



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2517 OF 2017

CHRIS OANDA.....CLAIMANT

VERSUS

KENYA AIRWAYS.....RESPONDENT

RULING

Introduction

1. The Application before the Court is the Notice of Motion dated **15th August, 2018** and is brought by the Claimant seeking for the following Orders **THAT:-**

- a) The Statement of Response dated 21st May, 2018 and filed on 22nd May, 2018 be struck out or in the alternative, paragraphs 100 to 111 of the Statement of Response and Paragraphs 2 to 19 of the witness statement of Peter Mungai (the offending paragraphs) be struck off.
- b) The documents filed at pages 319 to 381 of the Respondent's Bundle of documents be expunged from the Court record.
- c) The period for filing the reply to defence be extended and the Claimant granted 7 days upon determination of this application to file its reply to the Statement of Response.
- d) The costs of and incidental to this application be awarded to the Claimant.

2. The Application is premised on the following grounds **THAT:**

- a) The Statement of Response, witness statements and bundle of documents filed on 22nd May 2018 contain information and documents at paragraphs 100 to 111 of the Statement of Response, paragraphs 2 to 19 of the witness statement of Peter Mungai (the offending paragraphs) and pages 319 to 381 of the Respondent's bundle which:
 - i. Relate to the period between May and July 2017 when the Claimant was undergoing the disciplinary process. The allegations raised were not part of the allegations that were raised in the show cause and have never been brought to the attention of the Claimant prior to 22nd May 2018.
 - ii. Are not relevant to the issue for determination in this matter.
 - iii. Was obtained by violating the Claimant's rights under Article 31 (d) of the Constitution not to have his privacy of his communication infringed.
 - iv. The Respondent's witness, Mr. Peter Mungai has admitted that the information he has set out in his statement was obtained by hacking into the Claimant's work and personal gmail account.
 - v. The gmail account is a personal and private and confidential email owned and only accessed by the Claimant.
 - vi. Admission of such otherwise irrelevant matters would not only condone the infringement but also be detrimental to the administration of justice and unfair to the Claimant.
- b) The Respondent is at all-time bound by the provisions of Article 31 (d) of the Constitution, which forbids them from infringing on

the privacy of the Claimant's communication.

c) The offending information and documents have been obtained in total violation of the Claimant's right to privacy and confidentiality and is therefore in breach of Article 54(4) of the Constitution which provides as follows:

“Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would make the trial unfair, or would otherwise be detrimental to the administration of justice.”

d) The offending information and documents have been filed in Court with an ulterior motive to defeat the Claimant and portray the Claimant in a negative light unnecessarily.

e) Paragraphs 100 to 111 of the Statement of Response, Paragraphs 2 to 19 of the witness statement of Peter Mungai (the offending paragraphs) and pages 319 to 381 of the Respondent's Bundle make scandalous and untrue allegations.

f) The fact that the Respondent obtained information from the Claimant's official email which was assigned while he was an employee of the Respondent does not entitle the Respondent to use that information in civil suits.

g) The offending paragraphs and information in the Statement of Response, Witness Statement and bundle of documents have been filed in bad faith and inclusion of the offending paragraphs is intended to achieve an ulterior motive thus amounting to an abuse of the Court process.

h) The Claimant requires more time to file its Reply to Defence once the offending information is expunged from the Court record.

i) It is in the interest of justice that the prayers sought herein are granted.

3. The Application is filed under Article 50(4), 31(d) of the Constitution, Section 12 of the Employment and Labour Relations Act, Section 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and all the enabling provisions of the Law.

Claimant/Applicant's Case

4. The Application is supported by the Affidavit of Chris Oanda, the Claimant herein sworn on 15th August, 2018, who reiterates the averments in the grounds on the face of the Application. The main ground for the Application is that the Respondent in its offending paragraphs seeks to include documents that were obtained in total disregard to Articles 31(d) and 54(4) of the Constitution of Kenya, 2010.

5. The Claimant further avers the offending paragraphs ought to be expunged from the Court record as they are an infringement to his constitutional Rights and that the offending paragraphs have no connection whatsoever with the dispute before Court and will not assist the Court to decide the matter fairly and arbitrarily.

