



REPUBLIC OF KENYA



KENYA LAW
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**Otieno v RHS Freight Services (K) Limited (Cause 490 of 2019)
[2023] KEELRC 2635 (KLR) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2635 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 490 OF 2019
L NDOLO, J
OCTOBER 26, 2023**

BETWEEN

BEATRICE AKINYI OTIENO CLAIMANT

AND

RHS FREIGHT SERVICES (K) LIMITED RESPONDENT

RULING

1. By its Notice of Motion dated 29th May 2023, the Respondent seeks orders to expunge the Claimant's documents identified as No 13, being emails dated 17th September 2015 to 17th March 2019.
2. The Motion is supported by an affidavit sworn by the Respondent's Country Director, Rajesh Nayarana Shetty and is based on the following grounds:
 - a. That the emails were irregularly and illegally obtained from the Respondent's Manager's private emails;
 - b. That at paragraph 11 of its Statement of Defence filed on 7th November 2019, the Respondent raised concern on how the Claimant was able to access the emails, being private and privileged communication;
 - c. That the conduct of the Claimant is a serious breach of individual right to privacy and if she is allowed to produce the emails, it would lead to violation of the fundamental rights and freedoms as provided by the Constitution;
 - d. That in light of the foregoing, in order to ensure the ends of justice are met, this application should be allowed.
3. The Claimant opposes the application by her replying affidavit sworn on 5th July 2023.



4. The Claimant depones that the emails dated 17th September 2015 to 17th March 2019 were not illegally obtained. She states that she obtained the said emails from her officer desktop computer.
5. The Claimant avers that sometime in March 2019, a salesman with the Respondent, one Swapnil logged into her desktop using his email account swapnil.m@hrsfreightkenya.com. The Claimant claims to have found Swapnil's web page open on her desktop with an email titled 'Termination of Staff & Fee Structure-Beatrice Otieno'.
6. The Claimant states that the emails caught her attention as they concerned termination of her employment. She therefore decided to forward them to her personal email address.
7. The Claimant gives an interesting account of how the impugned documents came into her possession. If she is to be believed, she obtained the documents in the ordinary course of her work at the Respondent.
8. The Court takes judicial notice that within an employment relationship, employees will access information of a confidential, privileged or restricted nature, which they are not at liberty to disclose or use without authorisation.
9. In the submissions filed on behalf of the Respondent, reference was made to the persuasive decision in *Faccenda Chicken Limited v Fowler* [1987] 1 CH. 117 where it was stated:

“In the absence of express terms, an employee was bound by implied duty of good faith to his employer not to use, or disclose, for the duration of his employment, confidential information gained in the course of employment...”
10. Given the intricate and intertwined nature of the workplace, it would be extremely injurious to the employer if employees are allowed to freely use information acquired in the course of employment, all in the name of the right of access to information. In this regard, the right of the employee to information must stop where the right of the employer to privacy and fair play begin.
11. I make this finding in light of the fact that an employee who requires information from the employer, to advance their case, has recourse in law, through pretrial discovery and interrogatories.
12. In its decision in *Susan Wariara Kariuki v Diakonie Katastrophenhilfe* [2016] eKLR this Court stated the following:

“This Country now has a Constitution that enables parties to access documents necessary for their case through legal means and there is therefore no need to resort to street methods to do so and as held by Lenaola J (as he then was) in *Okiya Omtatab Okoiti & 2 others v Attorney General* [2014] eKLR a court of law will not rely on documents that are improperly obtained.”
13. In the present case, the Claimant had no reason to resort to unorthodox means to access the documents in issue.
14. Ultimately, I find and hold that the documents identified as No 13, being emails dated 17th September 2015 to 17th March 2019 were improperly obtained. The said documents are therefore expunged from the record.
15. The costs of this application will be in the cause.
16. Orders accordingly.



DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF OCTOBER, 2023

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JUDGE

Appearance:

Ms. Kataghai h/b for Mr. Rakoro for the Claimant

Mr. Kimathi for the Respondent

