



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1315 OF 2016**

(Before Hon. Justice Hellen S. Wasilwa on 24<sup>th</sup> April, 2019)

**WYCLIFFE LIDONG'A KIVUNIRA.....CLAIMANT**

**VERSUS**

**NATIONAL BANK OF KENYA LIMITED.....RESPONDENT**

**RULING**

1. The Application before the Court is a Notice of Motion filed by the Respondent/Applicant on 22<sup>nd</sup> November 2018 and is brought under Article 31 (b) (c) (d) Article 50 (4) of the Constitution, Order 19 Rule 6 Civil Procedure Rules, Section 31 (2) of the Banking Act and Clause 4.2.5(a) of the Central Bank of Kenya Prudential Guidelines on Corporate Governance CBK/PG/02. The Orders sought by the Respondent/Applicant are, that :

**1. This application be certified urgent and be heard on priority basis.**

**2. The confidential documents filed by the Claimant in the Supplementary List of Documents filed on 2<sup>nd</sup> August 2018 be expunged from the Court record. These documents are:-**

**a) The Board Report on employee related Court cases as well as the opinion by the Federation of Kenya Employers (FKE) on the dismissal cases filed by 4 directors at pages 40-56 of the Claimant's Supplementary List of Documents (hereinafter "the bundle").**

**b) The Minutes of the 38<sup>th</sup> and 39<sup>th</sup> Board Audit Committee of the National Bank of Kenya (hereinafter "the Bank") marked as private & confidential at pages 57 to 76 of the bundle.**

**c) The Minutes of the 430<sup>th</sup> Board Meeting of the Bank and the Minutes of the Special Board of the Bank, both marked as private & confidential at pages 77 to 79 of the bundle.**

**d) The payroll analysis of the year 2016 at pages 80 to 81 of the bundle.**

**e) Letters from the Bank Chairman to the Directors of the Banking Supervision and Governor of the Central Bank of Kenya at pages 98 to 180 of the bundle.**

**f) The Bank's Supervision Inspection Report as at 31<sup>st</sup> March 2015 which is marked as Confidential and is at pages 135 to 180 of the bundle.**

**3. Pending the inter-parties hearing and determination of this application, the Claimant be restrained, whether by himself or through his servants, agents and/or employees from disclosing and/or in any manner howsoever divulging any information of whatever nature with respect to or arising from or touching howsoever on the above listed documents.**

**4. Pending the inter-parties hearing and determination of this application, the Court file herein be kept under lock or such other safe custody and any person controlling and/or owning any media including but not limited to print, electronic, social media be restrained from disclosing, broadcasting and/or in any manner howsoever divulging any information of whatever nature with respect to or arising from or touching howsoever on the above listed documents.**

*5. Pending the hearing and determination of this claim, the Claimant be restrained whether by himself or through his servants, agents and/or employees from disclosing, broadcasting and/or in any manner howsoever divulging any information of whatever nature with respect to or arising from or touching howsoever on the above listed documents.*

*6. Pending the hearing and determination of this claim the court file be kept under lock in the strong room or any such other safe custody and any person controlling and/or owning any media including but not limited to print, electronic, social media be restrained from disclosing, broadcasting and/or in any manner howsoever divulging any information of whatever nature with respect to or arising from or touching howsoever on the above listed documents.*

*7. The Claimant be restrained from divulging any other information in contravention of section 31 (2) of the Banking Act and Clause 4.2.5 of the Central Bank of Kenya Prudential Guidelines, 2013 on Corporate Governance CBK/PG/02 and/or other relevant provision of the law.*

*8. Such other orders as this Honourable Court may deem fit and proper to grant.*

*9. The costs of and incidental to this application be awarded to the Respondent.*

2. The application is supported by the Affidavit Habil Waswani sworn on 21<sup>st</sup> November 2018 and is based on the following grounds:

