



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1773 OF 2015

GNK.....CLAIMANT

VS

USA-AFRICA MANAGEMENT CO LTD.....1ST RESPONDENT

CRVH t/a VHC.....2ND RESPONDENT

RULING

1. This ruling relates to the Respondents' application dated 1st March 2016, brought under certificate of urgency. The application, which is supported by the affidavit of C R V H , seeks orders to restrain the Claimant from publishing or causing to be published, broadcasting or causing to be broadcast any material concerning this suit pending its hearing and determination.

2. The application is based on the following grounds:

a. That on 21st December 2015, the Claimant contacted two of the 1st Respondent's consultants, Dr. Ameet Aggarwal and Dr. Felice Tilin informing them that the 2nd Respondent had been charged with sexual harassment and unlawful termination of employment. The Claimant also informed the consultants that due to the nature of the case, allegations and evidence, the case had attracted the attention of the media who were keenly following the proceedings;

b. That in the emails to the consultants, the Claimant had forwarded scanned copies of the Memorandum of Claim dated 2nd October 2015 and informed the said consultants that more information could be obtained from this Court;

c. That Dr. Ameet Aggrwal had subsequently informed the 1st Respondent that he wanted his name deleted from its website. The 1st Respondent acquiesced to the consultant's request, deleted his name from its website and had not received the consultant's services since;

d. That Dr. Feline Tilin had informed the Respondents that the Claimant was circulating the said emails to the 1st Respondent's consultants;

e. That the information conveyed by the Claimant to the 1st Respondent's consultants was *sub judice* as it is still under judicial consideration before this Court. Further, the information was partly misleading as the suit has not been covered by the media as alleged by the Claimant;

f. That if the prayers sought are not granted, there is danger that the Claimant will continue to discuss these proceedings with the Respondents' clients, employees and consultants, misleading them on the coverage the suit has received. This will be detrimental to the Respondents' business,

reputation and workforce;

g. That the harm the Respondents are likely to suffer if the orders sought are not granted cannot be compensated by damages;

h. That the orders sought will not prejudice the Claimant as she is in any event not permitted to discuss issues that are being determined by the Court;

i. That it is in the interest of justice that the application is allowed.

3. Counsel for the Respondents appeared before **Wasilwa J** (*ex parte*) on 2nd March 2016 and obtained the following interim orders:

“THAT pending the hearing and determination of this application, the Claimant/Respondent whether by herself, her agents, her servants or otherwise be and is hereby restrained from publishing, causing to be published, broadcasting or causing to be broadcast any works, pictures, videos or statements concerning this suit by any medium whatsoever.”

4. For some reason that was not clear to the Court, the Claimant chose not to respond to the Respondent's application. Nevertheless, this being a court of justice, its decision must be guided by the facts before it and the applicable law.

5. In their application, the Respondents are asking the Court to restrain the Claimant from publishing or broadcasting anything to do with her claim because these matters are *sub judice*.

6. The *sub judice* rule is a common law principle that generally prohibited public discussion on matters pending before the court. At common law, the principle was particularly appropriate in cases of trial by jury where there was genuine fear that lay jury members would be swayed by public opinion. The retired Constitution of Kenya appeared to secure the common law position on *sub judice* (see Section 79(2)).

7. However, under the Constitution of Kenya, 2010 any limitation on the freedom of expression guaranteed under Article 33 must be justified. This was the holding by **Majanja J** in ***Okiya Omtatah Okoiti v Attorney General & 2 Others [2013] eKLR***. I hold a similar position. It is no longer enough to front *sub judice* as an automatic bar to public discussion on matters pending before the court.

8. Kenyan courts are manned by well trained judges and magistrates who are capable of rising above the cacophony of public debate to render objective and just decisions based on the facts before the court and the applicable law. I think the only allowable limitation on the freedom of expression guaranteed under Article 33 must be as provided under Article 24. The Respondents did not advance any arguments on this score.

9. This being an employment matter, the Court must address itself to issues arising from information gained by parties in an employment relationship. In ***SBI International Holdings AG (Kenya) v Amos Hadar [2015] eKLR*** this Court held that parties in an employment relationship carry a common law duty not to disclose information that is proprietary in nature and is revealed in confidence. This duty applies irrespective of whether there exists a confidentiality agreement or clause in the employment contract and generally extends beyond the life of the employment relationship.

10. The question must however be asked as 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 its protection;

d) More importantly, public policy dictates that confidentiality agreements cannot be invoked to bar disclosure of illegal or immoral activity that would be injurious to society.

11. The Respondents seek a general gag order which in my view does not meet the above cited threshold. In fact, the information disclosed in the email communication that triggered this application is contained in court pleadings which are themselves open to the public.

12. In adjudicating a dispute such as the one before me, the Court must be careful not to issue orders whose effect is to leave an employee or former employee walking on egg shells wondering what information they may or may not disclose.

13. Overall, I find no reason for issuing the general gag order sought by the Respondents. The application therefore fails and is dismissed with costs being in the cause. The interim orders granted on 2nd March 2016 are hereby vacated.

14. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 15TH DAY OF APRIL 2016

LINNET NDOLO

JUDGE

Appearance:

No appearance for the Claimant

Mr. Angwenyi for the Respondent