



**Mboku v Gikera & 2 others (all trading as Gikera & Vadgama Advocates)
(Cause 900 of 2017) [2022] KEELRC 8 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEELRC 8 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 900 OF 2017**

**AK NZEI, J
APRIL 28, 2022**

BETWEEN

CAROLYNE MBOKU CLAIMANT

AND

STEPHEN NJOROGE GIKERA 1ST RESPONDENT

PUNIT DIPAKUMAR VADGAMA 2ND RESPONDENT

EMMA OCHIENG 3RD RESPONDENT

ALL TRADING AS GIKERA & VADGAMA ADVOCATES

RULING

1. The application before me is the Respondent's Notice of Motion dated 5th November 2021, and is expressed to be brought under Sections 1A, 3 and 3A of the *Civil Procedure Act* Order 50 Rule 8 of the *civil Procedure Rules*, Articles 31,50(1) & (4) and 159 of *the Constitution* of Kenya 2010 and all enabling provisions of the law. The following orders are sought:-
 - a. that the Honourable Court be pleased to order the witness statement of Tony M. Odera Advocate, a former employee of the Respondents, made on 30th September 2020 and filed on 1st December 2020, be expunged from the Court record.
 - b. that the Honourable Court be pleased to grant any other order it deems fit to grant, and
 - c. that costs of the application be borne by the Claimant.
2. The application sets out in detail the grounds upon which it is predicated, which grounds are further and substantially replicated in the affidavit of Wyclife Ndege Advocate sworn on 5th November 2021 in support of the application. It is deponed in the said supporting affidavit, inter-alia:-



- a. that Tony M. Odera is a former employee of the Respondents and was the Head of the Dispute Resolution Department in charge of the Respondent's Nairobi, Mombasa and Nyanyuki offices.
 - b. that by virtue of his status while in the Respondents' employment, and as an Advocate, Tony M. Odera was privy to the facts leading to the case herein, and as the Head of Litigation Department spearheaded the Respondent's Counsel team before the Respondents appointed the firm of Muthee Kihiko Soni LLP to take conduct of the matter.
 - c. that the Respondent's letter of instructions to Muthee Kihiko Soni LLP, dated 17th July 2018, informed the said Advocates to liaise with Tony M. Odera for any legal help they would require in order to adequately defend the Respondents.
 - d. that Tony M. Odera was instrumental in preparing the Respondent's pleadings, and indeed exchanged correspondence with the Respondents' Advocates on record on the best strategy to take so as to adequately defend the Respondents.
 - e. that Tony M. Odera viewed the pleadings and gave his thoughts on how the Respondents' witnesses should frame their statements to align with the chronology of events that occurred before termination of the Claimant.
 - f. that Tony M. Odera is privy to correspondence and documents relating to the suit herein and is, and was aware of every plan and action that the Respondents undertook to defend the suit.
 - g. that the witness statement which has been presented in support of the Claimant's case and any information that may arise during cross-examination is confidential in nature as the same was obtained during Tony Odera's employment with the Respondents.
 - h. that such information in Tony M. Odera's possession was obtained by him as Counsel for the Respondents in the suit herein is privileged in nature and is protected under the law.
 - i. that the Respondents do not intend to waive the said privilege to allow Tony M. Odera to testify on behalf of the Claimant in the case herein.
3. Among the documents annexed to the said supporting affidavit of Wyclife Ndege Advocate is the Respondents' letter of instructions to Muthee Kihiko & Soni Advocates dated 17th July 2018. The said letter states in part:-
- “...our Mr. Odera will henceforth be available to convey any legal position held or revert to any of your queries as the matter evolves. Kindly acknowledge our instructions and as such we look forward to an expedient close of the matter.”
4. Also annexed to the said supporting affidavit are email correspondence between Tony M. Odera and the Respondents' Advocates on record dated 2nd November 2018 and 5th November 2018 respectively, apparently giving instructions on the suit herein.
5. The application is opposed by the Claimant, who on 29th November 2021 filed a Replying Affidavit sworn by herself on 24th November 2021. It is deponed in the said Replying Affidavit, inter-alia:-
- a. that there is no conflict of interest whatsoever as alleged by the Respondent/Applicants since Tony M. Odera was merely an employee of the Respondents and any action he undertook was only under the instructions of the partners who are the Respondents/Applicants.



- b. that Tony M. Odera is the best placed to testify as the Claimant's witness since he was the Claimant's supervisor and is well placed to inform the Court the circumstances of the Claimant's unlawful termination.
 - c. that the Respondents were served with the Claimant's further list of documents and witness statement of Tonny M. odera on 01/12/2020.
 - d. that when the suit came up for hearing on 24/5/2021, Tony M. Odera appeared virtually and was ready to testify, and no issue was raised then as to his employment status with the Respondent.
 - e. that the objection being raised now should have been raised earlier.
 - f. that the Respondent/Applicants have not sufficiently shown any prejudice that they will suffer if Tonny M. Odera is allowed to testify as the Claimant's witness.
6. It is not in dispute that Tony M. Odera while in the Respondent/applicants' employment as Head of Litigation department, interacted with the case herein, both as the Respondents' employee and as an Advocate aiding the Respondents' Counsel charged with defending the suit herein. Tonny M. Odera has not come out to deny any of the matters stated in the affidavit sworn in support of the application herein. The Claimant has not attempted to deny such matters, either. Documents exhibited by the Respondent/Applicant, whose authenticity has not been questioned by the Claimant, place Tonny M. Odera Advocate within the parameters of Section 134(1) of the Evidence Act which provides:-
- “No Advocate shall at any time be permitted unless with his clients express consent, to disclose any communication made to him in the course and for the purpose of his employment as such Advocate, by or on behalf of his client, or to state the contents or condition of any documents which he has become acquainted in the course and for the purpose of his professional employ or to disclose any advice given by him to his client in the course and for the purpose of such employment.”
7. The Claimant's intended witness, Tonny M. Odera Advocate, has been shown by the Respondent/Applicant to be in possession of the Respondents' confidence regarding the suit herein. He cannot be allowed to testify against a party whose defence he aided in building. His employment status with the Respondent/Applicants may have changed, but he remains chained to his statutory obligation as set out in Section 134 of the Evidence Act. The Respondent/Applicants stated that they do not intend to waive the privileged nature of the information held by Tonny M. Odera to allow him to testify on behalf of the Claimant in the suit herein.
8. Consequently, and having considered written submissions filed by counsel for both parties, I allow the application in the following terms:-
- a. the witness statement of Tonny M. Odera Advocate, a former employee of the Respondents made on 30th September 2020 and filed on 1st December 2020, is hereby expunged from the Court's record.
 - b. costs of the application will abide in the main cause.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF APRIL 2022

AGNES KITIKU NZEI

JUDGE



ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Mwanza for Claimant

Miss Abwao for Respondent