*a) The Claimant filed an Application dated 11<sup>th</sup> June 2018 for leave to amend the Claim and introduce new documents. Consequently, Claimant filed the Amended Statement of Claim, Verifying Affidavit and a Supplementary List of documents on 2<sup>nd</sup> August 2018.*

*b) The new documents fall under class of confidential documents and ought not be produced by the Claimant.*

*c) The documents came into the possession of the Claimant in the course of performing his duties and responsibilities under the employment of the Respondent and after the termination of his contract of employment. The production of the said documents are contrary to the Respondent's clear and uniformly applied Confidentiality Policy.*

*d) The production of the documents will cause grave injustice to the Respondent and would further prejudice his right to fair trial.*

*e) The nature and content of the particular documents, if produced would cause prejudice to the Respondent's interest in its trade in the Banking Industry.*

3. In response to the Application, the Claimant/Respondent filed his Replying Affidavit on 19<sup>th</sup> December 2018. He avers that the contents of the said documents will assist in the fair and full determination of the case as the minutes of the Respondent's Board of Directors and communication by senior management demonstrate that the issue he was falsely accused of were proposed and approved by the Respondent's Board of Directors. Therefore, these documents ought not to be expunged.

4. He further states that the documents have already been provided to the Capital Markets Authority and various investigative agencies and that the Central Bank of Kenya verified and approved the very accounts he is accused of.

5. He avers that the documents were legally obtained as the Respondent willingly supplied the documents to various regulatory and investigative bodies including the Capital Market's Authority and the Banking Fraud Investigative Unit in Criminal Case No. 934 of 2017 and Criminal Case No. 2044 of 2017. In addition, his criminal prosecution was as a result of the examination of the said documents. According to him, confidentiality ceased to exist when the Respondent purported to file criminal complaints against him and provided the said minutes for his prosecution.

6. He avers that the Respondent has not demonstrated how it is likely to suffer prejudice or how the documents would disrupt the Respondent's operations beyond inconvenience or reinstatement & compensation.

7. He avers that he has no intention of publishing the documents as alleged by the Respondent and he is willing to have the matter heard in camera while the documents remain in the Court's custody.

8. He states that he has a right to access information which would assist in the prosecution of his claim and to free and fair labour practices. Further, that the Respondent has failed to produce various documents provided in the Notice to produce documents dated 15<sup>th</sup> February 2018 and that it is in the interest of justice that the documents be on record.

#### **Respondent/Applicant's Submissions**

9. The Respondent submitted that the Claimant has breached post-employment confidentiality and that there is a common law duty on part of the employee not to reveal confidential information that is proprietary in nature and is made known to them in confidence. The Respondent submitted that this duty extends beyond the life of the employment relationship.

10. It relied on the case of **SBI International Holding Ag (Kenya) v Amos Hadar [2015] eKLR** and further submitted that confidentiality in the banking sector is provided under Section 31 (2) of the Banking Act.

11. It is the Respondent's submission that former employees are wholly bound by the duty of confidentiality even after their termination and that this obligation is pursuant to Clause 4.2.5 (a) of the Prudential Guidelines which provides that:-

***“No member of staff or director should during, or upon and after termination of employment with the institution’, except in the proper course of his duty and or with the institution’s written consent , divulge or make use of any secrets, correspondence or accounts of the institution.”***

12. The Respondent averred that the disclosure of information shared by the Claimant is within the bounds of advocate-client privilege and is restricted under Section 134 of the Evidence Act. It relied on the case of **Petro Oil Kenya Limited v Kenya Pipeline Company Ltd [2016] eKLR** where Otieno J held:-

***“In my view this is privilege to protect communication between an advocate and his client intended to promote, bolster and facilitate fair hearing and able representation in that a client is assured, to the full extent, that whatever communication or confessions made to an advocate are kept confidential. It must be kept in mind that that privilege is to the client and not to the advocate.”***

13. According to the Respondent the reliance on the legal opinion given by a Senior Officer at the Federation of Kenya Employers amounts to privileged information and that no consent or waiver of privilege was given by the client for the legal opinion to be released to the Claimant. It therefore follows that its disclosure is contrary to section 134 of the Evidence Act.

