



**Ipomai v Sanlam Kenya Limited (Cause 263 of 2018)
[2024] KEELRC 1521 (KLR) (14 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1521 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 263 OF 2018**

**J RIKA, J
JUNE 14, 2024**

BETWEEN

VICTORIA IPOMAI CLAIMANT

AND

SANLAM KENYA LIMITED RESPONDENT

RULING

1. The Respondent has applied, through an application dated July 27, 2023, for expunging from the record, of the following documents, filed by the Claimant: -
 - a. 2017 corporate business review and internal correspondences thereon.
 - b. March 2017 Insurance Regulatory Authority Report.
 - c. Draft legal opinion from Daly & Inamdar Advocates, dated July 21, 2017.
 - d. Internal e-mail correspondences between the Respondent's representatives, in relation to a loan that was to be procured by the Respondent.
 - e. A Draft Health Check Report prepared by KPMG.
 - f. E-mail correspondences between KPMG, and the Respondent in relation to tax health check.
 - g. Engagement letter between the Respondent and KMPG.
 - h. Group expenses report, as at June 30, 2017.
 - i. Insurance Regulatory Authority letter dated July 6, 2017.
 - j. Settlement letter to the Claimant from the Respondent, dated November 14, 2008, made on 'without prejudice basis.'



- k. Claimant's Advocates' letter dated November 24, 2018, and an accompanying draft consent letter, through which the Claimant made an offer for settlement on 'without prejudice basis.'
 - l. Board paper No. 11 on the funding of the Head Office.
2. The Claim came up for hearing on December 27, 2023, when the Respondent informed the Court that it had filed a notice of objection dated July 27, 2023, on production of various documents. The Court directed that the Respondent files a formal application for expunging of these documents.
3. The grounds are that: -
 - a. The documents were unlawfully obtained by the Claimant, after termination. Alternatively, they were unlawfully retained after termination.
 - b. They were obtained contrary to confidentiality clause in the Claimant's contract of employment, and Human Resource Policy.
 - c. Their use is in breach of the Respondent's right to privacy [Article 31] and fair administration of justice [Article 50].
 - d. Production would have to be made by the document authors, some of whom are not compellable witnesses.
 - e. The documents are not relevant to just determination of the dispute.
 - f. The documents between the Respondent and its Advocates are protected by client-advocate privilege.
 - g. Some of the documents were prepared on 'without prejudice basis,' and cannot be presented in Court.
4. The Respondent submits that the Claimant's contract bound her to confidentiality. It states that, "all information acquired in the course of your professional work, must be treated strictly confidential and not used for your personal advantage ...other than is reasonably required... in no circumstances shall you without the prior written consent of the CEO disclose to any person whatsoever, any of the secrets, concerns, affairs or accounts of the company, or of any of its participants during your employment or after its termination...you are not allowed to make any copy, abstract, summary of the whole or any part of a document belonging to the company, except where expressly authorized to do so..."
5. It is submitted that the Human Resource Policy, states *inter alia*, that " it is our policy that all information considered confidential, will not be disclosed to external parties or to Employees without a 'need-to-know' and due authorization... Employees shall not disclose any information about the practice, business dealings, or affairs of the company...they shall keep the information confidential in the course of their employment and after termination...the restriction shall cease to apply to information of knowledge which may come into the domain of the public."
6. The Respondent makes further reference to the Human Resource Policy clauses which prohibit Employees and Ex-Employees from taking custody of the Respondents documents, whether in hard or soft copies.
7. The Claimant is opposed to the Application. She submits that she held a senior management position. All the documents she intends to rely on, came to her by virtue of her position, or were shared with her by the Respondent, by virtue of her position.



8. It has not been shown that she obtained any document illegally. She was Head of Sanlam Life, and received the Insurance Regulatory Authority Report in this capacity. She was responsible for its implementation. There is no privacy involved in production of the Report. The Respondent cannot use the Court to hide from the statutory regulation of the relevant body. The Claimant further submits that she relies on correspondence made on ‘without prejudice basis,’ to show that negotiation took place. She does not rely on the correspondence to show that there were terms of settlement agreed to by the Parties.
9. Parties agreed to have the Application considered and determined on the strength of submissions. They confirmed filing and exchange of submissions, at the last mention before the Court, on April 3, 2024.

