



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 432 OF 2014**

**SUSAN WARIARA KARIUKI.....CLAIMANT**

**VS**

**DIAKONIE KATASTROPHENHILFE.....RESPONDENT**

**RULING**

1. The Respondent's application dated 20th January and filed in Court on 21st January 2016 seeks an order to expunge a letter dated 29th May 2013 exhibited at page 38 of the Claimant's Memorandum of Claim. The application, which is supported by the affidavit of Wangalwa Oundo, Advocate sworn on 20th January 2016 is based on the following grounds:

- a. That the letter consists of privileged communication between an Advocate and their Client;
- b. That the circumstances surrounding the possession of the subject letter by the Claimant smacks of unethical and criminal conduct.

2. In the supporting affidavit sworn by Wangalwa Oundo, Advocate he depones that the subject letter was merely meant to seek legal advice and opinion and was not intended for use by third parties. Counsel further depones that there is reasonable apprehension that the letter was obtained by use of unethical or unlawful means as it is not signed. He adds that to decline the application would highly prejudice the principle of confidentiality between Advocates and their clients.

3. In a replying affidavit sworn by the Claimant, Susan Wariara Kariuki on 2nd February 2016, she depones that she legitimately came upon the letter dated 29th May 2013 in the regular course of her employment as the Respondent's Administrative and Logistics Officer. Kariuki denies using any unethical or criminal means to access the letter as she stumbled upon it while on routine duties working for the Respondent. She adds that no criminal charges have been preferred against her on account of the said letter.

4. The Claimant takes the position that inclusion of the subject letter is relevant to the just determination of her claim. Further, he holds that by not raising objection to production of the letter before the trial, the Respondent waived the Advocate-Client privilege.

5. The single issue for determination in this application is whether letter dated 29th May 2013 exhibited at page 38 of the Claimant's Memorandum of Claim is properly on record. The Respondent states that the letter which contains legal advice from its Advocate is privileged communication and cannot therefore be produced in Court. The Claimant on the other hand maintains that the letter is necessary for the just determination of her claim and ought therefore to remain on record.

6. It is not in contest that the letter in issue contains communication from an Advocate to his client and

under Section 134 of the Evidence Act, such communication is privileged and can only be produced under exceptional circumstances. In addition, there is now firm jurisprudence from this Court that an employee may not exhibit restricted information belonging to their employer without authorisation of the employer or an order by the Court (see ***SBI International Holdings AG (Kenya) v Amos Hadar [2015] eKLR***).

7. The Claimant simply states that she came across the subject letter in the course of her employment with the Respondent but does not provide details. The Court could not therefore tell how the letter which was neither addressed nor copied to her came to her possession. In the absence of any further explanation, the Court reached the conclusion that the Claimant used unethical and unlawful means to access the letter.

8. This Country now has a Constitution that enables parties to access documents necessary for their case through legal means and there is therefore no need to resort to street methods to do so and as held by **Lenaola J** in ***Okiya Omtatah Okiiti & 2 Others v Attorney General & 3 Others [2014] eKLR*** a court of law will not rely on documents that are improperly obtained.

9. Consequently, letter dated 29th May 2013 exhibited at page 38 of the Claimant's Memorandum of Claim is hereby expunged from the record. The costs of this application will be borne by the Claimant.

10. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS**

**18TH DAY OF MARCH 2016**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Osundwa for the Claimant

Mr. Wangalwa for the Respondent