14. It is the Respondent's submission that the documents which it seeks expunged offend the provisions of Order 19 Rule 3 (1) of the Civil Procedure Rules. It relied on the decision by Warsame J in **Baseline Architects Limited & 2 others v National Hospital Insurance Fund Board Management [2008] eKLR** that:-

***“It is clear that the law places a duty on deponent to limit and/or confine facts in an affidavit to issues and/or facts and information within his own knowledge or which he is able to prove. In cases where the facts are within the knowledge of the deponent, it is mandatory for the deponent to disclose the source and grounds of information and facts in the affidavit.”***

15. The Respondent submitted that the Claimant did not disclose the source of the documents which are private and confidential hence this Court can conclude that the same were contrived or unlawfully procured. The Respondent relied on the decisions in **Baseline Architects Limited & 2 others v National Hospital Insurance Fund Board Management [2008] eKLR** and **Okiya Omtatah Okoiti & 2 Others v Attorney General & 3 others [2014] eKLR**. The Respondent, in conclusion, urged this Court to allow its application.

#### **Claimant/Respondent's submissions**

16. The Claimant submitted that Article 35 of the Constitution provides every citizen with a right to information while Article 47 and 50 provides that every citizen has a right to administrative action that is expeditious, efficient, lawful, measurable and procedurally fair.

17. He relied on the case of **Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 others [2013] Eklr**. He further relied on the decision in **Justus Gesito M’mbaya v Independent Electoral & Boundaries Commission 7 3 Others [2013] eKLR** where the Court held:-

***“The Respondent seeks to have expunged from the Court record paragraphs 13 – 16, 18 – 23, 27 – 29, 42, 47, 49, 52, 53 and 65 – 85 of the Petitioner’s Affidavit sworn on 17th May 2013. He also wants the documents annexed thereto expunged. The grounds for seeking these prayers have been stated above in this ruling.***

***This Court, on 14<sup>th</sup> May 2013, granted both the Petitioner and Respondents leave to file further or additional affidavits. Corresponding leave was also granted to any party to respond to the further and/or additional affidavits filed. Pursuant to the said Order, the Petitioner filed an affidavit, the subject matter of this application. The content of the said affidavit is a response to the responses to the petition filed by the Respondents. I have perused the said affidavit, and I do not see any new issues introduced that depart from the petition. A response to a response to the petition may not be provided for in the electoral laws, however, this Court pursuant to Rule 17 (letter i) of the Election Rules has the discretion to allow the filing of further or additional affidavits, which might as well be, a response to a response to the petition. These prayers are devoid of merit, and accordingly fail.”***

18. It is the Claimant's submission that the Respondent has not shown any legitimate aim for insisting that documents should be expunged from the record. The Claimant submitted that it is the Court's discretion to receive or not to receive any evidence as provided under Section 20 of the Employment and Labour Relations Court Act. Further, that the Court is not bound by the Evidence Act which has elaborate provisions on evidence that may relate to private or confidential information.

19. The Respondent relied on the case of **Leland I. Salano v Intercontinental Hotel [2013]** where Rika J held:-

***a. Whether the employee came upon the documents in the regular course of business, as opposed to rummaging through the files;***

***b. Whether the employee shared the documents with other employees or persons, or simply shared with his Advocates;***

***c. Nature and content of the particular document, in order to weigh the employer's interest, in keeping the documents***

*confidential;*

*d. Whether the employer kept in place a clear, uniformly applied, confidentiality policy;*

*e. Balancing of the relevance of the documents, against the consideration whether their use or disclosure, unduly disrupts the employer's business; and,*

*f. Consider the right of the employer to conduct business legally and efficiently, weighed against the employee's right to be free from unfair labour practices.*

20. The Claimant submitted that the gag order sought against the Claimant is aimed at restricting him from prosecuting or defending his suit. He relied on the decision in **GNK v USA-Africa Management Co. Ltd & another [2016] eKLR** and submitted that the Respondent has not met the threshold set out therein.

