



**Kira v Kenya National Highways Authority (Employment and Labour Relations  
Petition E063 of 2023) [2024] KEELRC 1632 (KLR) (24 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1632 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E063 OF 2023**

**K OCHARO, J**

**JUNE 24, 2024**

**BETWEEN**

**DISMAS KUNGU KIRA ..... PETITIONER**

**AND**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... RESPONDENT**

**RULING**

**Background**

1. Through a Notice of Motion Application dated 12<sup>th</sup> January 2023, the Respondent seeks that the documents specified therein under limb 1 (a) – (p) be expunged from record, and as a result the petitioner be; directed to return all copies of the privileged documents obtained from the Respondent has the course of his employment and which do not relate to the proceedings herein; restrained by way of a permanent injunction from using any information relating to the Respondent acquired during the course of his employment and which do not relate to the proceedings herein; and that this court be pleased to remove the said documents from the physical file and from the e-filing platform.
2. The Application is anchored on the grounds set forth on the face of the application and those on the supporting affidavit sworn by Elphas Chonge on the 12<sup>th</sup> January 2022.
3. The Petitioner resists the application on the grounds that obtain on his replying affidavit sworn on the 31<sup>st</sup> January 2023.
4. Pursuant to this court's order, the parties herein have filed their written submissions for and against the application.



## **The Application**

5. The Respondent/Applicant states that the Petitioner herein challenges the termination of his employment which was on account of violation of its policies and Code of Conduct guiding the conduct of its employees.
6. The Applicant contends further that under his list of documents dated 26<sup>th</sup> October 2022, the Petitioner filed documents herein containing privileged information relating to it and third parties. Further, the documents include confidential information.
7. The Applicant argues further that the documents have no correlation whatsoever to his claim for unfair termination. The documents enumerated in the application were illegally acquired.
8. By producing and disclosing the documents, the Petitioner has caused the Applicant/Respondent to breach its duty of confidentiality to its clients. Further, the Petitioner took advantage of the trust and confidence the Applicant had in him during the course of his employment relationship.
9. The Applicant asserts that the documents are deemed confidential as it had taken reasonable steps to limit access of the same to employees and other unauthorized persons and their release would damage its reputation; breach of undertakings to respect confidentiality; breach of statutory restrictions of disclosure of information and impede its effective management.
10. Lastly, the Respondent argues that an employment relationship is anchored on mutual trust, confidence, good faith and fidelity. This imposes a duty on the employee not to unfairly exploit information acquired or skills imparted by their former employer to the prejudice of that employer.

## **The Response**

11. The Petitioner asserts that his termination was a result of an online publication by a blogger.
12. Further, as part of his employment duties, he could often sit in various Tender Evaluation Committees constituted by the Respondent to award various tenders to deserving and qualified tenderers.
13. He asserts that contrary to the Applicant's contention that the termination of his employment flowed from a breach of its policies and code of conduct, he was terminated because he wrote a letter to the Director General and other Senior Officers revealing the worrying trend that was taking root within the Applicant entity, of tenders being awarded to underserving contractors. He felt constitutionally obligated to do that.
14. The documents sought to be expunged do not at all contain confidential information as alleged by the Applicant.
15. He contends that the documents here a correlation with his case as the documents formed the basis of his whistle blowing and the anonymous letter dated 12<sup>th</sup> February 2019 to the Director General, that led to his dismissal.
16. The documents are public documents that can be accessed by any member of the public. The Applicant's assertion that they confidential makes no sense therefore.
17. The documents that he seeks to rely on in support of his case were not unlawfully obtained as alleged.



## The Respondent's/Applicant's Submission

18. Counsel for the Respondent distils two issues for determination, whether the documents contain privileged and confidential information and whether the illegally obtained evidence by the Petitioner is admissible.
19. Replying on the South African case of *Advtech Resourcing (Pty) Ltd v Kubn* 2007 (4) ALL SA 1386, c Para {51}, Counsel submitted that in order for information to qualify as confidential; it must involve and must be capable of application in trade and industry; that is; it must be useful; it must not be public knowledge and public property; it must be known to a restricted number of people or to a closed circle; and the information must be of economic value to the person seeking to protect it.
20. Counsel places further reliance on the case of *SBI International Holdings Kg (Kenya) v Amos Hader* [2015] eKLR.
21. To further buttress the submission that the documents are privileged and confidential, Counsel substantially reiterates the contents of the supporting affidavit.
22. On the 2<sup>nd</sup> issue Counsel submits that Article 50 (4) of *the Constitution* of Kenya 2016 forbids the admission of illegally obtained evidence. Further, *Black's Law Dictionary 10<sup>th</sup> Edition* defines the term "illegally obtained evidence" to mean "evidence obtained by violating a statute or the person's constitutional or other rights."
23. The Petitioner has not demonstrated to the court that he obtained the documents which include the Respondents contractual engagements with its clients and award of tenders, both legally and with the consent of the Respondent. To support this submission, Counsel places reliance on the case of *David Ogolla Okoth v Chief Magistrate Court Kibera & 2 others* [2016] eKLR and the Supreme court of Kenya decision in *Njonjo Mue & Another v Chairperson of Independent Electoral and Boundaries Commission & 3 others* [2017] eKLR.

