



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 805 OF 2012

BETWEEN

LELAND I. SALANO.....
CLAIMANT

VERSUS

INTERCONTINENTAL HOTEL
RESPONDENT

Rika J

CC. Elly Jo' Metho

*Ms. J. Guserwa instructed by J.A. Guserwa & Company Advocates
for the Claimant*

Mr. Karongo instructed by Walker Kontos Advocates for the Respondent.

RULING

[a] What are confidential documents in an employment relationship

[b] Should an employee who has been summarily dismissed, and who has instituted a claim for unfair termination against his former employer, be permitted to use documents to support his claim, where those documents are held to be confidential by the employer, and to have been illegally obtained?

[c] Would the admission by the Industrial Court of such documents violate the employer's right to privacy, and compromise the employer's right to a fair trial?

1. These questions are raised by the Respondent, in an application dated 16th January 2013. The Claimant was employed by the Respondent on 2nd October 1996 as a Painter. He rose through the ranks to become the Assistant Systems Manager, the position he held on 9th December 2011 when he was summarily dismissed.

2. Salano filed the Statement of Claim on 14th May 2012 and a Supplementary List of Documents on 6th December 2013. Among the documents filed with the Statement of Claim are:-

- a. A letter dated 27th August 2009 from the Ministry of State for Immigration and Registration of Persons, addressed to the General Manager of the Respondent, and referenced 'COMPLAINTS REGARDING THE CONDUCT OF EXPATRIATE STAFF.'
- b. A letter dated 2nd June 2011 from Karla Hala the Respondent's Director of Operations, addressed to Hon. Najib Balala, Minister for Tourism, with the reference, 'FACT SHEET ON INTERCONTINENTAL NAIROBI.'
- c. In the Supplementary List of Documents, the Claimant attached lengthy electronic mails exchanged among Senior Managers of the Hotel, relating to some commercial transactions conducted by the Respondent with 3rd Parties; standard operating procedure for security related issues with computers and printers; and e-mails of the Director of Human Resources discussing staffing of the IT section.

3. The Respondent is opposed to the use of these documents by the Claimant to advance his cause. The documents are confidential and were obtained by the Claimant illegally. The Respondent asks the Court to expunge these documents from the record. It is submitted by the Respondent that under Article 31 of the Constitution, every person has the right to privacy, which includes the right not to have their possessions seized, information relating to their family or private affairs unnecessarily required or revealed, or privacy of their communication infringed. The confidential, and illegally obtained documents, violate Article 50 [4] of the Constitution of Kenya, and their retention in the proceedings would deny the Respondent the right to a fair trial.

4. The application is based on the affidavit sworn on 16th January 2013, by the Respondent's Director of Human Resources Steven Mutuma. The Claimant is opposed to the application and filed Grounds of Opposition dated 15th January 2013. The application was canvassed by the respective Parties' Advocates on 26th February 2013.

5. Mr. Karongo for the Respondent argues that the documents are confidential in nature. They comprise correspondences between the Respondent and certain Ministries of the Government of Kenya. There are e-mails from the Respondent's Management, touching on the conduct of the Claimant. The Respondent's Constitutional Rights detailed above would be violated, if these documents are admitted in evidence. It was not intended that the Claimant should have these documents. The Claimant was an IT Manager, but had no authority to hack into other people's e-mails. The Respondent adopts the Ruling of Justice Mohammed Warsame in **High Court Miscellaneous Application Number 1131 of 2007, between Baseline Architects Limited & 2 Others v. National Hospital Insurance Fund Board Management**, in which the Court struck out documents sought to be relied upon by the Claimants, on the ground that the documents were privileged and confidential, and had been obtained by the Claimants illegally.

6. Ms. Guserwa answers that, the documents sought to be expunged are attached to the affidavit of Steven Mutuma. They have been re-introduced by the Respondent, at the prompting of the Claimant. The Constitution grants all persons the right to information. The Claimant was an IT Manager, and came across these documents in the course of his employment. None of the documents are marked 'confidential.' A litigant cannot be denied information obtained in the course of his employment. Article 31 of the Constitution does not override Article 35. The decision by Justice Warsame involved documents obtained clandestinely by bidders in a public procurement process. This cannot be the same to the present case, where the former IT Manager proposes to use documents obtained in the course of employment, in a claim for unfair termination. The application is frivolous and should be rejected.

The Court Finds and Orders-

7. Confidential documents in the employment relationship are documents regarded by the employer to

contain secret information, or information which is not generally known, or readily accessible to other persons, other than the employer. They are confidential if their unauthorized disclosure, could damage the essential interests of the employer's business.

8. Such documents may contain signs, or paragraphs, identifying them to be confidential. They are protected from misuse and improper disclosure. The documents are deemed confidential when the owner of those documents has taken reasonable steps, to limit access of the documents to employees and other unauthorized persons.