21. He argued that he shall suffer prejudice should the documents be expunged as he was unfairly terminated from employment and the same documents are being used to unfairly prosecute him. He relied on the decision in **Transport & Allied Workers Union v Service Internationale De Tele Communication Aeronautiques (SITA) [2014] eKLR**.

22. He further argued that the Respondent's wish to supply the Court and other quasi-judicial bodies with selective documents is extremely prejudicial and seeks to manipulate the justice system.

23. He submitted that the rights conferred under Article 31 are not absolute and in the instant case the documents in issue are necessary for the Claimant's case. He urged the Court to allow him rely on the documents presented in his Supplementary List of Documents which are already in the public domain and being utilized by every other party.

24. I have examined all the averments of the Parties herein. The subject matter of this application are the documents filed by the Claimant on 2/8/2018 with his Amended Statement of Claim, which are from pages 40 to 81 and 98 to 180 of the Claimant's documents filed on 2/8/2018.

25. Pages 40 to 56 is a confidential report on employee related Court cases which was prepared by the Bank's Lawyer, the Federation of Kenya Employers (FKE). The Claimant has not explained how he got hold of these documents which are a communication between a client and its advocates.

26. Section 134 of the Evidence Act provides as follows:-

*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) shall continue after the employment of the advocate has ceased".*

27. It is apparent that information supplied by an advocate to his client is privileged communication and the Claimant cannot seek to rely on such information. It is therefore proper that documents supplied by the Claimant at pages 40 to 56 be and are hereby expunged from the record.

28. As for documents at pages 57 to 79, these are minutes of the Board of the Respondent held on various dates from 2015 to 2017. The minutes of 38<sup>th</sup> meeting, the Board's Audit Committee held on 29.10.2015 at 10.05 am (page 51 to 64) indicate that the Claimant was present in attendance as Ag. Chief Finance Officer. It is therefore apparent that he has the knowledge of what transpired on this day. He sat in the meeting as Ag. Chief Finance Officer and as such this was in the course of his duty.

29. The Respondent sought to rely on Clause 4.2.5 of their prudential guidelines, which forbid an employee from divulging any information concerning the institution without consent from the Respondent. It would therefore not be proper for the Claimant to seek to rely on these minutes as his evidence without consent of the Respondent.

30. As to the other Minutes, from pages 65 to 79, the Claimant was not in the meeting. He has not set out by way of evidence or affidavit how he got the said documents.

31. In the **Baseline Architects Limited & 2 Others vs NHIF** (supra) J. Warsame as he then was and relying on Order 19 Rule 3(1) of Civil Procedure Rules opined that:-

***“In cases where the facts are within the knowledge of the deponent, it is mandatory for the deponent to disclose the sources and grounds of information and facts in the affidavit”.***

32. From the Affidavit filed in opposition to this application, the Claimant depones that some of the documents that he wishes to rely on were used by the Respondents against him in criminal case No. 934 of 2017 and criminal case No. 2044 of 2017.

33. The Claimant has however not been specific about the particular documents produced. It would be prudent to have him set out the said documents and show by affidavit that they were supplied by the prosecution in the criminal trials.

34. The Claimant is very general in his reply and therefore it would not be safe to allow him use documents the source of which has not been disclosed. I believe this also applies to documents at pages 80 to 81 and those from pages 98 to 180.

35. The Claimant has averred that he needs the documents to prove his case and has a right to access information. Whereas this may be the position, the Claimant should 1<sup>st</sup> lay down by evidence the source of the documents and establish that they were not illegally acquired. In the circumstances, I find that the application by the Respondent is merited and is allowed expunging documents complained off from the record.

36. Also due to the security of the documents already filed, I will order this file kept in the Strong Room pending its hearing and determination.

37. Costs in the cause.

**Dated and delivered in open Court this 24<sup>th</sup> day of April, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Makori for Respondent – Present

Applicant – Absent