



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO. 2029 OF 2017**

**DEEPESH SUBHASCHANDRA MODI.....CLAIMANT**

v

**PAN AFRICA EXPRESS TRANSPORT LTD**

**(Licensee of the Federal Express Corp).....RESPONDENT**

**RULING**

1. For ruling is an application dated 13 July 2018 by Pan Africa Express Transport Ltd (Respondent) seeking orders

1. **THAT** this Honourable Court be pleased to strike out and expunge from the record the private and confidential reports dated 25/07/2017 and 31/07/2017 appearing at pages 105 – 132 of the Plaintiff's bundle.

2. **THAT** the costs of this application be borne by the Claimant.

2. The primary grounds advanced in support of the application are that it was an express term of the employment contract between the Respondent and the Claimant that he would not disclose confidential and private information relating to the Respondent; that the reliance by the Claimant on the confidential reports violates the Respondent's right to privacy; that the reports contained information damaging to the Respondent and that it was against public policy to allow a litigant to rely on confidential and private reports.

3. The Respondent drew the attention of the Court to *Leland I Selano v Intercontinental Hotel* (2013) eKLR.

4. The Claimant filed a replying affidavit in opposition to the application on 9 November 2018 and it was therein asserted that the reports sought to be expunged from the record were the source of his frustrations at the workplace; that the non-disclosure term in the contract of employment applied only to the Respondent's competitors and external persons; that the reports were critical to cause of action presented in Court and that the application was meant to attempt to litigate through affidavits rather than substantively as required by the principles of fair trial.

5. The Court took arguments from the parties on 12 November 2018 and the submissions mainly mirrored the grounds in support of and against the application.

6. The Court has considered the material placed before it including the *Selano* decision.

7. Access to information and privacy are rights guaranteed under the Constitution of Kenya, 2010 and the Court is under an obligation in a case such as this to balance/reconcile both rights.

8. Consequently, the Court has the duty to protect confidential information but at the same time ensure that there is disclosure of all information which would enable substantive justice to be done.

9. The common law has over the last century developed the concept of *open justice* (see *Global Torch Ltd v Apex Global Management Ltd* (2013) EWCA Civ. 819 and *Chodiev v Stein* (2016) EWHC 1210).

10. In *Chodiev*, the Court stated that simply saying that documents are of a kind that the parties to them would generally regard as confidential and private is not.... A sufficient reason for the court to impose on the use of the documents a restriction which would not otherwise exist

11. The Court has looked at the contract of employment signed by the Claimant on 27 July 2017.

12. It has a *confidentiality clause* in respect of the Respondent's *competitors, any person, firm or corporation* but with a rider that the Claimant shall not make a disclosure of such confidential information after discontinuance of the employment relationship.

13. However, the contract is silent on disclosure for purposes of court litigation or proceedings.

14. To the Court, the Court is not a competitor of the Respondent nor does it fit the bill of *any person, firm or corporation*.

15. What the Claimant is attempting to do in the litigation is to advance a cause of action which he believes arose out of a violation of his right to fair labour practices.

16. Further, the documents sought to be expunged were not illegally obtained by the Claimant. He prepared them in the normal course of his employment and he made certain observations and recommendations which may appear acrid to the Respondent.

17. The recommendations called upon the Respondent to carry out a more detailed inquiries and audit.

18. Without delving deep into the recommendations, the Court is not sure at this stage how the Respondent would be damaged or prejudiced if the reports were to be disclosed within the ambits of courtroom litigation. If at all, a redaction/restriction of publication of the reports to the public at large may serve to protect any such damage.

19. The Claimant has pleaded that the reports formed the background upon which the Respondent made the work environment hostile thus leading to the separation (he pleads constructive dismissal).

20. In the view of the Court, and in consideration of the principle of the right of access to information, *open justice* and that the Claimant alleges that the reports in contestation were at the heart of his tribulations hence the plea of constructive dismissal, the reports form an integral part of the dispute, and therefore should not be expunged from the record.

21. The application dated 13 July 2018 is thus dismissed.

22. Costs in the cause.

**Delivered, dated and signed in Nairobi on this 25<sup>th</sup> day of January 2019.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Namada instructed by Namada & Co. Advocates

For Respondent/applicant Mr. Makori instructed by Macharia-Mwangi & Njeru Advocates

Court Assistant Lindsey