



Chumo v Uthabiti Africa Advisory Services Ltd & another (Cause E366 of 2022) [2023] KEELRC 44 (KLR) (19 January 2023) (Ruling)

Neutral citation: [2023] KEELRC 44 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E366 OF 2022
L NDOLO, J
JANUARY 19, 2023**

BETWEEN

LEONARD FALEX CHUMO CLAIMANT

AND

ASAYYA IMAYA 1ST RESPONDENT

UTHABITI AFRICA ADVISORY SERVICES LTD 2ND RESPONDENT

RULING

1. The subject of this ruling is the notice of motion dated September 19, 2022, by which the 2nd respondent seeks the following orders:
 - a. That the claimant's suit against the 2nd respondent be struck out;
 - b. That paragraphs 8,9,13,18,19 and 23(iii)(vi) of the statement of claim touching on defamation claim, be struck out;
 - c. That the emails dated January 17, 2022 at pages 58 to 61 of the claimant's list of documents be expunged from the record.
2. The motion is supported by an affidavit sworn by the 2nd respondent, Asayya Imaya and is based on the following grounds:
 - a. That the entire cause as against the 2nd respondent is scandalous, frivolous and vexatious;
 - b. That the claim as against the 2nd respondent is a non-starter and is out-rightly against the principles in company law as established in the celebrated case of *Salomon v Salomon & Co Ltd* (1896) UKHL 1;
 - c. That the claimant was contracted as a consultant by and worked for the 1st respondent and not the 2nd respondent;



- d. That the claimant has no cause of action against the 2nd respondent;
 - e. That the 2nd respondent cannot be held vicariously liable for the commissions or omissions of the 1st respondent and is improperly joined in this suit;
 - f. That the claimant, despite being requested to, has failed neglected and or refused to supply particulars of facts and matters on which he relies to justify his claims for alleged defamation;
 - g. That the claimant has shared private communication between the 1st respondent and its employees, which were never copied to him, leaving no doubt that the same was fraudulently obtained;
 - h. That the claimant has not sworn an affidavit to demonstrate how he obtained the emails, in which he was never copied;
 - i. That all employees and consultants of the 1st respondent sign a binding non-disclosure agreement, which clearly the claimant has breached by sharing of privileged communication that he naturally did not have access to;
 - j. That the claim as filed may prejudice, embarrass and delay a fair trial of the action and is otherwise an abuse of the process to the extent shown and as demonstrates herein;
 - k. That this application is made *bona fides*, without delay and in the best interest of justice and fairness.
3. The claimant opposes the motion by his replying affidavit sworn on December 8, 2022.
 4. The claimant depones that he holds the 2nd respondent squarely responsible for manoeuvring the 1st respondent's systems and structures to pursue personal vendetta against the claimant, pursuant to the claimant's refusal to side with the 2nd respondent's illegalities.
 5. The claimant asserts that joinder of the 2nd respondent in the suit will in the long run, stop perpetuation of unjust labour practices against employees and contractors and act to curtail soliciting resources from unsuspecting donors and development partners in pursuit of personal and selfish ambitions, not related to development agendas.
 6. The claimant accuses the 2nd respondent of abusing his powers as the Chief Executive Officer, by exerting undue pressure on employees, including the purported complainant, to act, respond to surveys and testify against the claimant.
 7. The claimant states that the 2nd respondent has acted interchangeably as the chief Executive Officer and the owner of the company.
 8. The claimant maintains that the 2nd respondent has been properly sued in his capacity as Chief Executive Officer of the 1st respondent, with sufficient degree of knowledge and/or understanding of breaches of employee rights stated by the claimant.
 9. The claimant accuses the 2nd respondent of failing to take reasonable and proper steps to ensure compliance with the laid down Human Resource Policy documents of the 1st respondent.
 10. The claimant holds the 2nd respondent personally responsible for the claimant's frustrations at the workplace, to which the claimant assigns his resignation from employment.
 11. The claimant claims to have obtained the email communication at pages 58 to 61 of his bundle of documents lawfully in the course of his day today duties. He states that the said communication was



