



REPUBLIC OF KENYA



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**Okeyo v Board of Directors HHI Management Service Limited & another
(Cause E970 of 2023) [2024] KEELRC 1992 (KLR) (29 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1992 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E970 OF 2023**

JK GAKERI, J

JULY 29, 2024

BETWEEN

STEVE OKEYO CLAIMANT

AND

**THE BOARD OF DIRECTORS HHI MANAGEMENT SERVICE
LIMITED 1ST RESPONDENT**

HHI MANAGEMENT SERVICE LIMITED 2ND RESPONDENT

(Before Hon. Justice Dr. Jacob Gakeri)

RULING

1. Before the court for determination is the 2nd Respondent's Notice of Motion dated 29th November, 2023 seeking ORDERS THAT:-
 1. Document Nos. 1, 2 and 3 in the Claimant's List and Bundle of Documents dated 22nd November, 2023 be expunged from the court record entirely.
 2. The Honourable Court to direct the Deputy Registrar to immediately, upon allowing this Application remove the said documents both physically in the court file and virtually on the Judiciary e-filing platform.
 3. The costs of this Application be borne by the Claimant.
2. The Notice of Motion is expressed under Section 12(3)(iii), (iv) and (viii) of the *Employment and Labour Relations Court Act*, 2011 and Rule 17(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 and is based on the grounds set out on its face and the Supporting Affidavit of Arun Mathur sworn on 29th November, 2023 who deposes that Document No. I in the Claimant's List and Bundle of Documents comprises correspondences with the Board of Directors of



the 2nd Respondent and contain proprietary, highly confidential and sensitive information including financial information, business strategy, corporate governance, communication and Confidential Board Communication and came to the Claimant's knowledge by virtue of his employment and had no authority to disclose the same.

3. That the document is marked as confidential and privileged and contains sensitive personal data of employees of various entities under Hospital Holdings Investment B.V. (Netherlands).
4. The affiant further deposes that Document 2 has information touching on the 2nd Respondent's Business Operations and Performance with is of economic value and thus confidential and its production is contrary to the Claimant's Letter of Engagement and Respondent's Human Resource Policy.
5. Finally, the affiant states that Document 3 contains information on the 2nd Respondent's business operations and performance.

Response

6. By a Replying Affidavit sworn by the Claimant on 7th May, 2024, the Claimant deposes that he has the right to fair labour practices and the right to access information essential in prosecuting his case and obtained the documents legally as the Group Chief Executive Officer and the documents have only been shared with the advocate and the court and they are relevant to the claim.
7. That the communications in Document I attest the diligence of the Claimant and the circumstances that led to the Notice of Intent to declare the Claimant redundant.
8. That Document II is the List of the 2nd Respondent's Investors to show that the 2nd Respondent is financially healthy and Document III demonstrates the Claimant's contribution towards the 2nd Respondent's growth and that his role was not duplicated.
9. The affiant deposes that expunging the documents would be prejudicial to his claim and the 2nd Respondent has sabotaged efforts to resolve the claim through alternative dispute resolution mechanisms and terminated the Claimant's employment after the court had directed the suit to mediation, which the 2nd Respondent did not give a chance.
10. That the 2nd Respondent has not demonstrated how the use of the documents will disrupt its operations.
11. That it is in the interest of justice and fairness that the 2nd Respondent's Application dated 29th November, 2023 be dismissed with costs.
12. As to whether Documents 1, 2 and 3 are confidential or constitute proprietary information, counsel submits that they are as they reveal trade secrets and business decisions, corporate strategy, possible strategic plans, employee retention plans, brand merger and marketing.
13. That the list of investors in Document 2 is proprietary.
14. Reliance is made on the sentiments of the court in *Nduati & 26 others V Ernst & Young LLP* (2022) KEELRC 3926 on the test on confidentiality as enunciated in the South African case of *Advtech Resourcing (Pty) Ltd V Kuhn* (2007) (4) ALL SA 1386 (paragraph 51), to argue that the information availed by the Claimant is useful and has economic value.
15. That disclosing the List of Investors of a private organization is a breach of duty of confidentiality.



