



**Muchiri v Pernod Ricard Kenya Limited (Cause E198 of 2022)
[2024] KEELRC 1322 (KLR) (27 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1322 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E198 OF 2022
NJ ABUODHA, J
MAY 27, 2024**

BETWEEN

IRENE NYAMBURA MUCHIRI CLAIMANT

AND

PERNOD RICARD KENYA LIMITED RESPONDENT

RULING

1. The respondent/applicant moved the court through an application dated 18th September, 2023 seeking orders among others that;
 - a. (spent)
 - b. (spent)
 - c. That the honourable court expunge and or strike out the claimants supplementary list and bundle of documents dated 30th June, 2023.
2. The application was supported by the affidavit of one Magana Mungai who deponed on the main that;
 - a. I am the Respondent/ Applicant's Head of Human Resource, East Africa. I am well conversant with the matters in controversy in these proceedings and therefore competent and duly authorized to swear this affidavit.
 - b. I am advised by the Respondent's advocate whose advice I conscientiously believe to be true that Order 11 of the *Civil Procedure Rules*, 2020 requires that parties file all their pleadings and evidence before the case is certified ready for hearing. That any further documents/ evidence to adduced, after a matter is set down for hearing, ought to be filed only with leave of Court. The Supplementary Bundle was filed after parties had consented to a hearing date in Court and as such the Supplementary Bundle, having been filed without leave of Court, should be expunged and/or be struck out from Court records.



Annexed hereto and marked "MM 1" is a copy of the said Supplementary List & Bundle of Documents

- c. Having perused the evidence which the Claimant intends to rely on and produce, I am aware that the documents consist of private, confidential and proprietary information belonging to the Respondent as well as other third parties not before this Court.
- d. I am advised by the Respondent's advocates whose advice I believe to be sound, that the Claimant's acts of obtaining and seeking to rely on/ produce those documents without the Respondent's permission nor a court order offend the provisions of Article 50 (4) of the Constitution of Kenya. The said article provides that evidence obtained in a manner that violates any rights or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.
- e. I am advised by the Respondent's advocates whose advice I believe to be sound the Claimant's abovementioned acts also offend Clause 6.11 of the Policy, which provides that the Claimant shall not, at any time during and after her employment divulge or use any information of a confidential nature relating to the Respondent's business.
- f. The said acts also offend Clause 11.11 of the Policy which unequivocally provides that the Respondent has proprietary ownership of its internet and e-mail system, hardware, software, network, any and all data files, reports, notes etc. which may come into the Claimant's possession during the course of her employment

Annexed hereto and marked "MM 2" is a complete copy of the Respondent's Policy and Procedure Manual

3. The claimant opposed the application and filed a replying affidavit in which she deponed among others that;
 - i. That I instructed my advocates on record to file a supplementary list of documents in order for the Honourable Court to make a determination on the real issues before it.
 - ii. That the documents contained in the supplementary list of documents dated 30th June, 2023 were documents that I handled during the course of my employment and with the full knowledge and authority of the Respondent.
 - iii. That there is a delay of 74 days in filing the instant application since the supplementary list of documents was served upon the Respondent on 7th of July, 2023 and the application has been filed on 18th of September, 2023 a week before the hearing on the 26th of September, 2023 in order to defeat the hearing. (See Ann. INM-I a copy of the email)
 - iv. That the Respondent/Applicant upon being served with the supplementary list of documents did not receive the same under protest and hence the application is an afterthought and is made in bad faith in an attempt to scuttle the hearing as well as steal a match. (See Ann. INM-I a copy of the email)
 - v. That whereas leave was not obtained from the Honourable Court to file the supplementary list of documents, we urge the Honourable Court to adopt the same as part of the court record as the same was served in good time.



