



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO 136 OF 2017**

**RIFT VALLEY RAILWAYS (KENYA) LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**KENYA RAILWAYS CORPORATION.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**THE GOVERNMENT OF KENYA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**AND**

**RIFT VALLEY RAILWAYS**

**WORKERS UNION.....INTENDED INTERESTED PARTY/RESPONDENT**

**RULING**

1. The ruling relates to an application dated 5<sup>th</sup> April 2019, brought under sections; 31 and 34 of the Advocates Act (Cap 16) Laws of Kenya and Order 51 of the Civil Procedure Rules, 2010. It is supported by the grounds thereto and an affidavit dated 5<sup>th</sup> April 2019, sworn by Bong Yoon, the Chief Financial Officer of the applicant.

2. The applicant seeks for orders that;

*a) Mr. Munayi Isaac Opondo be and is hereby declared unqualified to act for the intended interested party, in the suit, to wit, by drafting of court pleadings and documents and court representation.*

*b) All court documents and pleadings filed by the said Mr. Munayi be expunged from the court record.*

*c) All statements and representations made by Mr. Munayi and recorded by the honourable court as part of proceedings in the matter be struck off from the court record.*

*d) Costs of the application be provided for.*

3. It is that, Mr. Munayi has filed two notice of motion applications dated 29<sup>th</sup> August 2017 and 14<sup>th</sup> September 2017, in the capacity of an advocate of the High court, without having the qualifications required under section 9 of the Advocates Act; , (herein “the Act”), hence contravening that section.

4. That by virtue of; section 31 of the Advocates Act, an unqualified person cannot institute, carry on, or defend any suit or proceedings in the name of another person in any court of criminal or civil jurisdiction, save for the exception under section 83 of the Act, hence the pleadings, documents and court representations made by the said Mr. Munayi ought to be expunged and/or struck off the court record.

5. However, Munayi Isaac Opondo, the Secretary General of; Rift Valley Railways Workers Union, filed a response entitled “reply” dated 20<sup>th</sup> May 2019, on behalf of the intended interested party (herein “the Respondent”) and averred that, he has authority which he has filed herein, authorizing him to act on behalf of the respondent. Therefore, he has locus standi. He termed the application as vexatious, incompetent, a waste of the court’s time and an abuse of due process and ought to be dismissed without costs.

6. The parties disposed of the application by way of written submissions, wherein the applicant invited the court to consider the following

issues;

a) Whether Mr. Munayi Isaac Opondo is qualified to represent the intended interested party in this suit?

b) Whether Mr. Munayi falls within the exception embodied in section 83 of the Advocates Act?

c) Whether, all court pleadings, documents and statements made and filed by Mr. Munayi should be expunged from the court record?

7. The applicant submitted that, Mr Munayi has severally admitted in court, that he is not an advocate of the High Court of Kenya. Reference was made to the case of; Peterson Ndungu, Stephen Gichanga Gituro, N. Ojwang, Peter Kariuki, Joseph M. Kyavi & James Kimani vs. Kenya Power & Lightning Company Ltd (2018) Eklr, it was observed that, for one to be a qualified as an advocate of the High Court of Kenya, he must possess the qualifications under; section 9 of the Act. That similar principle was held in the case of; Pius Njogu Kathuri vs. Joseph Kiragu Muthura & 3 others (2018) eKLR.

8. It was submitted that, Mr Munayi, is only authorized to represent the members of the trade union in, the Employment and Labour Relations Court and not in the High Court. The case of; Republic vs. Karisa Chengo & Others, Petition no. 5 of 2015 was relied on.

The case of; National Bank of Kenya Limited vs. Anaj Warehousing Limited (2015) eKLR National Bank of Kenya Limited vs. Anaj Warehousing Limited (2015) eKLR was also cited where it was held that, an unqualified person cannot prepare documents or instruments in relation to legal proceedings. As such the documents filed by the respondent herein are void and should be expunged from the court record.

9. However, Mr Munayi submitted that, the law does not require him to first produce a document in court authorizing him to act on behalf of the interested party. That he is authorized by the law to represent the intended interested party, hence in the circumstances herein it amounts to perjury for one to insist that a document be presented when the law has clearly and abundantly bestowed upon him the right to do so.

