



**John v Bayer East Africa Limited (Cause 864 of 2016)
[2022] KEELRC 1426 (KLR) (16 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1426 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 864 OF 2016
K OCHARO, J
JUNE 16, 2022**

BETWEEN

MONICAH MWELU JOHN CLAIMANT

AND

BAYER EAST AFRICA LIMITED RESPONDENT

RULING

1. When this matter came up for hearing on the 10th of March 2022, Counsel Gatore for the Claimant indicated to Court that, the Claimant had through its notice to produce dated 18th May 2017, sought from the Respondent production of documents, whose details were placed forth thereon. That the Respondent had filed a notice of objection to the production of the documents.
2. There being no common cause on the production of the documents, consequent to the notice of production, this Court directed that it be addressed on the issue of production of the documents first before proceeding further into the matter. The parties were directed to file their written submissions on the issue within specific timelines, the Respondent did.
3. Through the Notice to produce dated 18th May 2017, expressed to be pursuant to the provisions of Section 69 of the *Evidence Act* Cap 80 Laws of Kenya, Section 22 of the *Civil Procedure Act* Cap 21, Article 35 of *the Constitution*, the Claimant wrote:

“Take Notice that you are hereby required to produce and show to the Court at the hearing of this suit all books, papers, letters, copies of letters and other writings and documents in your custody, possession or power, containing any entry memorandum or minute relating to the matters in question in the suit, and particular Employment related records of your current and former employees whose names appear below, all of who had similar or equivalent qualifications and experience as the Claimant herein:

- a) Ann Ndilu



- b) Lydia Wanjiru
- c) Jasper Kwamboka
- d) Anne Ritaungu

As follows:

- 1) 6 payslips up to March 2016.
- 2) Tax P9 forms of years 2014 and 2015.
- 3) Employment letters/contract documents.
- 4) Academic and professional certificates.
- 5) Separately, the payslips of 2016 and employment letter/contract documents of Isabela Ngarare Nyandieka, who replaced the Claimant immediately after termination.”

- 4. In his response to the Notice to Produce, the Respondent opposed the demand, stating that the Notice was improper upon basis of the following grounds:
 - a) Production of the documents sought would violate the constitutional right to privacy under Article 31 of *the Constitution* of Kenya, 2010, of Anne Ndilu, Lydia Wanjiru, Jasper kwamboka, Anne Rintaungu and Isabella Ngangare Nyandieka. [the employees].
 - b) The Notice offends the provisions of Section 5[4][b] of the *Employment Act* 2007.
 - c) The information sought falls under the limitation cited under Section 6[1] [d] of the *Access to Information Act* No. 31 of 2016.
 - d) The Respondent has already produced documents indicating the salary bands of employees in similar positions to the Claimant, and job requirements of her previous position viz a viz the current job requirements.
 - e) The Claimant has not laid any reasonable basis to warrant or justify the order sought.
 - f) The employees whose records the Claimant is seeking are strangers to the Claimant’s claim and their academic documents contain information that has been disclosed to the Respondent in a relationship of trust which Information was shared with the legitimate expectation that it would not be divulged to any other person.
- 5. According to counsel for the Respondent only a single issue is for determination in this matter, whether the Respondent should be compelled to comply with the Claimant’s Notice to produce dated 18th may 2017.
- 6. It is submitted by counsel that this Court has a discretionary power to determine whether or not it should order discovery and production of documents. However, the discretion should be exercised judiciously in a manner that promotes the principle of justice to all parties.
- 7. It was further submitted that documents exchanged between an employee and his/her employer are so exchanged in trust and confidentiality. It is an employee’s right and legitimate expectation that an employer withholds his or her private information in confidence without disclosing the information to any person. The legitimate expectation is founded on the right to privacy postulated in Article 31 [c] and [d] of *the Constitution* of Kenya, 2010.



8. It was argued by the Respondent's Counsel that matters relating to one's income tax obligations, academic and professional qualifications fall within the realm of private information by virtue of Article 31 [c] & [d] of *the Constitution* and can only be disclosed by an employer with consent of the employee. To allow the production of the documents will be an affront on the employee's constitutional right under Article 31 of *the Constitution*.
9. Counsel submitted further that in order for a court to direct production of documents, it must be satisfied upon the material presented by the party seeking the production, that the document[s] are relevant or the information sought is relevant to the issue in dispute. To buttress this, reliance was placed on the decisions in *Oracle Productions Limited v. Decapure Limited & 3 others* [2014] eKLR and *Selecta Kenya Gmbh Co Kg & another v. Peter Wanderi* [2015] eKLR.
10. It was further stated that looking at the character of the Claimant's case which is purely a claim for unfair termination, one cannot easily see the relevance of the documents sought to the claim.

Determination

11. Contrary to the directions of this Court, the Claimant did not file any submissions, which would in the circumstances of the matter form basis and justification for an order compelling the Respondent to produce the documents. Put in another way, the Court has no material placed before it in support of the notice to produce.
12. It is not difficult to discern that none of those employees whose documents – pay slips, contracts of employment and academic certificates are sought for production is a party to the case before this Court. Documents in an employment relationship exchanged between an employer and its employees are so exchanged in a state of confidentiality, as such employees will have a reasonable expectation of information privacy.
13. This Court is of the view that to allow the production of the documents sought by the Claimant will be an infringement of the provisions of the Data Protection Act, and I agree with Justice Rika's decision in the case of *Gloria Meli Musau & another v. Microsoft East Africa Limited* [2021] eKLR, that employees' payslips are private and confidential, and are protected under the *Data Protection Act, 2019*.
14. The Claimant has not established how the documents sought for production are relevant to her case, considering that one's pay slip and contract of employment are products of individual negotiations between an employer and an employee.

According to Halsbury's Laws of England, Volume 13 at page 38,

“Discovery will not be ordered in respect of an irrelevant allegation in the pleadings which, even if substantiated could not affect the result of the action nor in respect of an allegation not made in the pleadings or particulars nor will discovery be allowed to enable a party to “fish” for witnesses or for a new case, that is to enable him frame a new case. Each case must be considered according to the issues raised; but where there are numerous documents of slight relevance and it would be oppressive to produce them all, some limitation may be imposed.”

15. Consequently, this Court finds that the Claimant has not established any reasonable basis for her Notice to Produce, upon which an order for production of the documents stated in the Notice to Produce can issue.

READ AND DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF JUNE, 2022.



OCHARO KEBIRA

JUDGE

In presence of

Ms. Muma for the Claimant.

No appearance for the Respondent.

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 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.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

