



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 2160 OF 2018**

*(Before Hon. Lady Justice Maureen Onyango)*

**MAGDALENE KIBOI.....1<sup>ST</sup> CLAIMANT**  
**NASHON DWOYA.....2<sup>ND</sup> CLAIMANT**  
**JAMES KINYUA.....3<sup>RD</sup> CLAIMANT**  
**KEMUNTO MICHIEKA.....4<sup>TH</sup> CLAIMANT**  
**HILLARY OMENO.....5<sup>TH</sup> CLAIMANT**  
**RIXION KYALO.....6<sup>TH</sup> CLAIMANT**  
**EVANS OCHIENG.....7<sup>TH</sup> CLAIMANT**  
**MARY CONSOLATA NJERI.....8<sup>TH</sup> CLAIMANT**  
**ABDALLA SUDI.....9<sup>TH</sup> CLAIMANT**  
**SYLVIA ATIENO.....10<sup>TH</sup> CLAIMANT**  
**CYRUS BARMASAI.....11<sup>TH</sup> CLAIMANT**  
**MICHAEL OMOLO.....12<sup>TH</sup> CLAIMANT**  
**RICHARD KIVENZI.....13<sup>TH</sup> CLAIMANT**  
**ROSE OGGOT.....14<sup>TH</sup> CLAIMANT**  
**GRACE KELLER.....15<sup>TH</sup> CLAIMANT**  
**MATHEW KIPTALAM.....16<sup>TH</sup> CLAIMANT**  
**VICOTR SEREM.....17<sup>TH</sup> CLAIMANT**  
**DENIS NYABENGE.....18<sup>TH</sup> CLAIMANT**

**VERSUS**

**ENGEN KENYA LIMITED.....RESPONDENT**

## RULING

Before me, for determination is the Respondent's Notice of Motion Application dated 1<sup>st</sup> February, 2019. It seeks the following orders:

1. That this Application be certified urgent and be heard ex parte in the first instance.
2. That this matter be urgently placed before the Onyango J. for further directions.
3. That the Court be pleased to expunge from the Court record copies of the documents referred to and/or filed in the Claimants' Supplementary Lists of Documents dated 24<sup>th</sup> January, 2019, save for Matthew Kiptalam's payslip.
4. That the costs of this Application be borne by the Claimants.

This Application is premised on the grounds that:-

- a) On 21<sup>st</sup> January, 2019, before Onyango J., the parties herein took directions to have the Claimant file a Supplementary List and bundle of documents excluding any privileged documents and to have this matter determined by way of written submissions.
- b) The Respondent is scheduled to file its written submissions and any supplementary documents on or before 12<sup>th</sup> February and the matter is scheduled for highlighting of submissions on 15<sup>th</sup> February, 2019.
- c) The list and bundle of documents initially filed by the Claimants' Advocates on 18<sup>th</sup> January 2019 (which was withdrawn) was served upon the Respondent's advocate on Friday 18<sup>th</sup> January, 2019 at 4:35 pm in advance of the hearing that was scheduled for Monday 21<sup>st</sup> January, 2019.
- d) The Respondent's Advocates were not given sufficient time to go through the documents in detail but it did note that some included correspondences with the Respondent's Advocates and privileged documents which it pointed out to the Court.
- e) The Claimants herein served the Respondent with a Supplementary List of Documents dated 24<sup>th</sup> January, 2019 and its written Submissions on 24<sup>th</sup> January, 2019.
- f) Upon review thereof, it is noted that the said documents still include privileged and content shared with limited circulation between senior Managers including its Human Resources Manager in content and with limited circulation.
- g) The 4<sup>th</sup> Claimant is the Respondent's Human Resources and Administration Manager.
- h) The said documents appear to have been in the possession of the Claimants and specifically the 4<sup>th</sup> Claimant well in advance of the last minute filing of the same.
- i) Including the said documents in the said circumstances after directions have already been taken on the manner in which the matter is to be resolved is prejudicial to the Respondent's defence and its right to fair hearing of the matter. Effectively the Respondent is prevented from interrogating the said documentation including the background, contents and basis thereof through a preliminary hearing.
- j) The said documents were illegally and/or unlawfully obtained and utilized and the matters discussed therein were on a confidential basis. The said communication has been disclosed without the Respondent's authority.
- k) The production of the said documents is in breach of the employee's contractual obligation to keep confidential information obtained in the course of employment, mutual trust, confidence, good faith and fidelity imposed on employees in the conduct of their duties.
- l) On 10<sup>th</sup> December, 2018, the Respondent agreed in good faith to an expedient hearing of the matter. The Claimants' actions aforesaid and the last minute timing of the release of the said documents appears to be in bad faith calculated to steal a match from the Respondent. This Application has been filed without any delay.
- m) In the circumstances the Respondent is not in a position to progress the matter forward and to file its submissions until the matter addressed herein are addressed by the Court.
- n) It is only just and equitable that the orders sought herein are granted by the Court.

