



Sangare v International Planned Parenthood Federation & another (Cause E621 of 2023) [2023] KEELRC 3303 (KLR) (19 December 2023) (Ruling)

Neutral citation: [2023] KEELRC 3303 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E621 OF 2023
L NDOLO, J
DECEMBER 19, 2023**

BETWEEN

AISSATA TOUNKARA EPSE SANGARE CLAIMANT

AND

**INTERNATIONAL PLANNED PARENTHOOD FEDERATION 1ST
RESPONDENT**

MARIE EVELYNE PETRUS BARRY 2ND RESPONDENT

RULING

1. By a Memorandum of Claim dated 27th July 2023, the Claimant sued the 1st and 2nd Respondents for unlawful and unfair termination of employment.
2. In response, the Respondents filed a Memorandum of Response and Counterclaim dated 8th November 2023.
3. Contemporaneously with the Memorandum of Response, the Respondents filed a Notice of Motion under Certificate of Urgency, seeking the following orders:
 - a. An order directing the Claimant to provide security in the form of an unconditional and irrevocable bank guarantee in the sum of Kshs. 10,000,000 or any other amount that the Court deems fit for the Respondent’s costs of the suit;
 - b. An order directing the Claimant to provide security in the form of an unconditional and irrevocable bank guarantee in the sum of Kshs. 15,000,000 for the Respondent’s claim in the Counterclaim;
 - c. A gag order barring the Claimant and her agents or representatives from publishing, discussing and/or reporting the subject matter of these proceedings in any media including television, radio, website, the internet and any other media at large.



4. The application is supported by an affidavit sworn by the 2nd Respondent, Marie Evelyne Petrus Barry and is based on the following grounds:
- a. The Claimant was employed by the 1st Respondent on 14th June 2021 and based on her employment, the Claimant was granted a work permit and diplomatic visa by the Government of Kenya. The Claimant is a foreign national with no permanent residence in Kenya. Upon the termination of the Claimant's employment, the 2nd Respondent notified the Ministry of Foreign Affairs occasioning cancellation of the Claimant's work permit and diplomatic visa;
 - b. Due to breach of confidentiality, the Respondents filed a Counterclaim dated 8th November 2023, premised on the following grounds:
 - i. Breach of the contract of employment;
 - ii. Breach of confidentiality; and
 - iii. Loss suffered on account of investigations of the effects of the breach of confidentiality, mitigating the effects of the breach and rectification of the effects of the breach.
 - c. The Respondents are not aware of any assets belonging to the Claimant that are domiciled in Kenya, and they would therefore be subjected to great hardship in execution of any judgment that might be issued in their favour;
 - d. The actions of the Claimant have harmed the Respondents' reputation and it is therefore fair and just that the Court issues an order for security for costs with regard to the costs of the suit and the harm suffered;
 - e. On 20th September 2023, there was an article published in the Standard Newspaper titled 'Staff sacked for leaking details to husband seeks over Sh44m.' The article claims that the Claimant had gathered information regarding the 2nd Respondent's misuse of office, misuse of financial resources, fraud and that she sent the information to her husband who then called for investigations. The article as drafted quotes the name of the Claimant's lawyer and not the Firm on record thereby indicating that the Claimant and her lawyer had talked to the press and caused the article to be published;
 - f. At the time the article was published, the Claimant had not served the Respondents with the pleadings in this matter and the Respondents were surprised to hear that a case had been filed, summons were served on the Respondents on 19th October 2023;
 - g. The actions by the Claimant are malicious and are intended to damage the reputation of the Respondents and to subject the case to the court of public opinion;
 - h. The genesis of the dispute between the Claimant and the 1st Respondent stems from the Claimant admittedly sharing confidential information with her husband, Mr. Nouhoum Sangare. On 13th April 2023, Mr. Sangare sent an email to the current and former members of staff of the 1st Respondent and other stakeholders, claiming that the realignment process of the 1st Respondent was undermined by wrongdoings associated with misconduct of the 2nd Respondent and he called for investigations. In the email, he also called for the 2nd Respondent to step down and/or for the 1st Respondent to consider suspending her from her position. The Claimant's husband also stated that he would escalate the issue if his demands were not met;
 - i. The background of the dispute and the conduct of the Claimant proves that she has a history of sharing confidential information and the Respondents therefore ask the Court to issue



a gag order in order to protect the integrity of these proceedings and the reputation of the Respondents;