Respondent's Case

6. The Application is opposed by the Respondent through the Grounds of Opposition dated **10th September, 2018** and filed in Court on **11th September, 2018**. The Respondent raises the following grounds of opposition:

a) The Application is misconceived, incompetent, bad in law and is an abuse to the process of the Court;

b) The Application offends the provisions of Article 159 (2) (d) of the Constitution as well as Section 20(1) of the Employment and Labour Relations Act, 2011;

c) The Application does not meet the threshold set in **Anarita Karimi Njeru Versus Republic (No. 1) (1979) KLR 154** on infringement of constitutional rights and freedoms;

d) The Application does not meet the threshold set in **D.T. Dobie & Company (Kenya) Limited Versus Joseph Mbaria Muchina & Another (1980) eKLR** on striking out pleadings;

e) The Application as filed and the prayers sought thereof are unmeritorious and ought to be dismissed with costs to the Respondent.

Claimant's submissions

7. The Claimant submitted that, contrary to Articles 31(d) of the Constitution of Kenya, the Respondent intruded his privacy by hacking his private Gmail account and work account and retrieving the documents, which she intends to use as evidence against him in this case. He further submitted that the issue of admissibility and probative value of the impugned documents is significant and it should be determined before the hearing.

8. The applicant further submitted that the Honourable Court has power to exclude a wrongfully obtained document by dint of Article 54 (4) of the Constitution and prayed for the offending documents to be expunged from the record. The Claimant further relied on the case of

Okiya Omtata & 2 Others Versus AG. He submitted that the Respondent took advantage of the trust and confidence the Claimant had in them vide the employment relationship. In support of this position the Claimant relied on the authority of **Baseline Architects Ltd & 2 others Versus National Hospital Insurance Fund Board Management (2008) eKLR** where it was stated that:

“In my understanding, a party to a litigation is not obliged to produce documents which do not belong to him but which have been entrusted to his company by a third party in confidence. It would be an abuse of that confidence to disclose it, without permission of the owner of the original documents...It is also clear in my mind that justice is administered in civil disputes on the principles that you cannot use an advantage obtained improperly or illegally in a manner prejudicial and/or detrimental to the interests of the opposite party.

The principle is based and/or founded on fair play if we allow parties to steal a march by relying on documents improperly obtained from the other side.”

Respondent’s submissions

9. The Respondent submitted that the instant Application does not meet the threshold set in **Anarita Karimi Njeru Versus Republic (No. 1) (1979) KLR 154** on infringement of constitutional rights and freedoms. The Respondent relied on the decision Trevelyan and Hancock J. who held as follows:

“we would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the constitution it is important (if only to ensure that justice is done to his case) that he should set out reasonable degree of precision that of which he complains the provision said to be infringed and in the manner in which they are alleged to be infringed.”

10. The Respondent further submitted that it has not infringed the Claimant’s right to privacy as envisaged in Article 31 of the Constitution of Kenya and that this right is not absolute. For emphasis the Respondent relied on the case of **Harold Berstein and Others versus Von Wielligh NO and Others (1996) (2) SA 75** where Justice Ackerman of the Constitutional Court of South Africa held:

“...privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly...”

11. The Respondent further relied on the authority of **Mistry Vs Interim National Medical and Dental Council of South Africa (1998) (4) SA 1127 (CC)** that set out the factors to be considered when determining whether a right to privacy was violated. The Court stated that one ought to consider:

“ i. Whether the information was obtained in an intrusive manner;

ii. Whether it was about intimate aspects of the applicant’s personal life;

iii. Whether it involved data provided by the applicant for one purpose which was then used for another;

iv. Whether it was disseminated to the press or the general public or persons from whom the applicant could reasonably expect such private information would be withheld.”