The Application is supported by the Affidavit of HASEN ZALGAONKER sworn on 1<sup>st</sup> February, 2019 in which she reiterates the grounds on the face of the motion.

The Claimants' oppose the Application and filed Grounds of Opposition to the Application dated 1<sup>st</sup> February, 2019 dated and filed in Court on 14<sup>th</sup> February, 2019 in which they aver that the instant Application is misconceived and an abuse of the Court as the Respondent has not

provided sufficient grounds to warrant the expunging of the Claimants' Supplementary List of Documents.

They further contend that the Respondent/Applicant has not demonstrated that the documents contained in the Claimants' Supplementary List of Documents are privileged and confidential documents and that the same documents contain information within the public domain and generally known as it touches on the Claimants' unpaid house allowance.

In conclusion the Claimants' urged the Court to dismiss the instant Application as the same is void of merit.

The Application was thereafter argued orally when the Application was listed for hearing on 18<sup>th</sup> February, 2019.

### **Submissions by the Parties**

It is submitted on behalf of the Respondent/Applicant that the instant Application ought to be allowed as prayed as they seek to expunge communication between senior managers which the Claimants' purportedly are seeking to rely on.

It is further submitted that the Claimants actions of filing the said documents at this juncture was done in bad faith as parties had already taken directions on how to proceed with the matter, which was by way of written submission. That this would mean that the Respondent/Applicant is denied the chance to cross examine on the documents.

The Respondent/Applicant contends that the documents filed by the Claimants' in the Supplementary List of Document are documents with limited circulation and were provided by the 4<sup>th</sup> Claimant in breach of confidentiality of management. That the said 4<sup>th</sup> Claimant has not sworn an affidavit to dispute this.

The Respondent/Applicant further contends that the four Claimants owed a duty of confidentiality to the respondent by virtue of her position. As such she is in breach of the duty owed to the Respondent.

The Respondent/Applicant further submitted that it shall be greatly prejudiced if the Orders as sought in their Application are denied as the Claimants are still under their employment. To fortify their arguments the Respondent/Applicant relied on the Authorities as cited in the Respondent's List of Authorities dated 15<sup>th</sup> January, 2019 and filed in Court on 15<sup>th</sup> February, 2019.

In conclusion the Respondent/Applicant urged the Court to allow the instant Application as prayed.

The Claimants' on the other hand in opposition to the Application reiterated the averments made in their grounds of opposition dated 14<sup>th</sup> February 2019 and placed reliance on the List of Authorities dated 15<sup>th</sup> February, 2019.

It was their submission that the correspondence that the Applicant seeks to have expunged is not confidential as they were sent to other employees in the cause of their ordinary business.

The Claimants' urged the court to dismiss the Application for lack of merit.

### **Determination**

After considering the parties' arguments and the evidence adduced, I am of the opinion that there is only one issue for determination being whether the instant Application is merited or not.

A perusal of the email communication in question discloses that the same are emails between senior managers of the Respondent Company most of which are copied and/or sent to Kemunto Michieka, the 4<sup>th</sup> Claimant herein in her capacity as Human Resource and Administration Manager of the Respondent Company.

Parties to an employment relationship, both the employer and the employee will of necessity have access to confidential information about each other. For the employee, the employer will have information that should not be disclosed to any other person including the immediate family of the employee. For the employer, the employee will have access to information that should not be disclosed to third parties including clients and competitors.

As long as the information is proprietary in nature and is revealed in confidence, the employee has a common law duty not to reveal the information. This duty applies irrespective of whether or not there exists a confidentiality agreement or clause in the employee's employment contract and generally extends beyond the life of the employment relationship.

The question must however be asked as to what constitutes confidential information. In *Advtech Resourcing (Pty) Ltd v Kuhn 2007(4) ALL SA 1386, C para [51]* the Court held that for information to qualify as confidential the following requirements must be fulfilled:

*a) The information must involve and be capable of application in trade and industry; that is: it must be useful;*

*b) The information must not be public knowledge and public property, that is objectively determined it must be known to a restricted number of people or to a closed circle;*

*c) The information objectively determined must be of economic value to the person seeking to protect it.”*

It is my view that the documents in question were made available to the 4<sup>th</sup> Claimant by virtue of her position within the Respondent and as such the same can be classified as confidential and privileged information.

For these reasons, I allow the Application and Order that the Supplementary List of Documents dated 24<sup>th</sup> January 2019 be expunged from the Court records and a fresh list be filed with only the payslip of Mathew Kiptalam.

Costs of the application shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14<sup>TH</sup> DAY OF JUNE 2019**

**MAUREEN ONYANGO**

**JUDGE**