## The Petitioner's Submissions

24. Counsel for the Petitioner identifies two issues for determination, thus, whether the Petitioner's documents should be expunged, whether a permanent injunction should be granted and who should bear the costs of the application.
25. It is submitted that the Respondent's contention that the documents that the Petitioner seeks to rely on were illegally and unlawfully obtained, and that they are confidential, cannot hold water. Most of the documents have a correlation with his petition. They were issued to him on the basis of him being a whistle blower.
26. He further submits that most of the documents are public documents which were issued to the tenderers. They therefore ceased being confidential information. The documents can be accessed.
27. Counsel submits that *Francis Gurry* in his book "Breach of Confidence (2<sup>nd</sup> Edn) 1984" describes breach of confidence, thus;

"The basic attribute which information must possess before it can be considered confidential is inaccessibility. Information must not be common knowledge, i.e. in the public domain. This attribute is fundamental to the action of breach of confidence."
28. It is further submitted that the under section 87 of the *Public Procurement and Asset and Disposal Act*, the documents sought to be expunged are documents that the law does not intend to be kept



confidential by the Respondent. The provision of the law is geared towards ensuring that the processes contemplated in the Act are undertaken openly and transparently.

29. Considering the circumstances of the Petitioners case duly, it emerge will reveal that if the documents sought to be expunged are, the petition shall be unduly shaken.
30. Of the permanent injunction sought, counsel for the Petitioner submits that a permanent injunction can only be given in the Petition itself, after the parties have been heard on their respective cases. To support this, reliance is placed on the case of Kenya Power & Lighting Co. Ltd v Sheriff Molana Habib [2018] eKLR.
31. The application should be dismissed and as costs follow the event, the same be borne by the Applicant.

### **Analysis and Determination**

32. I have carefully considered the application, the grounds upon which it is premised, the affidavit in support thereof, and the Petitioner's answering affidavit and distil the following issues for determination;
  - a. Whether the documents are relevant to the Petitioner's case.
  - b. Whether the documents sought to be expunged contain confidential information.
  - c. Whether the prayers sought by the Respondent/Applicant can be granted.

### **Whether the documents are relevant to the Petitioner's case**

33. This court has keenly considered the petition, the response thereto by the Respondent/Applicant, and the circumstances that led to the impugned termination of employment and come to a clear view that the information contained in the documents sought to be expunged from record is relevant to the petitioner's petition. I will state no more so as to avoid embarrassing the court that shall hear the petition.

### **Whether the documents sought to be expunged contain confidential information**

34. Signing of confidentiality agreements to protect confidential information is a common practice in the employment realm. However, what happens when there is no such confidentiality agreement? Is confidentiality of confidential information required to be maintained even if there is no express contract? Confidentiality of information that is truly confidential must be kept at all material times, presence of a confidentiality contract or not. Employment relationships, as counsel for the Respondent has submitted are founded and thrive on trust, good faith and confidence.
35. In Saltman Engineering Company Limited v Campell Engineering Company Limited [1963] & ALLER, 413 – Lord Greene observed;

“It would not matter the least bit whether there was a contract or whether there was not a contract.”
36. In Coco v AN Clark [1968] F. S. R. 415, Garry J, set out three elements to be established by a party asserting breach of confidentiality in absence of a written contract. Firstly, the information must be of a confidential nature. Secondly, the information must have been communicated in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorized use of information to the detriment of the party communicating it.



37. I have carefully considered the documents that the Respondent/Applicant seeks to have expunged, and provisions of the Public Procurement and Assets Disposal Act, and form a clear view, that the law does not intend that the documents and the information contained therein be deemed confidential. In fact, a reasonable assessment of the structure of the Act, shall reveal that it drafters intended it to be a law facilitating and ensuring transparency, integrity and accountability in the procurement and disposal processes.
38. Having found as I have hereinabove that the documents and the information contained therein cannot be considered confidential, I find it unnecessary to go further into considering the other issues.
39. Imperative to state that a party asserting that confidentiality has been breached by the other, must be prepared to sufficiently demonstrate existence of the elements hereinabove stated. It won't be enough for him or her to baldly assert that a breach has occurred, as did the Applicant herein.
40. By reason of the premises foregoing, I find the Respondent's application lacking in merit. It is hereby dismissed with costs.

**READ, DELIVERED AND SIGNED THIS 24<sup>TH</sup> DAY OF JUNE, 2024.**

**OCHARO KEBIRA**

**JUDGE**

**In the presence of:**

**Ms Awino holding brief for Mr. Sagana for the Applicant**

**No appearance for Petitioner/Respondent**

**ORDER**

**In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.**

**A signed copy will be availed to each party upon payment of Court fees.**

.....

**OCHARO KEBIRA**

**JUDGE**

