



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nduati & 26 others v Ernst & Young LLP (Cause E186 of 2021)  
[2022] KEELRC 3926 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3926 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E186 OF 2021  
L NDOLO, J  
SEPTEMBER 22, 2022**

**BETWEEN**

**BANCY MUTHONI NDUATI ..... 1<sup>ST</sup> CLAIMANT**  
**CAREN BENTA A AYOO ..... 2<sup>ND</sup> CLAIMANT**  
**CHARLES GITHUKU GITHUATU ..... 3<sup>RD</sup> CLAIMANT**  
**CHARLES K RIBA ..... 4<sup>TH</sup> CLAIMANT**  
**DANIEL NJOGU KAMANDE ..... 5<sup>TH</sup> CLAIMANT**  
**DANIEL OUMA ..... 6<sup>TH</sup> CLAIMANT**  
**DAVID MUTHOKA MASAVU ..... 7<sup>TH</sup> CLAIMANT**  
**DUNCAN NDIRANGU MURIITHI ..... 8<sup>TH</sup> CLAIMANT**  
**ENOCK OMWENGA ..... 9<sup>TH</sup> CLAIMANT**  
**EZRA NYANGWARA ..... 10<sup>TH</sup> CLAIMANT**  
**FRANCIS WAWERU NJIRU ..... 11<sup>TH</sup> CLAIMANT**  
**FREDRICK CHEGE MACHARIA ..... 12<sup>TH</sup> CLAIMANT**  
**GEORGE MACHAU NJOROGE ..... 13<sup>TH</sup> CLAIMANT**  
**GRACE OTTICHA ..... 14<sup>TH</sup> CLAIMANT**  
**HELINA WACHU MWANGI ..... 15<sup>TH</sup> CLAIMANT**  
**JAMES GITHERE MAINA ..... 16<sup>TH</sup> CLAIMANT**  
**KAMAMIA LUCY WANJA ..... 17<sup>TH</sup> CLAIMANT**  
**KEZIAH A. MABWA ..... 18<sup>TH</sup> CLAIMANT**  
**LEAH AIDA OLIECH ..... 19<sup>TH</sup> CLAIMANT**



MARGARET WAHU KARANJA ..... 20<sup>TH</sup> CLAIMANT  
PATRICK MANYEKI ..... 21<sup>ST</sup> CLAIMANT  
PATRICIA WANJIRU MWANGI ..... 22<sup>ND</sup> CLAIMANT  
PAULINE WAMAITHA NDIBA ..... 23<sup>RD</sup> CLAIMANT  
PETERSON MWANIKI RIITHO ..... 24<sup>TH</sup> CLAIMANT  
RUTH AKINYI OTIENO ..... 25<sup>TH</sup> CLAIMANT  
STEPHEN MUTISO CHARLES ..... 26<sup>TH</sup> CLAIMANT  
TRUPHOSA K OMANGI ..... 27<sup>TH</sup> CLAIMANT

AND

ERNST & YOUNG LLP ..... RESPONDENT

### RULING

1. What presents for determination is the Notice of Motion dated September 22, 2021 by which the respondent seeks orders that:
  - a) The documents appearing at pages 68 to 80 of the claimants’ bundle of documents dated February 24, 2021, and all other documents, statements and information produced, made or disclosed by the claimants in breach of their duty of confidentiality to the respondent, be expunged from the court record entirely;
  - b) The deputy registrar do remove the said documents from the physical court file and from the e-filing platform.
2. The Motion is supported by an affidavit sworn by the respondent’s Chief Executive Officer, Nancy Muhoya and is premised on the following grounds:
  - a. The documents appearing at pages 68 to 80 of the claimants’ bundle of documents dated February 24, 2021 contain confidential information pertaining to the respondent’s contractual engagements with its clients;
  - b. By producing and disclosing the documents, the claimants have caused the respondent to breach its duty of confidentiality to its clients;
  - c. In addition, the claimants have breached their duty of confidentiality to the respondent, which duty survived the termination of their employment. This duty is expressed in the following documents *inter alia*:
    - i. Contract of employment - Clause 6 on “Professional Independence & Confidentiality”, all information acquired in the course of the claimants’ work is to be treated as strictly confidential;
    - ii. The respondent’s staff manual on the terms and conditions of service-Clause 3.2-information concerning the respondent’s clients is to be treated as strictly confidential;Clause 3.2.2 prohibits disclosure of the names of the respondent’s clients.



- iii. The respondent's global code of conduct - clause 5 requires the claimants to protect confidential data and information obtained from or relating to the respondent's clients;
  - iv. The respondent's confidentiality global policy-Clause 1 places a responsibility on the claimants to protect confidential information from unauthorized disclosure, access and use; Confirms that the respondent may have contractual obligations which require it to keep certain information confidential; Places an obligation on the claimants to return or securely dispose of, in a timely manner, confidential information in their possession once it is no longer needed.
- d. The claimants each signed a declaration of secrecy by which they solemnly promised and declared that during their employment and at all times thereafter, they would observe the strictest secrecy regarding *inter alia*, the respondent's business relationships with its clients;
  - e. The claimants declared vide their bi-annual declarations, that they have read and understood the documents referred to in paragraph (c) above as well as their responsibility to act in accordance with the respondent's values and policies on confidentiality;
  - f. In the bi-annual declarations, the claimants acknowledged understanding and committed to remain in compliance with the respondent's personal data protection global policy, as well as the data protection binding corporate rules;
  - g. According to section 30(1)(f) of the [Accountants Act, 2008](#), it is professional misconduct for a member of the Institute of Certified Public Accountants of Kenya to disclose information acquired in the course of professional engagement to any person other than a client, without the consent of the client, or otherwise than required by law;
  - h. Unless the court expunges the documents, the respondent will be liable to its clients for breach of its duty of confidentiality;
  - i. The respondent raised its objection to the production of the documents vide its Memorandum of Response & Counterclaim and vide its advocates' letter dated July 8, 2021 but the claimants have failed, refused and/or neglected to expunge the documents, hence necessitating the filing of this application;
  - j. It is in the interest of justice for this application to be allowed as prayed.
3. In her affidavit in support of the application, the respondent's Chief Executive Officer, Nancy Muhoya identifies the documents in issue as:
    - a. A copy of the respondent's consultancy contract with its client; and
    - b. The first page of a contract agreement between the respondent and its client.
  4. By consent of the parties, the application was urged by way of written submissions.
  5. The documents forming the subject of the present objection relate to the respondent's relationship with its clients. The claimants do not deny this fact nor do they deny that the said documents are confidential in nature.
  6. 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 reveal the said information.

7. In the SBI International Case (*supra*), the court went further to hold that the duty of confidentiality applies irrespective of whether there exists a confidentiality agreement and generally extends beyond the life of the employment relationship.
8. As to what constitutes confidential information, the South African case of *Advtech Resourcing (Pty) Ltd v Kuhn* 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.
9. By their nature, the documents which the respondent seeks to protect from disclosure fall within the aforesaid definition. What is more, by disclosing the said documents, the claimants have exposed the respondent, which is a firm of Certified Public Accountants, to the risk of breaching its contractual duty to its clients.
10. For the foregoing reasons, the respondent's Motion dated September 22, 2021 is allowed with the consequence that the documents appearing at pages 68 to 80 of the claimants' bundle of documents dated February 24, 2021 are expunged from the court record.
11. The costs of the Motion will be in the cause.
12. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 22<sup>ND</sup> DAY OF SEPTEMBER 2022**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

**Mr Eredi for the claimants**

**Miss Babu for the respondent**

