



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1353 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 19th December, 2016)

ANN GICHIMO.....CLAIMANT

VERSUS

KENYA ORDINANCE FACTORIES CORPORATION.....RESPONDENT

RULING

1. Before the Court is a Notice of Motion Application dated 3rd May 2016 brought under Section 4 and 12 of the Industrial Court Act Order 19 rule 6 of the Civil Procedure Rules A35, A10, 73, 24 of the Constitution and any other enabling provisions of the law.

2. The Respondents/Applicants are seeking orders:

1. That the documents provided before the Court by the Claimant be declared inadmissible hence not accepted by the Court.

2. That the suit be dismissed.

3. That the costs of this application be in the cause.

3. The application is based on the following grounds as well as on the annexed affidavit of the Amelia Chesinya State Counsel Advocate for the Respondent.

1. That the Applicant has produced evidence that is sensitive in nature and hence confidential.

2. That the documents produced are not in the public eye hence the Claimant could only have accessed them illegally.

3. That the documents are classified and we contest the authenticity of the evidence hence all evidence by the Claimant is contested.

4. The Claimant/Applicant has filed a response via Replying Affidavit dated 10th May 2016 where they aver that the State Counsel ought not to have sworn the supporting affidavit as the matters at hand are of fact and evidence and are contentions.

5. They aver that the State Counsel has failed to demonstrate how the documents are sensitive, and that the documents were not obtained illegally as claimed as the Claimant/Respondent was an employee for the Respondent in a managerial position and had access to all the documents.
6. They aver that documents had previously been used in JR No 330 of 2011 and the Respondent was aware, further, the application is too vague as it had not pointed out which documents were illegal, a security risk or forged.
7. They aver that none of the documents are privileged as the same are relied upon by the Respondent.
8. They aver that the application before Court is but a waste of the Courts time, it was brought almost two years after they were served with the claim, it is frivolous, vexatious and is aimed at damaging the character of the Claimant/Applicant.
9. They aver that their case is *prima facie* with a high chance of success and that the Respondent/Applicant's application should be dismissed with costs.
10. The Respondent/Applicant filed a further affidavit dated 10th May 2016 where they aver that the documents they would like expunged are those dated 16th February 2016 and filed on 17th February 2016.
11. In their submissions the Respondent/Applicant avers that the Claimant did not request for production of the documentation that is subject of this application. They submit that the documents are confidential and could then only have been gotten illegally, they should not be in the public eye and should be protected.
12. They submit that the Claimant signed Secret Officials Act, and they rely on the case of **Standard Gauge Railway Petition 58 of 2014, Okiya Omtata vs. the Attorney General** at paragraph 30 where is was stated that:

“she has not produced the maker of the said document”.
13. They also rely on the case of **Lengko Energy UK vs. Kaya Pipeline Company Limited** where it was held that:

“the Claimant was handling the documents she must have left them at her employers place. ..”.
14. In Response the Claimant/Respondent submitted that the prayers ought to have been overtaken by events. They submit that the reason for termination was that she deleted some documents and the documents produced are but a snap shot of emails dated 3.10.2011 and office memo dated 15.5.2011 which is over five years old and could not possibly cause harm.
15. They submit that the Claimant had a right to access the documentation and that Article 35 (1) (a) of the Constitution grants public right to access information held by state together with Section 79 (g) of the Evidence Act which defines public documents. They rely on the case of **Conway vs Rimmer [1968]** 1 ALL ER 8 (74).
16. They submit that documents Respondents seek expound from the record do not possess any security risk but lack of production would mean Claimant case will collapse. They submit that it is evident that the documents are very relevant to the determination of this case. There is no proof of any illegality. They pray that the application is dismissed.
17. In response the Respondent/Applicant reiterate that while she had the right to access the documents, she did not have the right to reproduce them. They submit that the Court cannot sanction an illegality and that their application should be allowed.
18. I have considered the submissions of both parties. Under the Evidence Act Cap 80 Law of Kenya

Section :-

“Subject to the provisions of this Act and of any other law, no evidence shall be given in any suit or proceeding except evidence of the existence or non-existence of a fact in issue, and of any other fact declared by any provision of this Act to be relevant”.

19. Thus all evidence so long as it is for existence or non-existence of a fact in issue is relevant evidence and can be produced.

20. The Claimants aver that the evidence they rely on is for proving the existence or non-existence of a fact and is therefore admissible.

21. The Applicants position is that the evidence the Claimant wish to rely on is “sensitive”, classified and was obtained illegally by the Claimant and a security risk. In determining this aspect, I wish to refer to Section 11(2) (c) of the Public Officer Ethics Act 2003 which provide that:

“a public officer shall not for personal benefit of himself or another, use or allow the use of information that is acquired in connection with the public officer duties”.

22. The Claimant has stated that she obtained the documents complained of in the course of her duty which is an infringement on the law as stated above.

23. The right recourse for the Claimant would have been pursue the documents in question through Article 35 of the Constitution which gives every citizen a right to information held by the State. This, the Claimant would have achieved by giving the Respondent notice to produce the documents in question. The Claimant failed to do so and hence obtained the documents illegally.

24. The Petition 58/2014 **Okiya Omtata and Another vs. Attorney General and Others**, the Petitioner choose to obtain certain documents in a clandestine manner and the Judge declined to rely on them terming them fraudulently obtained. In this case, the Learned Judge cited **Dubai Aluminum company Limited vs. Al-Alawi (1999) 1 WLR 1964** where confidential documents were obtained by a private investigator’s agents by making so called “pretext calls” and the Judge held that:

“But it seems to me that criminal or fraudulent conduct for the purposes of acquiring evidence in or for litigation cannot properly escape the consequence that any documents generated by or reporting on such conduct and which are relevant to the issues in the case are discoverable and fall outside the legitimate area of legal professional privilege. It is not as though there are no legitimate avenues which can be sought with the aid of the Court to investigate (for instance) banking documents-----“.

25. The above position is correct and I agree with it that no public documents should be obtained by anybody save as provided by law as under Section 80 of Evidence Act. The Claimant having obtained the documents illegally cannot be allowed to rely on them.

26. Having found as above, the question is what this Court should do with the questioned documents.

27. In the case of **Derby and Company Limited and Others vs. Weldon and Others (1990) 3 ALL ER 672** where documents obtained illegally were in custody of Claimant, the Court ordered all copies of the privileged documents returned to the Respondent.

28. In applying the above tests, I will order that the documents complained of those dated 16th February 2016 and filed on 17th February 2016 be expunged from the record forthwith.

29. Costs in the cause.

Read in open Court this 19th day of December, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Chesyina for Applicant – Present

No appearance for Respondent