16. That disclosure of performance of employee not privy to the case is unfair and cites Section 25 of the Data Protection Act on data protection to urge that personal data is protected.
17. On whether the Claimant breached his duty of confidentiality, the applicant's counsel submits that he did as he contravened Clause 7 of the Letter of Engagement and Clause 129 of the 2nd Respondent's Human Resource Manual.
18. Reliance is made on the sentiments of the court in *Martin Kabanga Gathawa V Associated Battery Manufacturers (E.A) Ltd (2019) eKLR*, *Magdalene Kiboi & 17 others V Engen Kenya Ltd (2019) eKLR* and *Njenga V DIB Bank Kenya Ltd (2023) KEELRC 1549* to urge that the Claimant breached the duty of confidentiality
19. As to whether expunction of the documents will prejudice the Claimant, the 2nd Respondent argues that it will not as under Section 47(5) of the *Employment Act*, the burden of proving the grounds of termination lies with the employer.
20. The sentiments of the Court of Appeal in *Kenya Airways Ltd V Aviation & Allied Workers Union Kenya & 3 others (2014) eKLR* were relied upon.

Claimant's submissions

21. As to whether Documents 1, 2 and 3 on the Claimant's List & Bundles of Documents should be expunged, counsel for the Claimant submits that Article 35(1)(b) of *the Constitution* of Kenya, 2010 gives the Claimant the right to access information held by another person for the exercise or protection of any right or fundamental freedom and Article 41(1) gives the Claimant the right to fair labour practices and Article 50 the right to a fair trial, to urge that expunction of the documents would be prejudicial to the Claimant's case and a violation of his constitutional right to fair trial which applies in civil cases as held in *Pinnacle Projects Ltd V Presbyterian Church of East Africa, Ngong Parish & another (2019) eKLR*.
22. Counsel urges that in *Leland I. Salano V Intercontinental Hotel (2013) eKLR*, the court enunciated the guiding principles in determining whether or not to expunge documents on account of confidentiality such as, how the employee obtained the documents, with whom they were shared, nature and content of the documents, confidentiality policy, whether their use unduly disrupts the employer's business and right of the employer to conduct business legally and the employees right to fair labour practices.
23. In that case, the court dismissed the application to expunge documents.
24. Reliance was also made on the decision in *Deepesh Subhaschandra Modi V Pan Africa Express Transport Ltd (2019) eKLR* where the court declined to expunge reports relied upon the Claimant.
25. Reliance was also made on the decision in *Josephine Ndirima V Medecins Sans Frontiers Belgium (2022) eKLR* where the court relied on the decision in *Deepesh Subhaschandra Modi case (Supra)*.
26. Counsel urges that the Claimant has met the threshold for allowing the impugned documents as the documents were obtained in the course of employment, only shared them with his advocate, are relevant to the Claimant's case, no disruption of the Respondent's business, close of documents in court is not prohibited by clause 7, the 2nd Respondent was not eager to settle the matter out of court and expunging the documents will prejudice the Claimant's case.