- not marked confidential and were availed to him in the course of his employment, as director of policy and partnerships.
12. He adds that he intends to use the email trail in his claim for unfair termination/constructive dismissal.
 13. This is a mixed grill application seeking orders to strike out the 2nd respondent from the proceedings, part of the statement of claim and documentary evidence availed by the claimant.
 14. In his plea to exit the proceedings, the 2nd respondent relies on the doctrine of privity of contract, stating that there was no contract between him and the claimant.
 15. In response, the claimant states that the 2nd respondent played a specific role in the events leading to the termination of the claimant's employment. In this regard, the claimant accuses the 2nd respondent of manipulating the 1st respondent's systems and structures to pursue a personal vendetta against the claimant.
 16. In the final submissions filed on behalf of the claimant, reference was made to section 2 of the [Employment Act](#) where an employer is defined as:

“...any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.”
 17. The claimant submits that the definition of the term ‘employer’ suggests that directors and officers of a corporate employer may be joined with their business vehicles in redressing employment wrongs.
 18. In advancing this argument, the claimant relies on the decision in [Daniel Mutisya Masesi v Romy Madan & another](#) [2013] eKLR where it was held that:

“The [Employment Act](#), 2007 does not bar directors and their companies from being joined in the same claim, filed by their employees...the doctrine of corporate separateness is not inviolable particularly in labour law...The law aims to assist the lesser of the parties in the bargaining equation, by making it possible for the weaker party, to proceed and apportion liability to any of the decision making components in the economic enterprise.”
 19. I fully associate myself with the finding in the [Masesi Case](#) (supra) and agree that in appropriate cases, directors or officers of a body corporate may be joined as co-respondents.
 20. In the present case, the 2nd respondent, who at the material time was the Chief Executive Officer of the 1st respondent, has been assigned specific allegations which would call for his response. His plea for release from these proceedings is therefore rejected.
 21. The second prayer in this application relates to segments of the statement of claim. In this regard, the court is invited to strike out paragraphs 8,9,13,18,19 and 23(iii)(vi) which touch on defamation. The reason given by the 2nd respondent for this plea is that the claimant has failed to provide particulars of defamation as required in law. The only thing I will say on this issue is that the 2nd respondent has jumped the gun as it is the responsibility of the claimant to prove his claim and if he fails to do so, the court will render itself appropriately.
 22. The third plea by the 2nd respondent is that certain email correspondence filed by the claimant be expunged from the record on the basis that they constitute confidential information.
 23. In its decision in [SBI International Holdings Ag \(Kenya\) v Amos Hadar](#) [2015] eKLR this court held that where an employee, in the course of employment, gains access to confidential information that is



proprietary in nature, that employee owes a common law duty to the employer not to reveal the said information.

24. As to what constitutes confidential information, the South African case of *Advtech Resourcing (Pty) Ltd v Kubn* 2007(4) ALL SA 1386, C para [51] is instructive. In that case it was held that for information to qualify as confidential the following requirements must be fulfilled:
- a. The information must involve and be capable of application in trade and industry; that is: it must be useful;
 - b. The information must not be public knowledge and public property; it must be known to a restricted number of people or to a closed circle;
 - c. The information must be of economic value to the person seeking to protect it.
25. In *Leland I Salano v Intercontinental Hotel* [2013] eKLR Rika J held that:
- “Confidential documents in the employment relationship are documents regarded by the employer to contain secret information, or information which is not generally known, or readily accessible to other persons, other than the employer. They are confidential if their unauthorized disclosure could damage the essential interests of the employer’s business.”
26. Apart from objecting to production of the subject emails, the 2nd respondent did not adduce any evidence to demonstrate that the information contained in these emails is indeed confidential. In an adversarial system such as ours, courts must guard against locking out evidence just because it is uncomfortable to a party.
27. In the upshot, I find and hold that the 2nd respondent has failed to convince the court to grant any of the pleas in the notice of motion dated September 19, 2022. The motion is therefore dismissed with costs in the cause.
28. It is so ordered.

DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF JANUARY 2023

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JUDGE

Appearance:

Mr. Mulama h/b Mr. Cheboi for the Claimant

Ms. Kipruto for the Respondents

