



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1296 OF 2015**

**VN.....CLAIMANT**

**VERSUS**

**APL.....RESPONDENT**

**RULING**

*(Redacted version for Law Report)*

1. The Respondent/Applicant's notice of motion application dated 9<sup>th</sup> November 2019 seeks to restrain the Claimant herein from *inter alia* publishing words or content making direct or indirect reference to *inter alia* the Applicant, its representatives, officers on social media or any other platform on the grounds that she has a dispute with the Applicant in this matter which is not yet determined. The Application is supported by the Annexed affidavit of RK sworn on 9<sup>th</sup> November 2021.
2. The Claimant/Respondent filed an affidavit in opposition to the motion. The affidavit is 23 paragraphs long and in it, the Respondent asserts that she was advised by her advocates that the Applicant's motion is ill advised as it is not founded on any existing claim on account of the allegations of threat made to the Applicant's CEO on social media. She depones that there was a finding by Radido J. in respect of a similar motion where the learned Judge held that on the question of the Claimant's alleged defamation of the Respondent after the termination of her contract, this Court is of the view that the allegations should form the basis of a fresh cause of action as the same have no nexus with the questions before the Court as captured in the Respondent's List of Issues filed in Court on 14 March 2020.
3. The Respondent asserts the grant of the orders sought will bar her from discussing the case and are radical as they seek to gag her to the extent she will not be able to talk about her work experience with the Respondent to anyone including her family, friends, potential employers, business associates including issuing instructions to lawyers (when need arises) or her therapists who have so far been part of her support system. She depones that many organisations take matters of harassment, assault and victimisation at the work place very seriously and require that the issue be reported. The Respondent asserts that the implication of the orders sought will also mean she cannot include her work experience for the period she worked in the Applicant in her resume. She depones that the Applicant has filed many applications in Court to paint her as the wrongdoer and ultimately seek to derail the proceedings filed upon unlawful termination of her employment. She asserts the Applicant has occasioned inordinate delay of the case by filing applications on the eve of the hearing of cases and has on numerous occasions contravened the law and Court orders. She cites incidences such as the physical assault by MC, forceful removal from her house, failure to co-operate with the Kenya Embassy situate in Dar and ignoring her plea of time to enable her relocate thus necessitating the issuance of emergency travel documents to enable her travel home, and so on. She asserts the requirement by most employers is for job seekers to disclose work history and the reasons of exit from the previous employment.
4. The Respondent asserts that the Applicant has not been condemned unheard and that it shall be heard on complaints she has lodged or will lodge should need arise. She asserts that there is nothing damaging or illegal in the tweets she made. She depones that in as far as the Application is based on alleged malicious statements, the same constitutes a fresh cause of action which is severable from the employment cause pending before this Court. She asserts the Applicant has attempted to have the case thrown out on the basis that it is *res judicata* and that it is bent on ensuring the case is never concluded in the near future. She depones that there is no basis in common law to curtail her social engagement in respect of material that is not known to the Court or is yet to be published or presented. She depones that the statements complained of are not defamatory or malicious but mere expression of her thoughts and/or experience in TZ. She depones that the alleged publication or posts do not in any way make reference to the case pending in Court. She asserts the reliance of the Applicant on materials filed in support of the declined application for amendment of its defence is an abuse of the Court process and is intended to simulate victimization. She asserts the judgment in TZ was concluded and judgment entered in her favour and the facts and basis of the two cases are distinct and separable on account of jurisdiction of the respective Courts. She thus prays the application be dismissed with costs.
5. The Respondent/Applicant filed submissions to the motion while the Claimant/Respondent's submissions are not on record.

