



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.1705 OF 2015

JAMES OKELLO OUMA.....1ST CLAIMANT
YUSUF ONYANGO OBONYO.....2ND CLAIMANT
DAVID HARAMBE OTAMBO.....3RD CLAIMANT
PATRICK GEORGE MARABURI.....4TH CLAIMANT
ROMANUS OHANGA.....5TH CLAIMANT

VERSUS

RIFT VALLEY RAILWAYS (KENYA) LIMITED.....RESPONDENT

AND

RIFT VALLEY WORKERS UNION (K)INTENDED INTERESTED PARTY

N.O. SUMBA & CO. ADVOCATES.....INTENDED 2ND RESPONDENT

RULING

The ruling herein relates to application and Notice of Motion dated 24th December, 2020 filed by the intended interested party, Rift Valley Workers Union (K) (the Union) and the Notice of Preliminary Objections dated 12th February, 2021 and filed by the intended 2nd respondent, N.O. Sumba & Co. Advocates (the Advocate).

Applicant union is seeking for orders that;

1. Sent.
2. Spent.
3. Spent.
4. The intended interested party and the intended 2nd respondent herein this matter be enjoined in the matter as the interested party and the 2nd respondent respectively.
5. The said 2nd respondent be directed to release to the grievants' herein, through the interested party the amounts totalling to Ksh.3, 735,633/= and interests there upon accrued, owed to the said grievants by the said party, same amounts having been released by the respondent in the matter in accordance to the directives of the court for the eventual satiation of the Courts Award and or directives in respect to the judgement issued on the 13th day of June 2018.
6. Costs be in the suit.

The application is supported by the affidavit of Munayi Opondo Isaac and on the grounds that judgement herein was delivered on 13th June, 2018 and the court awarded the claimants Ksh.3, 735,633. The respondent filed an appeal against the judgement and award and the court directed them to deposit the judgement sum in court or in the joint account of the advocates in order for the appeal to be heard. That the mere fact that the appeal was not filed attests to the fact that the funds were released the decree herein having been extracted on 10th July, 2018. Taxation was done and the Deputy Registrar awarded ksh.271, 987 in costs meaning the judgement sum was released to the claimants' advocate.

Mr Opondo avers in his affidavit that he is the secretary general of the union with authority to support the application. He avers that on 3rd August, 2020 the 2nd respondent in responding to enquires the union made confirmed that the respondent acted as directed by the court in the judgement delivered on 13th June, 2018. On 26th August, 2020 the 2nd respondent failed to address the issue at hand with regard to released judgement sum.

Mr Opondo avers that the claimants lodged a complaint with the Law Society Kenya (LSK) against the 2nd respondent for abdicating duty to pursue justice on behalf of the claimants who had instructed him. The 2nd respondent has failed to respond to communication from the union with regard to the claimant's matter herein and such is in breach of the fiduciary duty and the orders sought should issue.

In reply, the Advocate filed the **Replying Affidavit of Nicholas Sumba** and who avers that he is an officer of the court and acting for the claimants in this case. He avers that the court lacks jurisdiction to hear the instant application and any complaints against an advocate at the first instance as such power lie with the LSK disciplinary tribunal or the advocate's complaints commission under the office of the Attorney General.

Mr Sumba also avers that he cannot be enjoined in a suit where he is acting for the claimants by virtue of legal representation as such would result in him being a litigant and advocate at the same time in the same matter.

The applicant has no locus standi to institute this complaint as he enjoys advocate/client relationship and there is no legal basis set out for the orders sought. The claim for joinder herein is both malicious and defamatory and where there was a compliant such ought to have been addressed with the LSK. He is an advocate of long standing and in good standing. He has since learnt that the claimants made complaints against him at the LSK and he asked them through the LSK to pay his legal fees and to appoint another advocate but instead opted to file the instant application with intend to defame and malign him which is with malice.

Mr Sumba also avers that it is defamatory for the applicant to assert that he has been paid by the respondent and that he is withholding such monies and has refused to pay. Upon filing suit for herein on behalf of the claimants he filed application dated 18th August, 2017 seeking for an order for the deposit of the judgement sum in court and in the alternative for the attachment of the respondent's assets but the respondent has since closed shop in Kenya and has no known assets locally.

The application was allowed on 7th December, 2017 but the respondent did not deposit the sum of Ksh.3, 735,633 in court as directed and neither were the claimants able to trace any assets. Judgement was then delivered in the favour of the claimants on 13th June, 2018 but the auctioneers could find little or nothing to attach in execution as the respondent concessionary agreement terminated on 31st July, 2017. He informed the claimants of these developments all along. He engaged private investigators to work with the claimants to trace any assets belonging to the respondent without success. The applicant has resulted to malicious and harassments by lodging malicious complaints and leading to the instant application and which should be dismissed and costs assessed at Ksh.30, 000.

