



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1497 OF 2015

KENYA HOTELS AND ALLIED WORKERS UNION.....CLAIMANT

VS

ALL AFRICA CONFERENCE OF CHURCHES

T/A DESMOND TUTU CONFERENCE CENTRE.....RESPONDENT

RULING

1. This ruling was triggered by a preliminary objection raised by the Respondent by notice dated 16th November 2015. The objection is premised on the ground that the documents annexed and marked as exhibit 9; being letters dated 23rd April 2015 and 7th July 2015 are privileged documents and are inadmissible as evidence by dint of Sections 134, 135 and 139 of the Evidence Act, Cap 80 of the Laws of Kenya. The said documents therefore ought to be expunged from the record.
2. In its submissions filed in Court on 17th February 2016, the Respondent states that the letters in issue which the Claimant seeks to rely on were exchanged between the Respondent and the firm of Gatheru Gathemia & Co Advocates. The letters are therefore privileged. The Respondent adds that if the said letters are expunged from the record, the entire claim will have been dispensed with.
3. In its written submissions filed in Court on 24th February 2016, the Claimant states that the purpose and function of the letters which the Respondent seeks to protect are unjust, unfair and against the constitutional rights of its members.
4. There are two related issues for determination in this application:
 - a) First, whether the preliminary objection raised by the Respondent meets the required threshold;
 - b) Second, whether the letters in issue are privileged.
5. In its submissions filed on 17th February 2016, the Respondent made reference to the famous case of *Mukisa Biscuit Manufacturing Co. Ltd v Westend Distributors Ltd (1969) E.A. 696* in which a preliminary objection was defined as one which:

“raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what it sought is the exercise of judicial discretion.”

6. In my understanding, the Respondent's objection is based on the admissibility of the two letters dated 23rd April 2015 and 7th July 2015 written to the Respondent by its Advocates on record. The Respondent submits that if the said letters are expunged, the dispute is over.

7. I disagree. Having looked at the Claimant's claim in its entirety, I am satisfied that even if the two letters were expunged, the substance of the Claimant's claim would still remain.

8. I will now deal with the admissibility of the two letters. The gist of the Respondent's objection to production of these letters is that they carry privileged communication between an Advocate and a client. Section 134(1) of the Evidence Act places communication between an Advocate and their client under the cover of privileged communication. However under proviso (a) any communication made in furtherance of any illegal purpose is not covered.

9. I have looked at the letters in question and have formed the opinion that their aim was to lay a strategy on how to defeat the Claimant's claim for recognition for purposes of collective bargaining. In essence these letters aimed at subverting justice by coercing the Claimant's members to denounce their union membership. This is an illegal scheme aimed at taking away the workers' rights to union representation and the Court must nip it in the bud.

10. Consequently, the Respondent's preliminary objection is overruled with costs to the Claimant. I direct the parties to list the main claim for hearing on priority basis.

11. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF MAY 2016

LINNET NDOLO

JUDGE

Appearance:

Mr. Simiyu (Union Representative) for the Claimant

Mr. McDonald for the Respondent