The Court Finds

10. Most of the documents sought to be expunged were relevant in the disciplinary proceedings leading to the dismissal of the Claimant. She challenges dismissal, and the Court does not see why she should be disabled in prosecution of her Claim, by being prevented from exhibiting before the Court relevant documents.
11. The documents, are documents she interacted with, as Group Chief Finance Officer and as the Acting Principal Officer of the Respondent’s subsidiary, Sanlam Life Insurance Limited.
12. The documents are not being shared with 3rd Parties, or with other persons, in breach of the Claimant’s contract and Respondent’s Human Resource Policy. They are being shared with a Court of Law, for purposes of adjudicating a dispute which has arisen, between the Claimant and her former Employer, the Respondent herein.
13. Parties have an obligation, under Section 3 of the *Employment & Labour Relations Court Act*, to assist the Court, and fully participate in the proceedings of the Court, to enable the Court reach a just determination.
14. This must include making full disclosure of relevant documents. The documents intended to be produced by the Claimant are relevant to the issues in dispute, and are not in breach of confidentiality or privacy rights of any Party. They are being shared with the Court, not with other 3rd Parties. The Claimant has not by availing these records, acted in furtherance of a personal interest against her former Employer, but in compliance of Section 3 of the *Employment & Labour Relations Court Act*, which binds Parties to assist the Court, in attainment of full and effective determination of disputes. The documents will be examined by the Court in reviewing the positions of both Parties. They are not to be applied one-sidedly and once placed before the Court, they belong to the Court, not to the Parties, or other persons prohibited by the Claimant’s contract, and the Respondent’s Human Resource Policy, from accessing the documents.
15. Corporate business review report; IRA [a public entity] reports; KPMG reports; and letters exchanged between the Parties on proposed mutual separation, are not documents which should be kept away from the consideration of the Court.
16. They are directly or indirectly mentioned, in the voluminous Pleadings filed by the Parties. The Court would be doing an injustice to both Parties, by turning its face away, from the documents sought to be excluded by the Respondent through expungement.
17. The Court does not think that in any event, it is an external party, who is barred from receiving what the Respondent has characterized as confidential documents, under the Claimant’s contract of employment. Confidentiality clauses are normally directed at business competitors. They are aimed at



protecting the Employer's trade secrets, business operations and strategies. They cannot be directed at the Court, barring it from accessing evidence which is relevant, in determining disputes. The Court definitely has a need to know, and is not in any business competition, with the Respondent. The Court is of the view also, that reports generated by public agencies, comprise information or knowledge, which is likely to come into domain of the public. There is no reason why they should be kept away from the Court, under the guise of confidentiality or for the reason that they were unlawfully obtained.

18. Furthermore, once documents are in the custody of the Court, a Party apprehending breach of confidentiality and privacy rights, can apply for protection of the Court, short of keeping the documents away from the Court. An order can be made restricting non-parties from accessing the documents. An order can issue, sealing the Court file. It is not in the interest of fair administration of justice, to expunge documents which are relevant, in resolution of the issues in dispute. The Court is not any other person, who has been availed confidential and private information, prejudicial to the business interests of the Respondent.
19. The letters exchanged on 'without prejudice basis,' were authored pursuant to an attempt at amicable mutual separation. The Respondent pleads that there was indeed such an exercise, and the Court does not see why the letters should be omitted, in confirming that there was a voluntary settlement exercise, attempted by the Parties. It is not intended to show that the Parties agreed settlement on any terms. It is not intended to have the Court impose any terms of settlement by the Parties, as a decision of the Court, or to bar any Party from taking an alternative position, to what may have been proposed in settlement.
20. There is however no need for the Claimant to exhibit the draft legal opinion of Daly & Inamdar Advocates. The Court agrees with the Respondent, that this opinion constitutes privileged communication between an Advocate and his/her Client. This privilege is sacrosanct for obvious reasons, and Courts will protect it, at all times. It is fundamental to the Rule of Law. The Claimant can adequately prosecute her Claim, without bringing in the opinion of the Respondent's Advocates. Should the Court need the legal opinion of any Advocate in resolving the dispute, the Court can always invite such opinion.

It Is Ordered:

- a. The Court shall allow the Claimant to exhibit all documents as filed, except the draft legal opinion of Daly & Inamdar Advocates, dated July 21, 2017.
- b. No order on the costs.

DATED, SIGNED, AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 14TH DAY OF JUNE 2024.

JAMES RIKA

JUDGE

