



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF

KENYA AT NAIROBI

CAUSE NUMBER 681 OF 2015

ROSE WAMBUI GICHURU.....CLAIMANT

VERSUS

HOUSING FINANCE COMPANY LTD.....RESPONDENT

RULING

1. By a motion dated 29th June, 2016, the claimant sought orders inter alia that:
 - a. That this honourable court do issue an order directed to the respondent (Housing Finance Company of Kenya limited) compelling it to produce all the email correspondence made between the respondent and Mohammed Kinyanjui Advocates in respect to Mortgage Account No [particulars withheld] belonging to one Mr Nilesh Bhailalbhai Patel and Mrs Diana Claire Jacobson Patel.
 - b. That the claimant wishes to rely on the email correspondence between Mohammend Kinyanjui Advocates and the respondent to file her further list of documents.
 - c. That the respondent will not be prejudiced by the said orders as they may also rely on the said documents during the trial.
3. The application was further supported by the affidavit of the claimant in which she repeated the grounds upon which the application was brought.
4. The respondent opposed the application and filed a replying affidavit through one Martin Machira who stated in the main that the email correspondence sought by the claimant contained privileged information. The respondent further contended that the claimant had not laid a basis or shown the reasons for making the request for production of the said email. The respondent also contended that the order requested by the claimant in her application was too broad to be complied with as the claimant sought to lay bare all email correspondence relating to the defendants bank two customers. The claimant according to the respondent did not specify the dates of the emails he is interested in or the content that she intended to rely on from such email.

5. The respondent further contended that the person named in the requested email correspondence were not parties to the claim herein nor had their consent been sought to have communication in relation to their account being produced. The respondent in resisting the orders sought wanted to protect communication between itself and the customer which information was privileged information.
6. Mrs Macharia for the claimant in her submissions contended that the information sought by the claimant was not privileged. The claimant was not seeking details of mortgage account statement but rather correspondence between the respondent and the advocates that were holding the title documents that the claimant was supposedly required by the respondent to have handed over to a client.
7. According to counsel, the failure by the client to hand over the title documents to the respondent's client Patel led to an in accusation that she was negligent in her duties and yet the documents were in the possession of the client's advocates. Counsel submitted that the general principle as to the disclosure in such an instance is settled by the English Case of **Chantrey Martin & Co –Vs- Martin [1953] All ER 691** where it was held that the mere fact that the giving of the discovery will involve a breach of confidentiality as against some 3rd person or in any way affect or prejudice his interest does not constitute of itself an independent objection to the giving of discovery, disclosure under compulsion of the court.
8. According to counsel the communication sought are specific as to proving that the title documents were in possession of Mohammed Kinyanjui advocates at the time the claimant was dealing with Mr Patel. Counsel further submitted that the respondent waived its right to privilege by relying on the correspondence between the claimant and Mr Nilesh B. Patel and Mr Diana Claire Jacobson Patel as part of its supplementary list of documents. There is a strong nexus between the correspondence sought with the above internal communication and the claim before the court. Even though the communication sought involve Mr and Mrs Patel who are third parties to the suit they will not in any way be prejudiced as the communication sought are purely restricted to establishing the circumstances under which the claimant was not able to hand over the title documents to the third parties when required to do so.
9. Mr Mugambi for the respondent on the other hand submitted that for such an order to issue the request has to be specific. To this extent counsel relied on the case of **White –Vs- Spafford & Company Ltd [1901] 2 KB 2411** which was cited with approval in the case of **Motor Mart & Exchange Ltd Vs Standard General Insurance Company** where it was stated that it was not sufficient to make a general affidavit based on a prior reasoning that certain classes of documents must be in his opponent's possession or power. The discovery must be of a specie not genus. Counsel further cited the case of **Board of Trustees Vs Dr Sally Kosgei & Another** where it was held that lack of specificity will amount to fishing expedition and should not be encouraged. Counsel further submitted that in event that the generalized order is made it would not be feasible to comply without offending the provisions of section 134 of the Evidence Act regarding Advocate -Client privilege.
10. According to counsel once the customers Mr Nilesh Patel and Mrs Diana Claire Patel appointed the firm of Mohammed Kinyanjui Advocates, an advocate client relationship ensued. Henceforth any communication between them and the advocates became protected from usual disclosure unless with the client's consent. On this point, counsel relied on the case of **Baseline Architects Ltd Vs NHIF [2008] eKLR** where Warsame J held that a party to 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 the permission of the owner of the original documents.
11. Counsel further contended that the claimant while making a spirited argument for the production of the documents, she fails to address the fact that there exists a Bank/Customer relationship protected by Section 31 of the Banking Act.
12. The claimant herein was summarily dismissed on 18th March 2015 on account of gross negligence. According to the dismissal letter, the claimant was accused of delay in releasing customers documents leading to complaints. She was also accused of taking more than a month to release closed insurance files without any justifiable reasons. This led to delays in processing insurance refunds. The claimant was further advised that she had a running warning letter on similar lapses.

13. Concerning the current application the claimant in her response to the show cause letter stated that on 22nd January, 2015 she handled Mr Patel who had come to collect his title documents which were jointly owned with his wife. She informed Mr Patel that he needed to have a written authority, original passport or ID of the partner. Mr Patel did not have these documents. Earlier she had confirmed in the deed register that the title documents were in the respondent's possession however when she went to collect them from the strong room she found them missing. She immediately sought advice from Assistant Legal Manager conveyance and Securities and was advised to see Ms Mohammed Kinyanjui Advocates who confirmed that they had been holding the title due to non-payment of rate clearance since 2003.

14. The issue was also significantly discussed at the disciplinary hearing on 26th February, 2015 under issue No 2 on delaying customers at the reception. It would therefore seem that Mr Patel's case is not the sole reason why the claimant was dismissed. It was one of the several incidences which the respondent considered was an incident of undue delays the customers were subjected to by the claimant. The court therefore does not see any evidentiary value the production of the email correspondence between the respondent and Ms Mohammed & Kinyanjui over Mr Patel's account would add to the claimants' case. The claimant on her part and in her defence to the accusation over delaying customers stated that in this particular case the title document was with the respondent's lawyers. The respondent became of the view that the explanation was not satisfactory. The onus of proof that this was not a satisfactory explanation is on the respondent since by law the onus of proof of reasons for dismissal is on the employer.

15. This court has power in appropriate cases to order discovery or production of documents including those perceived by a party to be privileged if the interest of justice demands. The application before me does not present itself as meriting the orders sought for reasons stated above.

16. The same is therefore dismissed with costs.

17. It is so ordered.

Dated at Nairobi this 29th day of September, 2017

Abuodha J. N.

Judge

Delivered this 29th day of September, 2017

Abuodha J. N.

Judge