



**Gichuhi v Teachers Service Commission (Cause E536 of 2021)
[2023] KEELRC 3056 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3056 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E536 OF 2021
J RIKA, J
NOVEMBER 30, 2023**

BETWEEN

REGINA NJOKI GICHUHI CLAIMANT

AND

TEACHERS SERVICE COMMISSION RESPONDENT

RULING

1. The Claimant filed an Application dated 26th April 2023, seeking the following orders: -
 - a. The honourable Court be pleased to substitute the Claimant's sole witness, Regina Njoki Gichuhi with Jeremiah Githiga for purposes of testifying towards hearing and determination of the main suit.
 - b. The honourable Court be pleased to substitute the Claimant's witness statement with the witness statement sworn by Jeremiah Githiga.
 - c. The honourable Court be pleased to grant any further orders as it may deem fit.
 - d. Costs in the cause.
2. The Application is founded on the Affidavit of Jeremiah Githiga. He explains that the Claimant, is his wife. The Claimant suffers speech impediment, as a result of ischaemic brain disease, which she was diagnosed with, in the year 2010. She cannot project her voice, and cannot give evidence orally. Githiga has been married to the Claimant since the year 2001. He states that he is privy to the employment relationship between his wife and the Respondent. He exhibits his marriage certificate and medical report relating to his wife's illness, dated 24th November 2016.
3. The Application is opposed through a Replying Affidavit sworn on 18th July 2023 by the Respondent's Advocate, Edwiq Musundi. She states that the Claim is based on a contract of personal service between the Claimant and the Respondent. The contract is strictly between the Claimant and the Respondent.



Jeremiah Githiga is a stranger to the contract. Edwiq confirms that the Claimant was diagnosed with ischaemic brain disease resulting in speech impediment, in 2010. She was aware of her condition, and her inability to give oral evidence, when she filed the Claim in 2021. She ought to have filed the Claim through her next-friend. She is guilty of material nondisclosure. She has not been able to coherently communicate since 2017. Due to this impairment, she retired voluntarily from the Respondent. The nature of the Claim and the reliefs sought are *in personam*. The Claim can only be prosecuted by the Claimant. The Respondent would be prejudiced if the Application is allowed, as it will not be able to cross-examine the Claimant.

4. It was agreed by the Parties that the Application is considered and determined on the strength of the above Affidavits and Submissions, the latter which were confirmed to have been filed and exchanged at the last mention before the Court, on 28th September 2023.

The Court Finds: -

5. Parties agree that the Claimant has ischaemic brain disease, which has resulted in speech impairment. Although she initiated the Claim while still medically impaired, it is agreed that she is not able to give oral evidence, and cannot prosecute her Claim, without the aid of another person.
6. The Court does not think that her problem can be resolved by merely substituting her witness statement with that of her husband Jeremiah Githiga; the situation calls for appointment of Jeremiah Githiga as the Claimant's next-friend.
7. Substituting the witness would not have addressed the defect occasioned to the Claim, by the illness of the Claimant, in prosecuting and managing the Claim. A witness does not take responsibility for prosecution and management of the Claim. A witness is to be distinguished from a party to the Claim. Prosecution and management of a Claim, can only be done through a party, or through a next-friend, in event of a party's incapacitation. The Respondent submits that, ideally, the Claimant should have moved the Court through her next-friend, from the inception.
8. At common law, a next-friend is a person who represents another person who is underage, or because of disability or otherwise, is unable to maintain a Claim on his/her own behalf. The Court is not barred from appointing a next-friend, on the basis that the dispute relates to contractual obligations, or that the rights and obligations sought to be enforced, are *in personam*.
9. In case the Claimant is incapacitated, the Court is allowed to appoint a next-friend. A next-friend does not become a party to the Claim on appointment, but is an agent of the Court, whose role is to protect the rights of the incapacitated party. The appointment of a next-friend is not barred by the fact that the Claimant initiated the Claim in her name, while she ought to have done so through a next-friend from the outset. It is acknowledged that the need for appointment of next-friend, can arise after the filing of a Claim. Incapacity is not static. It can happen to a person who initiated a Claim, while fully capacitated. A next-friend can be appointed during the proceedings.
10. The interests of Jeremiah Githiga are not at variance with those of his wife, the Claimant herein. His appointment as next-friend would not only protect the interest of his stricken wife, but would aid the Court in discharging its mandate under Section 3 of the *Employment and Labour Relations Court Act* no 20 of 2011. It is worth restating the contents of this law, to buttress the need for appointment of Jeremiah Githiga, as the Claimant's next-friend.
11. Section 3 [1] states that the principal objective of the Act, is to facilitate the just, expeditious, efficient and proportionate resolution of disputes governed by the Act.



12. Section 3[2] requires that the Court, in exercise of its powers under the Act, or in interpretation of the rights of the individuals and the parties, seeks to give effect to the principal objective.
13. Section 3[3] mandates parties and their representatives, as the case may be, to assist the Court in furtherance of the principal objective, and to that effect, participate in the proceedings of the Court and comply with directions and orders of the Court.
14. The submission by the Respondent that it would be prejudiced by not being able to cross-examine the Claimant, while acknowledging that the Claimant has a medical condition impairing her speech, and therefore not able to give oral evidence, is not a position that aids the Court in discharging its mandate, under Section 3 of the Court's constitutive law. It is not a position that enables the parties to assist the Court in attainment of the principal objective, through participation in the proceedings.
15. The Court would be acting in gross violation of the Claimant's constitutional right of access to justice under Article 48, if it was to endorse the position taken by the Respondent, that because the Claimant has a speech impediment, she cannot be heard.

It is ordered: -

- a. Jeremiah Githiga is appointed as the Claimant's next-friend for purposes of trial and disposal of the Claim.
- b. The Statement of Claim shall be amended within 14 days of this Ruling to reflect the appointment of next-friend.
- c. The Claimant shall file and serve fresh witness statement or statements within the same period of 14 days.
- d. The Respondent may, if necessary, file an Amended Statement of Response and fresh witness statement or statements within 14 days of service.
- e. Parties to thereafter obtain a suitable hearing date for the main Claim, at the Registry.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS 2020, THIS 30TH DAY OF NOVEMBER 2023.

James Rika

Judge

