Order 2 Rule 15 of the Civil Procedure Rules; is based on the following grounds which are set out on the face of the application and amplified in the supporting affidavit of Aisha Mohamed Sheikh sworn on 29th October, 2024:-
 - a. that the Claimant/Respondent was employed by the Respondent/Applicant bank as the Branch Manager, Eastleigh 2 Branch, vide a letter dated 21st September, 2023.
 - b. that on or about October 2023, the Respondent/Applicant bank lost Kshs.500,000/= during relocation of the Respondent/Applicant's Eastleigh 2 Branch to BBS Mall, and investigations into the loss revealed that the Claimant/Respondent flouted the Respondent/Applicant's policies regarding repatriation of cash, and the Respondent/Applicant recommended disciplinary action against the Claimant/Respondent.
 - c. that the Respondent/Applicant initiated disciplinary proceedings against the Claimant/Respondent which culminated in the issuance of a warning letter dated 22nd January, 2024 to the Claimant/Respondent.
 - d. that the Respondent/Applicant invited the Claimant/Respondent to the Respondent/Applicant bank's Head Office for a meeting on 24th January, 2024, to communicate to her the bank's decision and the basis of issuing the warning letter.
 - e. that the Claimant, without any consent or prior approval, proceeded to record the deliberations of the meeting held on 24th January, 2024, and that the recording includes a private conversation of the deponent of the supporting affidavit (the Respondent's Head of Human Resources), and that the said private conversation is at Minutes 5:30-6:31.
 - f. that the Claimant filed the suit herein alleging unfair and unlawful termination of her contract, and at paragraph 13 of the statement of claim makes reference to the audio recording of the meeting between the Claimant and the Respondent/Applicant's Ms. Aisha Mohamed.
 - g. that the Claimant/Respondent has equally made reference to the audio recording at paragraph 12 of her witness statement, and adduced an electronically recorded copy of the audio in her list of documents as exhibits.
 - h. that the said evidence was obtained in violation of [the Respondent bank's] said Aisha Mohamed's right to privacy, and its admission would render the trial unfair and detrimental to administration of Justice.
 - i. that in the circumstances, it would be just and mete that the Court issues orders expunging the audio recording from the record and striking out paragraph 13 of the statement of claim and paragraph 12 of the witness statement of Miriam Mohamed Adan.
4. The application is opposed by the Claimant/Respondent vide a statement of grounds of opposition dated 12th November, 2024, and expressed to be filed pursuant to Order 51 Rule 14(2) of the Civil Procedure Rules.
5. For record purposes, proceedings in this Court, being a specialized court of the status of the High Court by dint of Article 162(2)(a) of the Constitution of Kenya 2010, are regulated by the Employment and Labour Relations Court (Procedure) Rules, as amended and/or reviewed from time to time, the



current edition of the said Rules being the [Employment and Labour Relations Court \(Procedure\) Rules 2024](#). Rule 48 of the said Rules provides as follows:-

“A party may respond to an application by grounds of opposition, a replying affidavit or notice of preliminary objection.”

6. Whereas matters of law regarding an interlocutory application may be appropriately addressed and/or raised vide a statement of grounds of opposition or a notice of preliminary objection, matters of fact stated in an application or deponed to in an affidavit sworn in support of an application are better responded to vide a replying affidavit. The Claimant/Respondent in the present suit chose to file a statement of grounds of opposition.

7. Section 29(b) of the [Data Protection Act 2019](#) provides as follows:-

“A data controller or data processor shall, before collecting personal data, in so far as practicable, inform the data subject of:-

- a. the rights of data subject specified under Section 26.
- b. the fact that personal data is being collected.
- c. the purpose for which the personal data is being collected.
- d. the third parties whose personal data has been collected or will be transferred to, including details of safeguards adapted.
- e. the contacts of the data controller or data processor and on whether any other entity may receive the collected personal data.
- f. a description of the technical and organizational security measures taken to ensure the integrity and confidentiality of the data.
- g. whether the data is being collected pursuant to any law and whether such collection is voluntary or mandatory; and
- h. the consequences if any, where the data subject fails to provide all or any part of the requested data.”

8. Personal data is defined in Section 2 of the [Data Protection Act](#) as:-

“Any information relating to an identified or identifiable natural person.”

9. In the present case, it is clear from the deposition contained in the supporting affidavit of Aisha Mohamed Sheikh that the Claimant was invited to the Respondent’s (her employer’s) Head Office for an official meeting with the Respondent/Applicant’s Head of Human Resources, and that she recorded the (official) deliberations without consent, and that the recording includes the said Head of Human Resource’s private telephone conversation at Minute 5:30 – 6:31. The Respondent/Applicant appears to be aggrieved by only a part of the said recording, which is identifiable in terms of the time of recording, and which is said to contain an identified person’s private telephone conversation. The Court has not been told how the alleged recording of a private telephone conversation happened within the context of official deliberations between the Claimant and the Respondent’s Head of Human Resources. This information and/or clarification, in my view, can only come out at the trial. Any part of the recording that is found to be a private conversation as alleged by the Respondent/Applicant can



always be redacted as the Court admits in evidence the rest of the recording, if the same is found by the Court to be admissible.

10. The application herein was, in my view, pre-maturely filed as pre-trial directions are yet to be taken pursuant to Rule 40 of the *Employment and Labour Relations Court (Procedure) Rules 2024*. It is at the pre-trial conference where points of agreement and disagreement are ascertained, the mode of taking evidence is settled, discovery and exchange of evidential documents/material is made, and securing of witnesses, including expert witnesses, is addressed.
11. Rule 42 of this Court's said *Rules* provides as follows:-
 1. If the parties cannot reach an agreement regarding the discovery of a document or an electronic recording, either party may apply to the Court for an appropriate order, including an order as to costs.
 2. For the purpose of this rule, an electronic recording includes a soundtrack, film, magnetic tape record or any other material or medium by which visual images, sound or other information is recorded."
12. As I have already stated in this Ruling, parties can only agree and/or disagree regarding discovery of a document or an electronic recording during a pre-trial conference held and/or convened pursuant to Rule 40 of this *Court's rules*. Rule 40(1) is couched in mandatory terms, making the holding of a pre-trial conference mandatory before the Court can be moved regarding discovery of documents and electronic recordings and/or admissibility of the same.
13. In the present case, parties are yet to move the Court to hold a pre-trial conference pursuant to Rule 40 of the *Court's Rules*. The import of all the foregoing is that the Respondent/Applicant's Notice of Motion dated 29th October, 2024 was filed pre-maturely. Further, the orders sought by the Respondent and the context within which they are sought would necessitate the opening and review by the Court of the alleged electronically recorded deliberations/conversation with a view to picking up therefrom the impugned portion that is alleged to contain a private telephone conversation between the Respondent/Applicant's Head of Human Resources and an unidentified third party. Such an exercise would amount to a miscarriage of Justice.
14. Where admissible under the relevant statutory provisions, electronically recorded evidence can only be reviewed by the Court during a trial, with full participation of all parties to the suit, where the suit in which such evidence is presented is defended. As already stated in this Ruling, the Respondent/Applicant is only challenging part of the alleged recorded deliberations/conversation. The Notice of Motion dated 29th October, 2024 is devoid of merit, and is hereby dismissed with costs.
15. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF FEBRUARY 2025

AGNES KITIKU NZEI

JUDGE

Order

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE



Appearance:

Mr. Akanga for the Claimant/Respondent

Miss Faheema for the Respondent/Applicant

