



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1375 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

JACKLINE CHPKEMOI KIMETO.....CLAIMANT

VERSUS

SHAFI GREWAL KAKA.....1ST RESPONDENT

JULIE DABALY SCOTT.....2ND RESPONDENT

MOHAMMED WANYOIKE.....3RD RESPONDENT

FEMINA DAWOODIA.....4TH RESPONDENT

RULING

By Notice of Motion filed under Certificate of Urgency dated 14th December 2018 the Respondents’/Applicants are seeking the following orders that:-

1. This Court expunge and/or strike out the Claimant’s supplementary List of Documents dated 19th October 2018; in the alternative
2. This Court expunge and/or strike out the privileged correspondence appearing as document number 64 contained at pages 607 to 623 of the Claimant’s Supplementary List of Documents dated 19th October 2018; and
3. The costs of this application be borne by the Claimant
4. The application be certified as urgent.

This Application is premised on the grounds that:-

- a) In its Supplementary List of Documents dated 19th October 2018, the Claimant has produced or attempted to produce privileged correspondence between the Respondents and their Advocate on record (“the privileged correspondence”);
- b) The privileged correspondence was obtained illegally and unlawfully;
- c) The admission of the privileged correspondence shall prejudice the Respondents’ right to a fair trial;
- d) The Respondents shall be prejudiced if the trial Court admits the privileged correspondence into evidence in the context in which it has been presented by the Claimant.

The Application is supported by the Affidavit of **Nicanor Sabula**, Chief Executive Officer of the respondent sworn on 14th December 2018 and on the grounds on the face of the motion.

The Application is filed under Article 50(4) of the Constitution of Kenya, 2010 and Rule 17(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016.

The Claimant opposed this Application and filed Grounds of Opposition dated and filed in Court on 17th December 2018. The Claimant raises the following grounds of opposition:

1. The Applicants have not disclosed sufficient grounds to merit the grant of the orders sought in the Application.
2. The Application is premature as the documents sought to be expunged have not been produced before the trial court as alleged or at all.
3. The Application is an abuse of the court process and the same is clearly intended to delay the hearing of the main suit as the respondents were served with the documents which they now seek to expunge more than six weeks ago and the same was filed a day before the hearing of the main suit.
4. The Application is misguided as the same seeks to dictate how the Claimant should conduct her case.
5. Such other grounds as shall be adduced at the hearing hereof.

The parties proceeded with hearing of the Application orally on 17th December, 2018.

Respondents'/Applicants' Submissions

It is submitted on behalf of the Respondents'/Applicants' that the documents which they wish to have struck off the Court's record are subject to Client/Advocate privilege. For instance the email at page 623 is an email to Wanjiru Ngige with legal advice. It is further submitted that all the corresponding emails contain advice strategy.

Counsel further submitted that a client has a right to seek legal advice and such communication is privileged. The Respondents'/Applicants' relied on the Authority of *Alfred Crompton Amusement Machines Limited Versus Commissioners of Customs and Excise (1973) 2 All ER*.

It is further submitted that the instant Application has not been made late as alleged by the Claimant or at all.

The Respondents further submitted that the said documents as contained in pages 607 to 623 were obtained illegally as the Claimant herein states in paragraph 78 of the Claim that her services were terminated in March 2015 while the emails are done in May 2015 and were sent to an official email. It is further the Respondents' contention that if the Claimant continued accessing the official email address after her termination, she did so illegally unless she is able to prove that the emails were sent to her personally.

It is the Respondents' further submission that the authority the claimant seeks to rely on of *Kuruma S/O Kaniu Versus Reginam (1955) ALL ER* is an old case that has since been overtaken by *Baseline Architects Versus National Hospital Insurance Fund Board Management (2008) eKLR* where Warsame J stated that the doctrine in *Kuruma S/O Kaniu Versus Reginam (1955) ALL ER* does not apply where documents have been obtained irregularly.

The Respondents'/Applicants' urged the Court to allow the instant Application with Costs to the Respondents.

Claimant's Submissions

It is submitted on behalf of the Claimant that the Respondents'/Applicants' have not disclosed sufficient grounds to warrant the grant of the Orders sought in their Application.

It is further submitted that the Respondent/Applicants' have not demonstrated illegality in how the said emails were obtained. Further, that the instant Application is premature as an objection can be raised if the Claimant sought to produce the documents which are on record but are yet to be produced.