- j. Throughout the disciplinary process, the Claimant admitted that she had shared confidential information with her husband, but she claimed that the information was shared because she was whistle-blower. The actions by the Claimant and her lawyer infringe on the 2nd Respondent's right to privacy, human dignity and her rights under the Data Protection Act. These actions also harm the reputation of the 1st Respondent, which is a reputable non-profit organisation. The smear campaign by the Claimant has caused irreparable damage to the 1st Respondent whose operations are funded through donor funds;
 - k. The article in the Standard Newspaper is a commercial strategy which aims to have leverage to the suit and condemn the Respondents in the public domain and smear their reputation;
 - l. Since the publication of the article, the Respondents have received several calls from family, friends and work stakeholders, regarding the matter and the previous exposure of private data by the Claimant's husband vide email dated 14th April 2023 has exposed the 1st Respondent to irreparable reputational damage and the 2nd Respondent to emotional anguish, harm and risk;
 - m. If the orders sought are not granted, the Respondents will be prejudiced, which prejudice cannot be compensated by damages.
5. The Claimant filed Grounds of Opposition dated 15th November 2023 stating:
 - a. The application is devoid of merit, discloses no arguable points of law or fact and is calculated to delay the fair trial of this matter;
 - b. There are no liquidated sums in the matter and the Respondents' prayers are therefore misplaced and a misapprehension of the need for an application for security for costs;
 - c. The application is a covert and subtle attempt to impede access justice for the Claimant because she is not a citizen of Kenya, which is discriminatory and in violation of Articles 27, 48 and 50 of *the Constitution* of Kenya.
 6. The Claimant further filed a replying affidavit sworn by her on 24th November 2023.
 7. She depones that the lack of a permanent residence in Kenya is not a reasonable and justifiable limitation to the right to access to justice in an open and democratic society based on human dignity, equality and freedom. She points out that the 2nd Respondent, Marie Evelyne Petrus Barry being a Citizen of France, is also not a citizen of Kenya.
 8. The Claimant further depones that she does not own or run any media house in Kenya and the gag order sought is misplaced and is an attempt to gag the media, contrary to Article 34 of *the Constitution* of Kenya on media freedom.
 9. According to the Claimant, documents filed in court are not subject to absolute privilege unless the Court issues a non-publication order based on the parties' right to privacy. She adds that under *the Constitution* of Kenya, any limitation to the freedom of expression guaranteed under Article 33 must be justified within the confines of Article 24.
 10. The Claimant maintains that the demand for security for costs in the sum of Kshs. 10,000,000 is misplaced as costs follow the event. She states that this prayer is presumptive that the Respondent will be successful.



11. The Claimant also maintains that the demand for security in the sum of Kshs. 15,000,000 for the Respondent's claim in the Counterclaim is not only presumptive and arbitrary but also premature.
12. The Claimant avers that if the orders sought in the application are granted before substantive hearing and determination of the claim, she will be prejudiced and her right of access to justice under Article 48 of *the Constitution* will be violated.
13. The Claimant concludes that the Respondents have not met the threshold for grant of the orders sought, as they have not established a prima facie case with a probability of success.
14. By their application, the Respondents seek two distinct orders; first, an order of attachment before judgment and second, a gag order barring the Claimant from discussing the subject matter of these proceedings.
15. Regarding the first order, the Respondents ask the Court to direct the Claimant to deposit a total of Kshs. 25,000,000.
16. Attachment before judgment is provided for under Order 39 Rule 5(1) of the Civil Procedure Rules in the following terms:
 - 5(1). Where at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him-
 - a. is about to dispose the whole or any part of his property; or
 - b. is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court,the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court when required the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.
17. Settled jurisprudence on attachment before judgment is to the effect that such an order is not to be issued idly. In its decision in *Kanyoko t/a Amigos Bar and Restaurant v Nderu & others* [1988] eKLR the Court of Appeal stated as follows:

“The power to attach before judgment must not be exercised lightly and only upon clear proof of mischief...namely that the defendant was about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him.”
18. The Respondents' plea for an order of attachment before judgment is informed by the fact that the Claimant is not a Kenyan citizen and she does not have a permanent residence in the Country. I find nothing in the law elevating this as a material consideration in considering applications for security for costs.
19. In her submissions in opposition to the Respondent's application, the Claimant referred to the decision in *Westmont Holdings SDN BHD v Central Bank of Kenya & others* (Petition 16 (E023) of 2021) KESC 11 (KLR) (17 February 2023) (Judgment) where the Supreme Court of Kenya set out guidelines to be observed in considering applications for security for costs, including proportionality and access to justice. Of significance, the Supreme Court held that an order for security for costs cannot be made merely on account of the impecuniosity of the opposite party.



20. The Claimant submits that directing her to deposit the sum of Kshs. 25,000,000 as security for costs and Counterclaim would place an impediment to her right to fair trial and access to justice guaranteed under Articles 25(c) and 48 of *the Constitution*.
21. In the circumstances of this case, I would agree with the Claimant that the Respondents have not established the threshold for grant of an order of attachment before judgment. This limb of the application therefore fails and is disallowed.
22. With respect to the prayer for a gag order, the Court notes that the Respondents pursue a general interdict restraining the Claimant, her agents or representatives from commenting on the subject matter of these proceedings. The reason the Respondents give for this broadside plea is that the Claimant has a history of sharing confidential information.
23. The question as to what constitutes confidential information was considered in the persuasive case of Advtech Resourcing (Pty) Ltd v Kuhn 2007 (4) ALL SA 1386, C Para [51] where the following requirements were established:
 - a. The information must be capable of application in trade and industry;
 - b. The information must not be public knowledge or public property;
 - c. The information must be of economic value to the person seeking its protection;
 - d. Confidential agreements cannot be invoked to bar disclosure of illegal or immoral activity.
24. The Respondents have not pointed out to the Court the exact information they wish to protect. In fact, they lump together the entire subject matter of these proceedings as information to be protected.
25. As held by Majanja J in Okiya Omtatah Okoiti v Attorney General & 2 others [2013] eKLR any limitation to the freedom of expression guaranteed under Article 33 of *the Constitution* must be justified within the confines of Article 24 on limitation of rights.
26. In this application, the Respondents have not only failed to identify the specific information they wish to protect but they have also failed to subject their proposed gag plea to an analysis of limitation of rights required by Article 24 of *the Constitution*.
27. For the foregoing reasons, I find and hold that the Respondents have not made out a case for grant of a gag order against the Claimant.
28. In the end, the entire application fails and is dismissed with costs in the cause.
29. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF DECEMBER 2023.

LINNET NDOLO

JUDGE

Appearance:

Messrs Lempaa and Kariuki for the Claimant