6. The Respondent/Applicant asserts that this is a matter that the court could have dealt with even orally if the circumstances were brought to its attention to safeguard the integrity of the matter and due process. There is currently a stay of proceedings and the Applicant needed to formally present before the Court evidence that in the period between 19<sup>th</sup> and 21<sup>st</sup> August 2021, the Claimant posted on twitter various incendiary and provocative references to the Respondent and its representatives and clients including threats placing the Applicant at risk of not getting a fair hearing in the courts and having to face a "fight" with the Claimant on social media at the same time. The Applicant asserts the order sought is simply to stop or prevent such further actions pending the hearing and determination of the case. Not all prohibitory or restraint orders sought are injunctions and the Claimant's response to the application is misleading. The Applicant has rightly sought protection of the court that is hearing the matter in dispute. The Claimant's replying claiming that a fresh suit should be filed to address these issues is also false and misleading. Multiple proceedings should be avoided at all courts. In any event the full history of the matter is in this file justifying the filing of this application invoking the inherent jurisdiction of the court in the circumstances to prevent a grave miscarriage of justice. The Applicant submits that the annexures it presents draw the court's attention to the tweets reproduced as an illustration of the Claimant's blatant attacks against the Respondent/Applicant. From the Tweets it is not disputed that the Claimant has tweeted of and about the Applicant and its representatives and/or employees. This is clear in the reference to the CEO of the company, the Applicant's Group Director and Managing Director and to each occasion, she has tagged the Applicant specifically. The Applicant submits that the referenced MC and RK are both witnesses in this pending case and it is not disputed that the only relationship between the Claimant and the Respondent was an employment contract which was terminated in disputed circumstances. The Court is yet to determine how and the why and whether the Claimant is entitled to the orders sought. In the first tweet referenced above she tags the Applicant and directs the same at a former General Manager of the Applicant threatening to charge him with fraud and a litany of crimes in TZ. As reflected in the pleadings, this is where the Claimant was recruited to work and where her claims against the Applicant in this matter arise. Tagging the Applicant confirms mischief and malice in that regard. Further, the post of the tweets above making specific reference to her employment with the Applicant as the beginning of her turbulent relationship with PTSD and drugs as referenced goes to the root of the issue in dispute between the parties, as she alleges harassment and mistreatment disputed by the Applicant. She repeats the allegations at paragraph 8 of her Replying Affidavit confirming the same and justifying the orders sought. It cannot also be disputed that the tweet alleges shock specifically with reference to the Applicant's work and its client in the context of the work the Claimant was allegedly doing, a personal attack against the Applicant placing at risk its relationship with the named client. It seems there is no limit to how far the Claimant will go to cause damage and injury to the Applicant's business and reputation again justifying the orders sought. The tweets further include threats of executing the Applicant's CEO giving the Claimant the greatest honour. The Applicant submits this is a disturbing statement reflecting the extent of bile that the Claimant has against the Applicant and its representatives warranting protection of the court in the circumstances.

7. The Applicant submits that the filing of the application was in the circumstances the only way to bring the Claimant's abuse of court process to the Court's attention for remedial action and directions to safeguard the integrity of the pending proceedings and protect the Applicant from a malicious assault by the Claimant. The Applicant submits the Court has therefore inherent powers to grant the orders sought in this matter in the circumstances in the larger interests of justice. It submits this with due respect is not a separate cause of action to warrant the filing of a fresh action in another court. The Claimant's Replying Affidavit It is quite telling that the Claimant has opposed this application that specifically seeks her adherence to the basic rules of fair play within a judicial process and within the case that she herself filed. The pending Application does not raise a separate cause of action as submitted above but is inextricably linked to the current suit, with the entire background and details in the matter for the court to get a full picture in that regard. It is trite law that multiple proceedings are to be avoided on related matters. The Applicant submits that the Claimant's objection that a separate suit is required to protect the integrity of the pending court processes and the Applicant from facing parallel "proceedings" on the streets of Twitter (social media) and its clients' boardrooms on matters pending before this Court affirms the Claimant's failure or refusal to submit fully to the court process she commenced and its rules. The Applicant submits that the Court has the power to take any justified action to protect the integrity of its processes and the rights of those who are already before it, particularly where matters are related.

8. The Applicant submits it has invoked the provisions of the Constitution that protect its right to a fair trial, fair labour practice and to a fair hearing. It is trite law for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The Applicant refers to the case of **Richard Muthusi v Patrick Gituma Ngomo & Another [2017] eKLR** in which reference was made to the case of **Chairman Co-operative Tribunal & 8 Others Ex-Parte Management Committee Konza Ranching & Farming Co-operative Society Ltd [2014] eKLR**, in support of the court's inherent jurisdiction to preserve the integrity of judicial process which is not to be diverted for an ulterior motive to gain collateral advantage as the Claimant has been doing. The Applicant thus calls on the court to invoke its inherent jurisdiction to stop the Claimant's actions, which continue to prejudice the Applicant before the court of public opinion, and in its business on the basis of a disputed termination of employment and alleged harassment and assault before the court which is denied. On the inherent powers vested in the court, the Applicant is guided by the Court of Appeal case of **Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyc Paints [2016] eKLR** and **Cefa Enterprises Ltd v Benedict Kyalo Kimuyu & 3 others [2020] eKLR**, where the court in great detail clarified the scope of this discretion with reference to various case law to the effect that the inherent jurisdiction of the court is a virile and viable doctrine and the court may draw upon it as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them. The Applicant submits that in addition and more specifically, the Employment and Labour Relations Court Act envisages the filing of an application seeking interim preservation orders and any relief that the court may deem fit to grant. It submits that Section 20(1) states that the court should act without undue regard to technicalities provided it informs itself "*...on any matters as it considers just and may take into account opinion evidence and such facts as it considers relevant and material to the proceedings.*" It is submitted that the Applicant seeks that the Court invokes this power in the interests of justice and as sought in the application. The Applicant submits the power is not limited as alluded to by the Claimant to require a fresh case to be filed when the substantive issue in dispute is in this matter and the orders are to protect parties in the same matter and the pending related judicial processes. This is an exception arising from peculiar circumstances of the Claimant's own making. Further, the court will note that it is the Claimant's undisputed actions that triggered this application and the previous one pending an appeal before the Court of Appeal. She has demonstrated a pattern and malicious motive that she will not stop unless by specific order of the court. She opted to take the law into her own hands and cannot claim prejudice as the author or her own misfortune for any protective steps taken.