12. The Respondent submitted from the bar that she never at any point hack the Claimant’s personal email account to access the information but verification was done from the Claimant’s official email account, which the Respondent has the liberty to access following the Claimant’s act of sharing official information to his personal gmail account. The Respondent relied on the case of **Angela Wokabi Muoki Versus Tribe Hotel Limited (2016) eKLR** where Lady Justice Monica Mbaru observed that a work email and all material at work is the property of the employer and an employee cannot claim privacy over such property.

13. The Respondent further relied on **Peter Apollo Ochieng Versus Instarect Limited (2017) eKLR** where the Court held that access to work place emails and communication is a prerogative of the employer. Where an employee uses workplace tools, time, resources to send communication, such time, tools and resources are the property of the employer.

14. Finally, the respondent submitted that that the Claimant’s application does not meet the threshold for striking out the witness statement and the accompanying documents, as set out by the Court of Appeal in the **D.T Dobie & Company (Kenya) Ltd Vs. Muchina Civil Appeal No. 37 of 1978**. She therefore urged the Court to dismiss the Application with Costs.

Analysis and determination

15. After careful consideration of the application, supporting affidavit, grounds of opposition, pleadings and impugned witness statement and attached documents, it is clear that the respondent has accessed the claimant’s official email account allegedly to verify the nature of information which he shared from the said account to his unofficial gmail account, chris.oanda@gmail.com and retrieved documents therefrom. There is no dispute that the respondent’s witness herein, Mr. Peter Mungai has filed a statement annexing the said retrieved documents as exhibits herein. The issues for determination are:

- a) Whether the impugned documents were illegally obtained, and if so what orders should be made.
- b) Whether leave to file reply to defence out of time should be granted.

Illegally obtained documents

16. The Claimant has alleged that the impugned documents were obtained by infringing on his right to privacy through hacking of his private gmail account contrary to Article 31, 35 and 54 of the Constitution. The Respondent has however denied the alleged hacking into the claimant's private gmail account and contended she lawfully accessed the Claimant's official email account to verify the information that was share from it to his unofficial gmail account. That the impugned documents were retrieved lawfully from the claimant's official account and maintained that she was at liberty to access the claimant's official email account because it was her property.

17. After careful evaluation of the rival contentions presented, I opine that the claimant has not proved on a balance of probability that the impugned documents were obtained by the respondent through hacking of his private gmail account. I however, find that the respondent has proved on a balance of preponderance that she lawfully obtained the said documents from the claimant's official account which she had liberty to access. That the documents had been shared from the claimant's official email account to his unofficial gmail account. I therefore return that the documents were lawfully obtained and I decline expunge the said documents and the said paragraphs of the defence witness's written statement from the record.

18. The foregoing view is fortified by **Angela Wokabi Muoki versus Tribe Hotel, Cause No.1712 of 2014** where the Mbaru J held that:

“... Such work email is the property of the employer. An employee cannot claim privacy over matters shared, included or shared out of such an address at the expense, time or within the tools allocated for work by the employer. In the case of Bar Bulescu versus Romania, Application 61469 of 2008, the European Court of Human Rights held that whilst human rights law gave employees a reasonable expectation of privacy at work, this right was subject to an employer's legitimate objective of managing its resources effectively. Therefore an employer could, if the circumstances justified it, be entitled to monitor employees' emails provided this was limited in scope and a proportionate means of achieving its legitimate objective”.

Leave to file reply to defence out of time

19. Both parties shied away from submitting either for or against the leave to enlarge time within which to file reply to the defence. I will therefore grant the leave sought as prayed, since no prejudice has been pointed out by the respondent.

Conclusion and disposition

20. I have found that the claimant has not proved that his private email address was hacked by the respondent and the impugned documents retrieved therefrom. I have further found that the respondent lawfully accessed the claimant's official email and retrieving documents shared from it to the claimant's unofficial gmail account. Finally I have found that leave to file reply to defence was not opposed. Consequently, the Application dated 15th August, 2018 is dismissed save that the Claimant is granted 7 days to file and serve his Reply to the Defence

Costs of the application to the respondent.

Dated, Signed and Delivered in Open Court at Nairobi this 7th day of December, 2018

ONESMUS N. MAKAU

JUDGE