10. Further, he has power bestowed on him under “section 2(a) and (c) of the Labour Relations Act 2007” to represent and file court proceedings and documents on behalf of the intended interested party/respondent herein. That he has not at any time, during the filing or address to the court either; in his pleadings and or his presentations ever presented himself as an advocate of the High Court, as alleged by the applicant.

11. He argued that in the circumstances the provisions of the Act quoted by the applicant do not apply and the provisions of in the section 9 of the Act, do not preclude him from representing the interests of the respondents. Further it is misleading and misplaced, for the applicant to allege that, the Employment and Labour Relations Court, is not a High Court in that, section 162 of the “supreme law” is quite clear while creating the Employment and Labour Relations Court, makes it a special court, of equal in status with the High Court.

12. Similarly, Article 22 of the Constitution of Kenya, deals with the Bill of Rights and “affirm” that any person has a right to institute court proceedings where a right or fundamental freedom has been denied, violated, or is threatened. Therefore, court proceedings may be brought by a person acting as a member of, or in the interest of a group or class of persons, or an association acting in the interests of one or more of its members.

13. Finally, Mr Munayi stated that, the applicant has not adduced any evidence to show that he is unqualified to represent the intended interested party, hence the court should dismiss the application.

14. At the close of the arguments by the parties, I have considered the averments and the submissions herein and I find that the following issues have crystallized for determination: -

a) Whether Mr. Munayi Isaac Opondo is qualified as an advocate of the High Court of Kenya and/or has at any time presented himself to the court as an advocate of the High Court of Kenya;

b) Whether Mr. Munayi Isaac Opondo has legal authority to represent and/or file documents on behalf the intended interested party in this matter;

c) Whether the documents and pleadings filed in court by the Mr. Munayi Isaac Opondo should be expunged; and/or

d) Whether the orders sought should be granted; and

e) Who would bear the costs of this application?

15. The provisions of; section 9 of the Advocates Act, states the qualifications to practice as an advocate as follows: -

“(9) Subject to this Act, no person shall be qualified to act as an advocate **unless**—

(a) he has been admitted as an advocate; and

(b) his name is for the time being on the Roll; and

*(c) he has in force a practicing certificate;*

*(d) deleted by Act No. 9 of 2000, s. 57 and for the purpose of this Act, a practicing certificate shall be deemed not to be in force at any time while he is suspended by virtue of section 27 or by an order under section 60(4)”.*

19. Similarly, the provisions of section 31 of the Act, further states that: -

*“(1) No unqualified person shall act as an advocate, or as such cause any summons or other process to issue, or institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction.*

*(2) Any person who contravenes subsection (1) shall—*

*(a) be deemed to be in contempt of the court in which he so acts or in which the suit or matter in relation to which he so acts is brought or taken, and may be punished accordingly; and*

*(b) be incapable of maintaining any suit for any costs in respect of anything done by him in the course of so acting; and*

*(c) in addition be guilty of an offence.*

20. Further, the provisions under section 34 of the Act, states that: -

*(1) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument—*

*(a) relating to the conveyancing of property; or*

*(b) for, or in relation to, the formation of any limited liability company, whether private or public; or*

*(c) for, or in relation to, an agreement of partnership or the dissolution thereof; or*

*(d) for the purpose of filing or opposing a grant of probate or letters of administration; or*

*(e) for which a fee is prescribed by any order made by the Chief Justice under section 44; or*

*(f) relating to any other legal proceedings;*

*nor shall any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument:*

*Provided that this subsection shall not apply to—*

*(i) any public officer drawing or preparing documents or instruments in the course of his duty; or*

*(ii) any person employed by an advocate and acting within the scope of that employment; or*

*(iii) any person employed merely to engross any document or instrument.*

*(2) Any money received by an unqualified person in contravention of this section may be recovered by the person by whom the same was paid as a civil debt recoverable summarily.*

*(3) Any person who contravenes subsection (1) shall be guilty of an offence.*

*(4) This section shall not apply to—*

*(a) a will or other testamentary instrument; or*

*(b) a transfer of stock or shares containing no trust or limitation thereof.*

21. Finally the provisions of; section 84 of the Act states that; nothing in the Act or any rules made thereunder shall affect the provisions of any other written law; empowering any unqualified person to conduct, defend or otherwise act in relation to any legal proceedings.