9. The commonly used criteria in determining whether documents at the employment place are confidential is where their release, would damage the employer's business; breach undertakings to respect confidentiality; breach statutory restrictions on disclosure of information; cause financial loss to the employer, or avail the employee improper gain or advantage; or impede the effective management of the enterprise.

10. It is important to understand the distinction between confidentiality and privacy, particularly as the Respondent has raised the issue that its right to privacy has been violated. Privacy is the control over the extent, timing, and circumstances of sharing oneself, physically, behaviourally and intellectually with others. Privacy is about persons. Confidentiality is about the treatment of information that the owner has disclosed in a relationship of trust, with the expectation that the information will not be divulged to others, in ways that are inconsistent with the understanding of the original disclosure. Confidentiality relates to identifiable data. It is an extension of privacy, and an agreement about maintenance, and who accesses identifiable data.

11. Should the Court allow Salano use of the confidential documents the Respondent alleges were illegally obtained? Courts have laid certain principles that guide how this question should be resolved. Some of the guidelines developed through case law are as follows:-

- a. Whether the employee came upon the documents in the regular course of business, as opposed to rummaging through the files;
- b. Whether the employee shared the documents with other employees or persons, or simply shared with his Advocates;
- c. Nature and content of the particular document, in order to weigh the employer's interest, in keeping the documents confidential;
- d. Whether the employer kept in place a clear, uniformly applied, confidentiality policy;
- e. Balancing of the relevance of the documents, against the consideration whether their use or disclosure, unduly disrupts the employer's business; and,
- f. Consider the right of the employer to conduct business legally and efficiently, weighed against the employee's right to be free from unfair labour practices.

12. The employment relationship is grounded on mutual trust, confidence, good faith and fidelity. This demands that employees do not unfairly exploit information acquired or skills imparted, by their former employers to the detriment of their former employer's business. Ex-employees may join their former employers' competitors. The obligation of the employee to keep employer's information confidential is not automatically ended with the termination of employment.

13. In the absence of an express term barring the employer from use of confidential material acquired in the course of employment after termination, the obligations of mutual trust, confidence, good faith, and fidelity imposes on the employee an implied contractual obligation to keep confidential the information obtained from the employer, during and after employment.

14. But, there is a marked difference between the obligation of confidentiality which the law imports into employment relationship during employment, and that which must be observed after termination. During employment, case law has established that the obligation of confidentiality extends to all information imparted by the employer, which the employee knows or ought reasonably to know to be confidential in nature. Once the employment relationship is at an end, the employee's obligation to retain the confidentialities of the former employer is less onerous.

15. The Court has not been able to find precedents from the Kenyan Courts on the specific subject of confidentiality in employment relationships. Decisions of the Industrial Court of yesteryears are not well recorded or dispersed, and other Civil Court's decisions on the subject are equally lacking. It is therefore forgivable, at a time when Judges are being impressed upon to rely on, and develop, homegrown jurisprudence, to look at decisions outside Kenya.

16. In the English case of *Faccenda Chicken Limited v. Fowler* [1987] 1 Ch. 17, the Court stated:-

“ In the absence of express terms, an employee was bound by implied duty of good faith to his employer not to use, or disclose, for the duration of his employment confidential information gained in the course of employment, and was furthermore bound by an implied term of his contract of employment not to use or disclose, either during his employment or thereafter, information which was not merely confidential but which was properly to be described as a trade secret; but no term was to be implied, which imposed upon him, an obligation binding upon him after his employment had ceased, to use or disclose confidential information short of trade secret.”

17. The diminution of obligation of confidentiality after termination was restated in the *Singaporean High Court Case of Medivac International Management Pte Limited v. Moore* [1988] 1 MLJ. The Court stated that, the duty of confidentiality outside employment is not as great as it is, during employment.... **“ and accordingly, confidential information concerning an employer's business, acquired in the course of his service, could be used by the employee, after his employment has ceased, unless the information was classed as a trade secret, or was so confidential that it required the same protection as a trade secret.”**

18. In a US landmark decision in 2010, which sparked debate in the entire global employment jurisprudence on the subject, leading some commentators to accuse Courts of sanctioning theft at the workplace, it was held that an employee who “steals” confidential employer's documents for personal use, is involved in a ‘protected activity.’ The decision is accessible as *New Jersey Supreme Court Case (Appellate Division) between Quinlan v. Curtiss-Wright Corporation* 204 NJ 239 (2010). The facts were this: Joyce Quinlan, an employee of the Curtiss Corporation copied confidential information from her employer, and turned it over to her Advocate. She had at the time filed a sex discrimination suit against the employer. She copied more than 1,800 documents, some containing confidential personnel information, in support of her sex discrimination suit. At the heart of her suit was that she was overlooked for promotion, in favour of a male co-worker. She gave a copy of the promoted male co-worker's evaluation report, in which the man scored abysmally compared to Lady Joyce. Filing of the sex suit, and ‘stealing’ of the documents, occurred before termination of employment. The ‘stealing’ was what triggered the employer's decision to terminate employment. The employee promptly added a retaliation claim to her sex discrimination lawsuit, which under the US employment law basically means that the employer unfairly dismissed the employee, in retaliation for her theft of the employer's confidential material. In the end the employee left the Court with US \$ 10.5 million in damages. What followed was a storm of criticism from employers, with allegations of ‘court sanctioned theft’ of confidential documents.

