



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1296 OF 2015**

**VATA NGANDA.....CLAIMANT**

**VERSUS**

**AFRICA PRACTICE EAST AFRICA LTD.....RESPONDENT**

**RULING**

1. On 25 January 2018, the Court directed the parties to file and exchange witness statements and documents before the Cause could be certified ready for hearing.
2. The Respondent was expected to file and serve its witness statements and documents before the end of 1 March 2018 but it did not comply. On 27 November 2018, the Court admitted the statement after leave was sought.
3. The hearing thereafter commenced on 14 March 2019 and the Claimant was partly cross-examined.
4. However, on 11 June 2019, the Respondent filed a Motion under a certificate of urgency seeking the striking out and/or dismissal of the Amended Statement of Claim which had been filed in 2016 on the ground that a Court in Tanzania had delivered judgment on 27 February 2018 determining similar Issues as presented by the Claimant before this Court and therefore the Issues were *res judicata*.
5. The Court directed that the question of *res judicata* be taken as part of the main hearing on the merits.
6. The hearing, therefore, resumed on 30 October 2019 and proceeded on 2 March 2020 when the Claimant closed her case.
7. The Respondent's case was opened on the same day and the first witness concluded his testimony.
8. When the hearing resumed on 3 March 2020 to take the evidence of the Respondent's second witness, the Respondent sought an adjournment to enable it to file a formal application seeking an order to amend the Response by introducing a Counterclaim.
9. The Court directed the Respondent to file and serve a formal application and a formal application was filed on 6 March 2020.
10. In the Motion, the Respondent sought orders
  1. **THAT** this Honourable Court be pleased to grant leave to the Respondent to amend its Memorandum of Defence filed in Court on 6<sup>th</sup> May 2016 in terms of the draft Amended Memorandum of Defence and Counterclaim annexed to the Affidavit in support of this application.
  2. **THAT** the Honourable Court be pleased to make such other or further orders as the Court deems fit.
  3. **THAT** the costs of this application be costs in the cause.
11. The Claimant filed a replying affidavit in opposition to the Motion on 13 March 2020 and this prompted the Respondent to file a further affidavit sworn by its Chief Commercial Officer on 21 September 2020 (no leave was sought and/or granted).
12. The Respondent filed its submissions dated 19 August 2020 while the Claimant filed submissions dated 14 September 2020.

13. The grounds upon which the application was anchored were primarily that the Claimant had failed to return documentation relating to the Respondent's business upon separation; the Claimant had communicated with a client of the Respondent about her alleged harassment and thus risking the contractual relationship between the Respondent and the client; that the Claimant had been actuated by malice in making the allegations of harassment against the Respondent; the Claimant had engaged in social media campaigns against the Respondent and its officers and that there was an inextricable connection between the allegations made by the Claimant and the Issues in dispute herein.

14. Opposing the application, the Claimant asserted that the application was in bad faith as it had been filed late in the day without providing an explanation; the application was meant to frustrate the conclusion of the Cause; the application was brought after she had closed her case; the emails relied on were unverifiable; there was no nexus between the alleged complaints and the instant proceedings; the employment restrictions cited by the Respondent were time-limited and there was no evidence the documentation referred to had been supplied to her during employment; that she had lost control of her social media accounts during the period in contention; that any mentions/discussions about her employment history with the Respondent were with an entity which is not a partner of the Respondent and that there was no malice in mentioning the employment history.

15. The Court has considered the motion, affidavits properly on record and the submissions filed by the parties.

16. The Court has also perused the cause of action sought to be introduced through the Counterclaim.

17. The particulars therein refer to documents the Claimant allegedly did not return after separation. The Respondent must have known all along well before it filed its Response and commencement of the hearing if there were any records the Claimant did not return at the time of separation and process of clearance.

18. It is, therefore, an afterthought to bring the question of the return of documents after the Claimant had closed her case.

19. 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.

20. The substratum of the Issues was whether the termination of the Claimant's employment was unfair.

21. In light of the foregoing, the Court finds no merit in the Motion and orders it dismissed with costs to the Claimant.

22. Since the Court is on transfer, this file should be placed before the incoming Judge for further directions/resumed hearing on 24 November 2020.

**Delivered through Microsoft teams, dated and signed in Nairobi on this 16<sup>th</sup> day of October 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Ms. Ngonde instructed by Njoroge Regeru & Co. Advocates

For Respondent Ms. Wetende instructed by Kaplan & Stratton Advocates

Court Assistant Lindsey