The **Notice of Preliminary Objections** by the Advocate is made on the grounds that;

The intended 2nd respondent, N.O. Sumba & Company Advocates shall seek to have the Notice of Motion dated 24th December, 2020 be struck off on the following grounds;

a. The Law Society of Kenya (LSK) has, vide its letter dated 2nd October, 2020 made a determination on the malicious complaint lodged by the applicant herein in form of a notice of motion application. The law society of Kenya did dismiss the very same complaints again now lodged before court.

b. This court has no jurisdiction to entertain and determine complaints against advocates at the 1st instance. Such powers are, by law, bestowed on the law society of Kenya disciplinary tribunal and/or the advocate's complaints commission under the office of the attorney general.

c. The intended 2nd respondent cannot be joined in a suit in which he acts as an agent of the claimants by virtue of legal representation. He cannot therefore sue himself neither can he be a litigant and an advocate at the same time, in the same matter.

d. The applicant has no locus standi to initiate this frivolous complaint as it is, against the intended 2nd respondent, an advocate for whom he does not have advocate/client relationship.

e. No basis and/or grounds has been laid to have the intended 2nd respondent enjoined in this matter. Should there be a basis laid, and then the cause of action would still lie in another forum, not before this court and not in this matter, in particular.

f. The claim for which the intended 2nd respondent is to be enjoined is malicious, frivolous and defamatory against the person of the intended 2nd respondent for which the intended 2nd respondent reserves the right to seek damages against that applicant and the claimants, as it is without basis, well within the knowledge of the malicious applicant.

In reply, the Union filed the Replying Affidavit of Mr Opondo and who avers that the court has jurisdiction as this is an employment and labour relations matter as defined under Article 162(2) of the constitution read with the Employment and Labour Relations Court Act and the claims made by the intended 2nd respondent in this regard are unsubstantiated and should be dismissed. The court has since inception of the instant suit been seized of jurisdiction.

The intended interested party has locus standi to prosecute this matter as the union is a registered trade union under the Labour Relations Act to address matters on behalf of workers and members. The Union has never lodged any complaints with the LSK as alleged and any such allegation is baseless.

Mr Opondo also avers in reply that the application dated 24th December, 2020 is not by the Advocate but by the Union and the objections made are meant to avoid the unprofessional conduct visited against the claimants in this matter where subsequent to the court judgement and award, the advocate has chosen to hold and or refused to release the monies as were released by the respondent herein in satisfaction of the award and or has apparently misdirected the monies to his own personal use. The Advocate's actions against the claimants is malicious and contrary to the profession of advocates and the application made should be allowed as prayed.

Both parties attended and made oral submissions in court. Each gave emphasis to the affidavits and objections made.

Determination

The substratum of the application dated 24th December, 2020 is that the union and the advocate be enjoined herein as interested party and 2nd respondent respectively.

The other issue is whether the court has jurisdiction to hear and determine the instant application and whether the union has *locus standi*.

Finally, who should pay costs.

As the court delves into the issues above outlined, it is important to appreciate, this is post judgement, which was delivered on 13th August, 2018. Cost were assessed by the Deputy Registrar and decree drawn on 10th July, 2018. To be enjoined at this stage requires a party to demonstrate good and satisfactory grounds. Section 12 of the Employment and Labour Relations Court Act, 2011 or Article 159 of the Constitution, 2010 is not sufficient to be cited.

On the issue of joinder as a respondent and interested party, a party may be joined into the suit not because there is a cause of action against it but the party's presence is necessary in order to enable the Court effectually and completely adjudicate upon and settle all questions involved in the case as held in **Kizito M. Lubano versus Kemri Board of Management & 8 others [2015] eKLR**. however, the one who initiates the suit must determine who the respondent(s) is and what orders are sought against such a respondent as held in **Werrot and Company Ltd & others versus Andrew Douglas Gregory & Others, HCCC No. 2363 of 1998, LLR 2828**;

For determining the question of who is a necessary party there are two tests;

i. there must be a right to some relief against such a party in respect of the matter involved in the proceeding in question and (ii) it should not be possible to pass an effective decree in the absence of such a party.

As noted above, the instant application is filed post judgement. What then is the essence of enjoining the intended 2nd respondent? None is outlined. The claimants while filing suit and as the right-holders herein ought to have addressed the aspect of the respondents they wanted to sue or be sued. Such cannot be left to a third party and a proposed intended interested party who is still outside and yet to be enjoined, to determine. The claimants have already identified the party against who is to be sued as a respondent and there is judgement against such party, the respondent.

Where are the claimants in this regard? Such an application for the joinder of a 2nd respondent ought and should have been filed by the claimants before judgement was delivered.

With regard to the joinder of an interested party into any proceedings, the rules are clear to the extent that such a party, while seeking joinder as an interested party must identify the stake or legal interest or duty in the proceedings in court and why such stake, interest or duty must be addressed on the suit as held in **Harpal Singh Semhi & 4 others v Zehrabanu Janmohammed & 3 others; Sports Registrar & 9 others [2020] eKLR**.

