



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1248 OF 2014

MARTIN KABANGA GATHAWA.....CLAIMANT

- VERSUS -

ASSOCIATED BATTERY

MANUFACTURERS (E.A) LTD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 31st May, 2019)

RULING

The respondent filed on 20.11.2018 an application by way of the notice of motion through Swanya & Swanya Advocates. The motion was under Order 2 Rule 15(1), (b) (c) and (d), Order 51 rule 1 of the Civil Procedure Rules, Sections 1A, 1B, and 3A of the Civil Procedure Act and Articles 31, 50(1) and (4) of the Constitution. The applicant prayed for orders:

- 1) That the witness statement of Benard Njoroge, a former employee of the applicant dated 30.07.2018 be expunged from the Court record for reasons that the witness statement violates the applicant's right to privacy, that the witness statement unlawfully discloses confidential communication between the respondent and its advocates, M/S Swanya & Swanya Advocates contrary to provisions of the Evidence Act, and that the witness statement violates the applicant's right to fair hearing contrary to the Constitution.
- 2) That the said witness statement of Bernard Njoroge, a former employee of the respondent, dated 30.07.2018 be struck out on ground that the purported witness statement does not disclose material facts or a cause of action for the Court to consider it a valid or bona fide witness statement.
- 3) That the witness statement of Bernard Njoroge, a former employee of the respondent dated 30.07.2018 be expunged from record for being filed out of time and without the leave of the Court contrary to mandatory provisions of rule 14(8) and (9) of the Employment and Labour Relations Court (Procedure) Rules, 2016.
- 4) That the costs of the application be borne by the claimant.

The application was based on the annexed supporting affidavit of Swanya & Swanya Advocates and upon the following grounds:

- a) The employment contract between the applicant and the said Bernard Njoroge precludes the said Njoroge from disclosing confidential information obtained during the cause of his employment with the applicant.
- b) The witness statement filed by Bernard Njoroge discloses such confidential information obtained during the cause of his employment with the applicant.
- c) The witness statement violates the privacy between the applicant and its advocates, Swanya & Swanya Advocates. In particular the witness statement violates sections 134 and 137 of the Evidence Act Cap 80 which prohibits disclosure of confidential information between a person and his or her advocate. It further offends mandatory provisions of Article 50(1) and (4) of the Constitution of Kenya, 2010 which guarantees the applicant a right to a fair hearing in that evidence obtained in violation of any right or fundamental freedom in the Bill of Rights shall be excluded from admission if the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice or cause prejudice to a party.
- d) The witness statement does not disclose material facts or a cause of action for the Court to consider it a valid or bona fide witness statement.

e) Bernard Njoroge is the applicant's former senior employee and part of the applicant's management so that he was privy to all correspondence between the applicant and its advocate and should not be allowed to bring the applicant to disrepute by scandalous and false averments in the witness statement in breach of the confidentiality clauses in the employment contract with the applicant.

f) The said Bernard Njoroge helped the claimant to draft the resignation letter and his witness statement is an afterthought. He did not disclose to the management at all material time that he had given the claimant such assistance.

g) The witness states in the witness statement that he resigned from the respondent's employment whereas the affidavit by Stephen Bosire Rosana clearly shows that he retired.

h) The witness statement was filed without leave and belatedly so under the rules of the Court. it should be expunged.

The claimant opposed the application by filing on 17.01.2019 the replying affidavit of Kibe Mungai Advocate and filed through Kinoti & Kibe Company Advocates. The claimant refutes that the witness statement discloses any privileged and confidential information so that the applicant's right to privacy or sections 134 and 137 of the Evidence Act have not been offended. Further the witness and his statement are meant to show that the claimant did not resign voluntarily. That even if the witness statement was filed out of time under rules 14(8) and (9) of the Court's Procedure Rules, 2016, the Court enjoys the discretion to allow it on record out of time and in any event the respondent has had enough time to reply or familiarise itself with the evidence expressed in the statement.

The Court has considered the submissions filed for the parties and the material on record in support of the parties' respective positions. There is no dispute that at all material time the witness in issue, Bernard Njoroge, served in the applicant's top management in the position of Human Resource and Administration Manager. The Court has revisited the witness statement date 30.07.2018 and filed the same date. Indeed the said Bernard Njoroge discloses confidential information being legal advice the applicant's advocates may have given to the applicant in a case of criminal allegations by the applicant as a complainant against the claimant and arising out of the parties' employment relationship. To that extent the applicant has established that the advocate-client confidentiality would thereby become seriously prejudiced if the witness statement is allowed on record. The applicant has thereby established that the provisions of the Evidence Act as invoked apply and would be violated if the witness statement is allowed and the witness is allowed to offer such evidence at the hearing of the suit.

The applicant has also established that in the contract of service between the applicant and the said Bernard Njoroge, the clause on confidential matters provided thus, "**You will not, without consent of the company, disclose any of its secrets, manufacturing processes or other confidential matters, relating to the company's operations to anyone not authorized to receive them.**" The Court considers that even without such contractual provision, the principle of advocate – client confidentiality would apply as per section 137 of the Evidence Act and the contractual clause goes to remove any doubt that the proposed witness was bound not to disclose such confidential information or secrets without the respondent's permission.

There was no dispute that the statement had been filed belatedly outside the time as stipulated by the Court's rules of procedure and that operates as an impetus to allowing the application.

Nevertheless, as submitted for the claimant, a witness statement is not a pleading like a defence and it was misconceived for the applicant to urge that it had not raised material facts as to disclose triable issues. Further the Court has considered the claimant's submissions that the applicant failed to invoke the Court's rules of procedure or invoked rules on pleadings but which were inapplicable. The Court has been guided with the principles in Article 159 of the Constitution and in furtherance of substantive justice and towards defeating any further delays in the disposal of the suit, the Court has excused such procedural defects. In that consideration, the costs of the application shall be in the cause.

In conclusion the application filed for the applicant by the notice of motion dated 19.11.2018 is hereby allowed with orders:

- 1) The witness statement of Benard Njoroge, a former employee of the applicant dated 30.07.2018 be and is hereby expunged from the Court record.
- 2) The costs of the application to be in the cause.
- 3) The parties to take prompt and further steps towards the expeditious hearing and determination of the main suit.

Signed, dated and delivered in court at Nairobi this Friday 31st May, 2019.

BYRAM ONGAYA

JUDGE