Analysis and determination

27. It is common ground that the Claimant was an employee of the Respondent effective 1st June, 2021 under a written contract of service dated 30th May, 2021 and served the Respondent diligently until he received a notice of intent to terminate on account of redundancy dated 10th November, 2023.
28. The letter inter alia catalogued the dues payable to the Claimant in the event the redundancy materialised.
29. It is also not in dispute that by a Notice of Motion dated 23rd November, 2023 filed under Certificate of Urgency, the Claimant sought injunctive relief to restrain the Respondents from restructuring or any negotiations on the same or rationalization of staff likely to result in a redundancy and vide a ruling delivered on 7th December, 2023, the court dismissed the application and encouraged the parties to embrace mediation.
30. Strangely, the 2nd Respondent opted not to give mediation a chance and proceeded to dismiss the Claimant as it had envisioned by its Notice of Intent to terminate on account of redundancy and did not reach out to the Claimant.
31. The 2nd Respondent had in the meantime filed two applications dated 27th November, 2023 and 29th November, 2023 respectively.
32. The former sought to have the dispute referred to arbitration as provided by the contract of employment and by a ruling delivered on 6th May, 2024, the court declined to refer the dispute to arbitration.
33. It was and still unclear to the court why the 2nd Respondent prefers arbitration yet the Court Annexed Mediation offers more advantages to both parties than arbitration and is the least expensive.
34. Similarly, clause 6.2 of the Claimant's Letter of Engagement provided that parties to the contract could only invoke arbitration if mediation failed.
35. Regrettably, no attempts were made to resolve the dispute by mediation, an out of court dispute resolution mechanism still available to the parties.
36. The foregoing history is necessary to contextualize the instant application which seeks expunction of certain documents from record.
37. The singular issue for determination is whether Document No. 1, Document No. 2 and Document No. 3 appearing on pages 1 – 22, 26 and 27 – 28 of the Claimant's List and Bundle of Documents dated 22nd November, 2023 should be expunged from the court record.
38. As correctly submitted by the Claimant's counsel, expunction of documents from court record is entwined with a litigant's right to access information, fair labour practices, confidentiality and the right to fair trial all of which are constitutionally protected under various articles of *the Constitution* of Kenya, 2010.
39. In determining such a case, the court is required to balance various interests to ensure that justice is not only done but manifestly be seen to be done to all the parties involved in the suit.
40. It is not in contest that the Claimant has the right of access to information necessary for the exercise or protection of the right to fair trial as ordained by Article 35(1)(b) of *the Constitution* of Kenya and has the right to fair labour practices under Article 41.



41. Similarly, the 2nd Respondent has the right to privacy of its communication and information relating to private affairs, which justifies the confidentiality clause in the Letter of Engagement which obligated the Claimant not to use or disclose confidential information relating to the business of the employer such as clients list, trade secrets, client details and pricing structures during employment and thereafter, without consent of the employer.
42. It need not to be gainsaid that being the Respondents Group Chief Executive Officer, the Claimant interacted with confidential and non-confidential information and communication relating to the 2nd Respondent and its businesses in the course of discharging his duties.
43. Granted that the right of access to information in the hands of another person to prosecute a suit in a court of law is a constitutional imperative, it behooves the party urging its expunction from record to cogently and justifiably demonstrate why the information ought to be expunged from record.
44. In the instant case, the Claimant has filed email communication obtained in the course of his employment by the 2nd Respondent as well as information about the 2nd Respondent's business methods and those of other entities of the company and intends to use it in prosecuting his case against the 2nd Respondent.
45. It is common ground that the documents in question have been shared with the Claimant's counsel on record and the court and no one else as confirmed by the Claimant vide paragraph 7 of the Replying Affidavit and the advocate is an officer of the court.
46. Relatedly, the Claimant justifies the inclusion of the documents in his List and Bundle of documents.
47. It is not in contest that applying the criteria applied in *Nduati & 26 others V Ernst & Young LLP (Supra)* cited by the applicant's counsel, some of the information availed by the Claimant is confidential and some were expressed as such.
48. However, Document I and 3 consists of various documents, not one and relate to different subjects.
49. Email communication on record for instance, relates to different matters and the applicant appears to be suggesting that the communication was confidential in all cases and cannot be disclosed to an advocate or the court which is unsustainable.
50. Granted that the Letter of Engagement had a confidentiality clause, it behooves the court to determine whether the clause prohibited the Claimant from disclosing any company information with the court in a matter before it.
51. Clause 7.1 of the agreement provided;

“By accepting this letter of offer, you acknowledge and agree that you will not, during the course of your employment or thereafter, except with the consent of the employer, as required by law or in the performance of your duties, use or disclose confidential information relating to the business of the company, including but not limited to client lists, trade secrets, client details and pricing structures”.
52. Clearly, the clause enabled the Claimant to use or disclose confidential information where it was a requirement of the law and as Clause 7.1 above does not categorise to whom the confidential information cannot be disclosed and the Claimant is using the information for purposes of safeguarding his rights, the court is not persuaded that the use amounts to a breach of the confidentiality clause.