9. The Applicant submits that it is entitled to seek protection before this court and that no other court has the full history of the related matters otherwise, duplication of court proceedings and filing multiple cases as suggested by the Applicant is an abuse of court process. The Applicant submits that it is false for the Claimant to allege in her Replying Affidavit that the order sought will prevent her from talking about her work experience to anyone including family, friends, potential employers, business associates etc. The allegations of harassment, assault, victimization at the workplace are all disputed and pending before the court. The Claimant cannot be prejudiced by an order preventing her from making attacks against the Applicant on social media or any forum as alleged. It is also false for the Claimant to allege that her tweets

relate to work experience. They do not and this is apparent. For instance, the tweets which tag the Applicant and its representatives and make reference to various threats, absurdities and directly and/or indirectly accuse the Applicant of engaging in various illegalities and causing the Claimant harm do not relate to work experience. They are clearly malicious and ill intended. The Applicant submits that the Claimant's Replying Affidavit at paragraph 6, 8 and 9 reinforce the need for the protective order sought as she is under the misguided understanding that despite no determination by the Court of the disputed issues relating to alleged harassment, assault and victimization, she is at liberty to discuss these matters as facts with third parties and in public forums. She should be stopped by the Court from continuing to do so. The motive of the tweets is also apparent from the Claimant's Replying Affidavit. She seeks to paint the Applicant in a bad light and is hitting back and venting with reference to the issues in contention in this matter and the perceived delay caused by the Applicant. It should be clarified that it is the Claimant whose actions during the pendency of the case has caused the delayed conclusion of the matter. Paragraphs 6, 8 and 9 of her Replying Affidavit leave not doubt on this. She is seeking to do as much damage as she can to the Applicant and its representatives notwithstanding the rules of fair play within a pending judicial process. The Applicant submits there is no justification legal or factual for going outside the court process to ventilate or express her frustration at the Applicant or to use such means to hit back at it in the circumstances. The court has unfettered power to control and manage the actions of a litigant before it as sought. Further, freedom of expression is not an absolute right to be considered in isolation as sought by the Claimant. It is subject to such limitation and boundaries to prevent harm to others and in our respectful submission is justified to protect the integrity of the pending court process and the Applicant. Factors such as the extent, duration, motives of the party are all relevant for the court's consideration and lead to the conclusion that in this case, unless restrained, the Claimant will continue to violate the Applicant's rights and reputation in respect of the matters arising in this case. The Applicant is guided by the case of **Senator Moses Masika Wetangula v British Broadcasting Corporation (BBC) [2017] eKLR** where while the court was considering a defamation case (distinguished from the matter before the court) it determined that the freedom of expression as guaranteed under Article 33 of the Constitution of Kenya is not absolute and that the right of freedom of expression has to be balanced against the rights and reputation of others. On this occasion, the Applicant submits that it has demonstrated on a balance that it is entitled to the orders sought.

10. The Court discerns there are deep tensions between the parties and on account of the stated mental health issues the Court will redact the decision and not permit its publication on the kenyalaw website or in the alternative remove names of parties so that they are not identified. The Applicant seems to make out a good case for a defamation suit as the tweets by their own do not merely speak to the Claimant's experiences at the Respondent's operations in TZ. There is latent threat of violence expressed in one tweet and there is reason to believe the Claimant and Respondent did not part in the best of ways with attendant blame on either side. As the Court is of the view that the Respondent/Applicant ought to have raised this as a review or seek to appeal the decision of Radido J. on the issue of defamation arising in the matter, there is no basis for the grant of the orders save for the Court to indicate to the Claimant and the Respondent there shall be no posting of the goings on of this case online by either party nor shall tweets issue in the name of discussing work experiences at the Respondent/Applicant and as the matter has a stay pending the appeal before the court of appeal.

11. The orders of stay remain in force. Parties to revert in February, 2022 towards the end to inform the Court on progress of the appeal.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2021**

**NZIOKI WA MAKAU**

**JUDGE**