19. The point is that once the employee has left employment, there is less onerous obligation to demand that the employee honours confidential information that may have been acquired during employment.

20. In the case of Salano and the Intercontinental Hotel, there is no written contract during employment, which restricted the employee from use of confidential material after termination. There is no confidentiality policy exhibited before the Court. There no written contract of employment in this dispute, imposing any obligations on the employee, not to use any documents acquired during employment, after

the termination of his contract of employment. The imposed obligation, as seen above, is less onerous after termination. It has not been shown by the Respondent, that the documents the Respondent seeks to have expunged from the record were confidential, at the time Salano was in employment, or that the Claimant had a duty to treat them as confidential. None of the documents contain any sign, or paragraphs, identifying them as confidential. There is no evidence that any Manager, including the Claimant, had the duty of keeping any document confidential. There is no evidence of restricted access, and no passwords imposing protections. In sum there is no prove that the documents were confidential, or were obtained illegally. The Court has not been told what trade secrets are at risk, with the disclosure of the documents before the Court. There is no evidence that Hotel Intercontinental has a confidentiality policy in place, which would bar the admissibility of the documents forwarded for the consumption of the Court by the Claimant.

21. Ultimately, the Court is persuaded that the Claimant legitimately came across the documents in question, in the course of his duties as the IT Manager. He did not rummage through the files. He did not share the documents with any employees, but only with his Advocates. The documents themselves have not been shown by the Respondent to fall within the class of confidentiality. The nature and content of the documents is relevant to the Claimant's suit for unfair termination. He claims he was unfairly dismissed because certain of his Managers, felt he was set to be promoted under the policy of Kenyanisation. The Claim has an element of race discrimination. The e-mails in question, routinely refer to the circumstances under which termination of the contract of employment took place. The letter from the Ministry of State for Immigration and Registration of Persons, refers to Kenyanisation, a process which the Claimant deems to be relevant to his Claim of unfair termination. The e-mails revolve around IT and HR departments of the Respondent, who are at the centre of this dispute. There was no clear and uniformly applied confidentiality policy which has been shown to be endangered. It has not been suggested that use of the contested documents, would disrupt the Respondent's operations, beyond the inconveniences associated with orders of reinstatement and compensation. The Claimant has a right under the Constitution of Kenya, to access of information that assists in prosecution of the Claim. He has a right to be free of unfair labour practices. The Respondent has not shown in what way, its right to privacy and fair trial, would be compromised by the admission in evidence, of the contested information.

22. Whether the Industrial Court receives, or does not receive, evidentiary materials, is a matter of discretion. Section 20 of the Industrial Court Act Number 20 of 2011, states that, "***in any proceedings, to which the Act applies, the Court shall act without undue regard to technicalities, and shall not strictly be bound by rules of evidence except in criminal matters.***" Under section 20 [4], the Court may require any person to produce ***any relevant document***. The Court is not bound by the Evidence Act Cap 80 the Laws of Kenya, which has elaborate provisions on evidence that may relate to private or confidential information. The Evidence Act itself, under Section 182, states that, "***nothing in the Evidence Act, shall be deemed to derogate from the provisions of any other written law which relate to matter of evidence.***"

23. The decision of the High Court of Kenya relied on by the Respondent, was argued out of context. Confidentiality within the public sector does not follow the principles that govern the private sector. Public servants are subject to certain statutory standards, such as contained in the Official Secrets Acts of Parliament. The High Court decision by Justice Mohammed Warsame dealt with public interest. The issue was about disclosure of documents that would be injurious to the public, which is not the case here. The High Court was grappling with the duty of public officers to safeguard public documents, from adverse parties. In issue in the dispute before this Court is about disclosure of an employer's documents, by an employee, which are alleged to be confidential. The Court is of the view that these documents have not been shown to be confidential, or illegally obtained. IT IS HEREBY ORDERED:-

(a) The application dated 16th January 2013 is rejected.

(b) Parties to agree on a suitable hearing date for the main dispute at the Court Registry.

(c) Costs in the cause.

Dated and delivered at Nairobi this 19th day of July 2013

James Rika

Judge