23. In instant matter Mr. Munayi Isaac Opondo, in the “reply” to the application concedes that, he is not qualified as an advocate of the High court of Kenya. However, relies on the provisions of; section 2 (a) and (c) of the Labour Relations Act, No. 14 of 2007, to argue that, he has authority to represent the intended interested parties herein. That section defines an authorized person as follows: -

*“In this Act, unless the context otherwise requires—*

*“authorized representative” means—*

*(a) the general secretary of a trade union;*

*(b) an employer or the chief executive officer of an employer;*

*(c) the secretary of a group of employers;*

*(d) the chief executive or association secretary of an employers’ organization; or*

*(e) any person appointed in writing by an authorised representative to perform the functions of the authorised representative;*

24. However, the Applicant relied on the provisions of; section 22 of the Employment and Labour Relations Court Act, to argue that, if Mr. Munayi has authority to represent the intended interested party, then that authority is to allow him right of audience in the Employment and Labour Employment court only and not the High court. The provisions thereof states that: -

*“In any proceedings before the Court or a subordinate Employment and Labour Relations Court, a party to the proceedings may act in person or be represented by an advocate, an office bearer or official of the party’s trade union or employers’ organization and, if the party is a juristic person, by a director or an employee specially authorized for that purpose.”*

25. In regard to these arguments I have considered the notice of motion application dated 14<sup>th</sup> September 2017, filed by the Intended Interested Party and signed by Mr. Munayi Isaac Opondo, and note that he is described as the Secretary General of Intended Interested Party. He states the same in the supporting affidavit of even date.

26. Similarly, I note from the court record that, Mr. Munayi orally addressed the court on behalf of the Intended Interested Party, on the following dates; 4<sup>th</sup> and 18<sup>th</sup> September, 19<sup>th</sup> December 2019, 13<sup>th</sup> March, 19<sup>th</sup> April, 4<sup>th</sup> June, 28<sup>th</sup> September, 2<sup>nd</sup> October, and 3<sup>rd</sup> December 2018, 20<sup>th</sup> February, 4<sup>th</sup> April, and 25<sup>th</sup> May 2019.

27. The question however, remains whether, Mr Munayi has authority to represent the Intended Interested Party/Respondent and/or address the court on their behalf. The provisions of; section 2(a) and (c) of the Labour Relations Act and section 22 of the Employment and Labour Relations Court Act, he relies on, indeed grants a person who is not otherwise qualified as an advocate authority to representation another person and/or party, in the Employment and Labour Relations Court, in the strict sense thereof. The proceedings herein are in the High Court.

28. The High Court and Employment and Labour Relations Courts have been established under different provisions of the Constitution of Kenya with distinct jurisdiction. The High Court is established under Article 165 while, the Employment and Labour Relations Court is established under Article 162(2) of the Constitution 2010. As such, Mr. Munayi cannot rely on these provisions under the Employment and Labour Relations Court Act and the Labour Relations Act to claim right of audience before any High Court.

29. Be that as it were, the authority allegedly granted to him by the Intended Interested Party/Respondent has not even been produced. The court is therefore unable to appreciate the scope thereof and/or its existence.

30. The upshot of all this is that, Mr. Munayi does not qualify as an advocate under the provisions of; sections 31 of the Advocates Act and/or qualify to enjoy the exception under section 83 of the Advocates Act. As a result, I find that the notice of motion application has merit and I allow the same as prayed in terms of all the prayers.

31. It is so ordered.

**Dated, delivered and signed on this 27<sup>th</sup> day of January 2020.**

**G. L NZIOKA**

**JUDGE**

In the presence of;

Mr. Ondati for the Plaintiff

Mr. Angwara for the Defendant

Mr. Munayi for the Intended Interested Party