It is further submitted that the instant Application seems to dictate to the Claimant how she can proceed with the case and which documents to produce.

The Claimant avers that there is no privilege between the Claimant and the Respondents herein therefore the Respondents cannot claim that the said documents be expunged as they are privileged communication.

The Claimant further avers that the documents are relevant in the circumstances of the cause before the Court. The Claimant relied on the case of *Kuruma S/O Kaniu Versus Reginam (1955) ALL ER* where court made an observation that "it matters not how evidence is obtained but what matters is the relevance it has to the case at trial."

The Claimant urged the Court to dismiss the instant Application with costs to the Claimant.

Determination

The issues for determination are whether the Application dated 14th December 2018 is merited or not.

The instant Application seeks to expunge documents (email correspondences) as contained in pages 607 to 623 of the Supplementary List of Documents filed by the Claimant on 22nd October 2018 on account of the same having been obtained illegally and being subject to privileged information.

What is Privilege Information?

Privileged Information is defined under **section 130 – 137** of the **Evidence Act** deals with privilege and provides for instances when communication between certain categories of persons can be inadmissible in proceedings for being privileged. These include communication during marriage, official communication to a public officer, communication between an advocate and his client and communications between advocates.

Section 134, Evidence Act provides;

134. Privilege of advocates

(1) No advocate shall at any time be permitted unless with his client’s express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure—

(a) any communication made in furtherance of any illegal purpose;

(b) any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client.

(2) The protection given by subsection (1) of this section shall continue after the employment of the advocate has ceased.

A scrutiny of the emails that are contested reveals as follows –:

· Pages 607 to 611 and 621 to 623

These are internal official emails between the Group C.E.O, Chairperson KATA, Managing Director of KATA and the Acting Chief Executive Officer KATA on diverse dates ranging from April 28th 2015 and May 19th 2015. These email are illegally obtained evidence as it is clear from the evidence that the Claimant was terminated in March 2015.

There is no evidence adduced by the Claimant as to how she obtained these emails as the emails are neither sent to her nor copied to her.

This is illegally obtained evidence and to be expunged as was held in the case of **Baseline Architects Versus National Hospital Insurance Fund Board Management (2008) eKLR**. Also in the case of **Susan Wariara Kariuki v Diakonie Katastrophenhilfe [2016] eKLR** Ndolo J stated that:

“This Country now has a Constitution that enables parties to access documents necessary for their case through legal means and there is therefore no need to resort to street methods to do so and as held by Lenaola J in Okiya Omtatah Okoiti & 2 Others v Attorney General & 3 Others [2014] eKLR a court of law will not rely on documents that are improperly obtained.”

· Pages 612 to 617

The communication appear to be between the Advocate acting on behalf of a former employee who is not the claimant, and the Respondent discussing the settlement of the case. The emails contain what appear to be negotiations between the Respondents and the Advocate who was clearly acting for the former employee. Unless the claimant can prove that she obtained them lawfully, they are privileged as they are communication between the respondent and its counsel in respect of the former employee who is not the claimant.

· Documents at Pages 618 to 620

These emails are between an Advocate and Client and official communication among officers of the respondent. They are covered under privileged information and as such cannot be used as evidence in Court by virtue of Section 131 and 132 of the Evidence Act.

It is clear that on the most cursory reading the above emails fall within the scope of privileged and confidential correspondence in the course of obtaining legal advice. In the case of **Susan Wariara Kariuki v Diakonie Katastrophenhilfe [2016] eKLR** Ndolo J. held that:

“It is not in contest that the letter in issue contains communication from an Advocate to his client and under Section 134 of the Evidence Act, such communication is privileged and can only be produced under exceptional circumstances. In addition, there is now firm jurisprudence from this Court that an employee may not exhibit restricted information belonging to their employer without authorisation of the employer or an order by the Court”

Conclusion

For the reasons stated above, the instant application succeeds. The court orders that Pages 607 to 623 be expunged from the Court record.

The entire list and bundle of documents dated 19th October 2018 is thus expunged from the record and the claimant is directed to file a fresh list and bundle of documents excluding the impugned documents in compliance with this order.

The Deputy Registrar is directed to physically remove the bundle from the record and return it to the claimant.

There shall be no order for costs of this application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF FEBRUARY 2019

MAUREEN ONYANGO

JUDGE