- vi. That the Application is filed as an afterthought intended to portray the aggrieved Claimant in bad light and to conceal vital information from the Honourable Court which is entitled to know the truth of the matter before it, there is nothing confidential about the document.
4. In the submissions in support of the application, Mr. Mwangi for the respondent submitted inter alia that the claimant's evidence as contained in the supplementary bundle of documents was obtained in violation of respondent's privacy and proprietary rights as protected in the Constitution and the respondent's policy and procedure manual. Further that the said bundle of documents were filed without leave of court first sought and obtained. The evidence according to Counsel was inadmissible by virtue of Article 50(4) of the Constitution and Order 11 of the Civil Procedure Rules, 2020.
5. To support the submissions Counsel relied on the cases of Kenya Railways Corporation & others v Okiya Omtatab Okoiti & others [2023]eKLR and Njonjo Mue & another v Chairperson IEBC & 3 others [2017] eKLR. Where the question of admissibility of unlawfully obtained documents was considered by both the Supreme Court and the Court of Appeal.
6. In the Njonjo case it was stated thus;
- “the use of such information before the court, accessed without following the requisite procedures, not only rendered it inadmissible but also impacted on the probative value of such information...”
7. Counsel further relied on the case of Susan Wariria Kariuki v Diakonie Katastrophehilfe [2016] eKLR where the court noted that the Country now has a constitution that enable parties to access documents necessary for their case through legal means and there was therefore no need to resort to street methods to do so.
8. Concerning the documents counsel submitted that the claimant being a former employee of the respondent was bound by the provisions of the Constitution and the Employment Act. Additionally, the claimant's employment was subject to terms contained in her letter of offer dated 16th may, 2016 and the respondent's Policy and Procedure Manual.
9. According to Mr. Mwangi the contested documents contained 27 internal email correspondence while the remainder comprised of respondent's internal policies and financial statements. These according to Counsel were private, confidential and proprietary information belonging to the respondent and its employees or former employers and customers.
10. Counsel further submitted that Article 31 of the Constitution guaranteed the right of privacy. This right included the right not to have information relating to one's private affairs unnecessarily required or revealed or the privacy of their communication infringed. Further, Clause 6.11 and the respondent's Policy and Procedure Manual prevented the claimant from divulging or communicating the respondent's affairs or that of its employees or customers or any information that claimant had access to during her employment. Counsel urged the court to note that the supplementary bundle contained email correspondence forwarded from claimant's work email to her personal g-mail account.
11. Mr. Mwangi further submitted that the substratum of the claimant's case before the court was unfair and unlawful termination of her employment on account of poor performance. However, the documents in the supplementary bundle that the claimant intended to produce and rely on were devoid of any nexus to the case before the court save for publicizing the respondents' affairs.
12. Ms. Guserwa for the respondent on the other hand submitted among others that the claimant's supplementary documents contained proof that the allegations of underperformance were untrue



hence the termination of service was unfair. Further that the documents were acquired by the claimant lawfully during the course of employment with full knowledge and authority of the respondent.