53. The court is guided by the sentiments of Radido J. in Deepesh Subhaschandra Modi V Pan Africa Express Transporters Ltd (Supra) as follows;

“ . . . What the Claimant is attempting to do in the litigation is to advance a cause of action which he believes arose out of a violation of his right to fair labour practices.

Further, the documents sought to be expunged were not illegally obtained by the Claimant. He prepared them in the normal course of his employment and he made certain observations and recommendations which may appear acrid to the Respondent . . .

In the view of the court, and in consideration of the principle of the right of access to information, open justice and that the Claimant alleges that the reports in contestation were at the heart of his tribulations hence the plea of constructive dismissal, the reports form an integral part of the dispute and therefore should not be expunged from the record”.

54. The foregoing sentiments apply to the facts of the instant case in several ways.

55. In Leland Solano V Intercontinental Hotel (Supra), the court stated as follows;

“ Courts have laid down certain principles that guide how this question should be resolved. Some of the guidelines developed through case law are as follows:-

- i. Whether the employee came upon the documents in the regular course of business as opposed to rummaging through files;
- ii. Whether the employee shared the documents with other employees or persons or simply shared with his advocates;
- iii. Nature and content of the particular document, in order to weigh the employer’s interest in keeping the documents confidential;
- iv. Whether the employer kept in place a clear uniformly applied, confidential policy;
- v. Balancing the relevance of the documents, against the consideration whether their use or disclosure unduly disrupts the employers business; and,
- vi. Consider the right of the employer to conduct business legally and efficiently, weighed against the employees right to be free from unfair labour practices.”

56. In that case, the trial court found that the applicant failed to prove that the documents were confidential or obtained illegally.

57. In the instant suit, unlike the Claimant whose Replying Affidavit clearly states the actual relevance of the documents to his case against the Respondents, the 2nd Respondent’s Supporting Affidavit is silent on the prejudice or inconvenience it stands to suffer if the orders sought are not granted.

58. Relatedly, the 2nd Respondent has not evidentiary demonstrated that all the documents sought to be expunged are indeed confidential or that its right to privacy and fair trial would be compromised if the documents are not expunged.

59. Puzzlingly, although Mr. Arun Mathur deposes that the clause on arbitration and mediation was intended to ensure that information which came to the Claimant’s knowledge would not be subject



- of public disclosure, the affiant makes no reference to the efforts he made to have the dispute resolved by mediation bearing in mind that in arbitration, counsel would still have sought their expunction.
60. In the court's view, only mediation would have actualized the 2nd Respondent's intention, but for unexplained reasons, it appears that the 2nd Respondent is not amenable to the process.
 61. Finally, granted that the Claimant is using the documents to pursue a civil suit against the 2nd Respondent, which is a fundamental right under *the Constitution* of Kenya and obtained the documents in the course of his employment, thus lawfully and the documents were only disclosed to his advocate on record and the court, and none is a competitor of the 2nd Respondent, the Claimant's arguments sound logical.
 62. From the evidence on record, it is unclear whether the 2nd Respondent had a clearly articulated and uniformly applied confidentiality policy as the Claimant was the Group Chief Executive Officer.
 63. Similarly, the Respondent tendered no evidence to show that the use or disclosure of the information on record would disrupt the employer's business in any way.
 64. In the circumstances, the court is not persuaded that the 2nd Respondent has made a sustainable case for expunction of Document 1, Document 2 and Document 3 of the Claimant's List and Bundle of Documents.
 65. Flowing from the foregoing, it is the finding of the court that the 2nd Respondent's Notice of Motion dated 29th November, 2023 is unmerited and it is accordingly dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 29TH DAY OF JULY 2024

DR. JACOB GAKERI

JUDGE

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 15th March 2020 and subsequent directions of 21st 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 *Civil 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.

DR. JACOB GAKERI

JUDGE