13. On the issue of leave prior to filing documents, counsel relied on the provisions of article 159(2)(d) as read together with rule 25(4) of the [Employment and Labour Relations Court Rules](#) which provided in paraphrase that in exercising judicial authority the Court shall be guided by the principle that justice shall be administered without undue regard to procedural technicalities and that the court shall conduct the hearing in a manner it considers most suitable to the just handling and recording of proceedings and shall if appropriate avoid legal technicalities and formalities. Counsel thus submitted that whereas it was incumbent for a party to seek leave of court before filing documents after pleadings have closed, the mistake of counsel should not be visited upon an innocent client. She therefore urged the Court to admit the documents. Counsel further took issue with the fact that the present application was filed some 74 days after the service of supplementary documents. The application was therefore intended to suppress the fact that the claimant never underperformed as alleged. Ms. Guserwa further submitted that the respondent had not stated which documents they were contesting in the supplementary bundle of documents.
14. To support the submissions, Counsel relied on the judgment in Petition No. 44 of of 2017 [Mark Busuru & Anor v IUCN & Anor](#) and Cause No. E0123 of 2022 [Grace Wairimu Munyi v Kenya Chemical Workers Union](#)
15. The right to privacy is protected under article 31 of the [Constitution](#) which confers among others, the right not have information relating to family or private affairs unnecessarily required or revealed or privacy of their communications infringed. Article 35 deals with access to information held by the state. It is in my view not concerned with information held by private individuals or corporations. These appear to be governed by private arrangements between parties in the conduct of their relationship. For instance, it is not unusual to find clauses in contracts of employment prohibiting employees from disclosing to unauthorized third parties, information they come across in the course of their employment and further prohibiting such disclosure even after cessation of employment relationship. The authorities relied on by the applicant do not therefore seem to apply in this particular case.
16. The applicant has contended that the information sought to be relied on by the claimant and contained in the supplementary affidavit, consist of confidential information which if disclosed could be injurious to its business interest and that the dispute between the claimant and the respondent concerned termination on account of poor performance and save for publishing the respondent's affairs, the documents are irrelevant to the case before the Court. While contending so, the applicant has not sufficiently demonstrated in what way the documents if produced, will be injurious to its business. It has merely contended that the documents have nothing to do with the dispute before the court which is termination on account of poor performance and that the claimant's motive in producing the documents is to publish the respondent's private affairs.
17. Under article 50 which concerns fair hearing, it is provided under sub-article (4) that:

Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.
18. In *David Ogolla Okoth v Chief Magistrate Court Kibera & 2 others* [2010] eKLR the Court stated as follows:

“I do not however agree with the position adopted by the Petitioner which is seemingly an unqualified one that all evidence not properly obtained lead to some form of prejudice



and therefore the automatic termination of a criminal trial. Such an approach negates and dilutes, invariably, the words of the *Constitution* emphasized above. There has to be established that a right in the Bill of rights was unjustifiably violated whilst obtaining the evidence in question. Secondly, there must then be shown that the admission of such evidence would render the trial unfair or be detrimental to the administration of justice."

19. While the above case concerns a criminal case, the principles are similar in civil cases. The operative words as stipulated in the constitution are

"if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice."

This implies that the person seeking the exclusion ought to sufficiently demonstrate that the inclusion of such evidence would render the trial unfair or would otherwise be detrimental to the administration of justice. The applicant herein has only stated that the dispute between the claimant and the respondent is about the former's dismissal on account of nonperformance and that the documents intended to be produced by the claimant have no probative value of this fact but only intended to publish the respondents private affairs. In the case of *John Muriithi & 8 others v Registered Trustees of Sisters of Mercy(Kenya) t/a "The Mater Miscencordliae Hospital & Another* [2013] eKLR Wasilwa J pronounced that:

"In determining whether to allow evidence being sought to be expunged, I am guided by the fact that the primary duty of this court is to do justice. If justice will be done using available documents and evidence not obtained in breach of the Constitution and the law, then this court would admit such evidence in order to have the right resources before it to enable determination of the issues in a just matter."

20. The Court has perused the documents intended to be produced by the claimant and they consist largely of work email between the claimant and his colleagues. Some may not have been addressed to her but they concern work issues. The claimant has further attached respondent financial statements. These are mundane documents in business affairs of any organization. Financial statements are a statutory requirement and are filed annually with the Registrar of Companies, they are therefore accessible by the public subject to conditions stipulated by the Registrar. The applicant as observed above has not gone that extra mile to demonstrate in what way the disclosure of these documents would be injurious to its business interests. In any event, the mere production of these documents does not lessen the claimant's burden to show their relevance to her case.

21. In conclusion, the Court finds the application without merit and the same is hereby dismissed with costs.

It is so ordered.

DATED AT NAIROBI THIS 27TH DAY MAY, 2024

DELIVERED VIRTUALLY THIS 27TH DAY OF MAY, 2024

ABUODHA NELSON JORUM

JUDGE.