Various attempts have been made at defining the term 'interested party.' Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which was echoed by the court in the case of **Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others [2015] eKLR** the court held that:

“interested party” means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation. ...

Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.

The question of who an interested party is further espoused by the Supreme Court in the decision of **Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others & Michael Wainaina Mwaura (as Amicus Curiae) [2017] eKLR** where the court set out the principles attendant thereto as follows;

One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.

ii. The prejudice to be suffered by the intended interested party in case of non-joinder must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.

iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.

Does the union and intended interested party meet the above threshold?

In the entire affidavit of Mr Opondo as the secretary general of the union, he fails to articulate where the claimants are. These are the right-holders of the suit. they have since been heard and judgement delivered. There is no appeal and no application for review is pending. The court stands *functus officio*.

Even where the Union is to rely on the provisions of the Labour Relations Act, 2007 and the right to represent its members, such right read under the provisions of section 20 of the Employment and Labour Relations Court Act, 2011 was addressed by the claimants when they opted for representation by Counsel on record. Such representation subsists and the union cannot usurp that choice of legal representation under the guise of the Labour Relations Act, 2007.

The ship has since sailed and docked at a different port.

Where the claimants were or are members of the union, such fact ought to have been addressed instantly. The union cannot seek to represent and assert the claimants rights at this point. It is post judgement. Where the claimants are aggrieved, if at all, by the actions of their advocate, recourse is elsewhere. Not before this court.

Where the claimants' advocates have been paid the judgement sum, if at all, such are not matters for the union to address post judgement and as interested party. The right-holder to the suit and judgement are the claimants.

Where are the claimants? The union has not demonstrated that the claimants are unable to attend herein, before their advocates and address matters which the union now seek to address in these proceedings. Such standing is lacking. This is not a constitutional petition premised under the provisions of Article 22 of 258 of the Constitution, 2010 and even if it were, there is a respondent who should confirm payment or non-payment. In any event, the judgement of the court delivered on 13th August, 2018 stand undisturbed.

Where the union is keen to assist the claimants, what remains of the judgement is execution. To attend and address as done herein in application dated 24th December, 2020 is in utter abuse of the court process. Such cannot be justified by the fact that the union is registered to represent its members and that there are complaints lodged at LSK and such should justify the joinder of the intended interested party. No evidence of membership is demonstrated and such matter ought to have been addressed before judgement issued.

With regard to the jurisdiction of the court to address complaints made against an advocate, such are not matters for this court to address. The application in its nature is seeking the joinder of the intended interested party and 2nd respondent. Such is addressed above. The reason(s) for the joinder of the intended 2nd respondent is the problem.

Complaints against an advocate attending any matter before the court, in its ordinary nature should be addressed by the subject client, In this case, the claimants.

Even where the claimants have any complaint(s) against the attending advocate, the point of first instance is the regulatory body, the LSK or the Advocate Complaints Commission. This court is denied the mandate to address such complaints against an advocate or advocates, if at all there is any complaint(s).

With regard to the standing of the union to lodge the instant application, as addressed above, the sole reason for filing application dated 24th member, 2020 is addressed by Mr Opondo in his Replying Affidavit at paragraphs 7 and 11 that;

I am aware from the on goings herein and the documentation in the possession of the grievants/claimants that every indication appears to point to the fact that he 2nd respondent may have elected to abdicate his role and duty to pursue justice on behalf of the claimants who instructed them and may have chosen to prioritise other pursuits over and above the claimants interests in the matter.

...

Further in a scenarios here it is increasingly becoming clear, that an act of apparent disenfranchisement of the claimants by their advocates could be suspect and apart also from the fact that the issues being raised may not be limited to being just civil in nature but appears to gradually assume a criminal connotation and or element that the said party can brazenly allege therefore that the applicant, a Registered Trade Union does not have the Locus to ask them the position of the monies as were released by the defendant in satisfaction of the court Award, and which to date the said Award has not been satisfied despite the monies having been released to pay the grievants.

These averments are speculative, devoid of evidence, and should never have seen the light of day. The union is not a party in these proceedings and even before establishing its stake, right and interest proceeds to make assertions which border in the least, the absurd.

Abuse of court process is not just the use of unbecoming words. It is also the entry into the arena for no good cause and to use such arena to do the absurd.

Where the union was keen to protect the interests of the claimants and or its members, such right should have been secured before the instant suit was filed with a report to the Minister. Upon such report, file suit and or instruct advocates to act for the union in the interests of its members.

To sit back and wait until judgement is passed so as to enter the fray and dirty the waters is in absolute abuse of court process. Mr Opondo as the secretary general of the union should know better than done herein.

Accordingly, the following orders are hereby issued;

- a. application dated 24th December, 2020 is in abuse of the court process and is hereby dismissed;**
- b. Mr Munayi Opondo Isaac shall personally bear the costs due to the Advocate, Nicholas Sumba at ksh.30, 000.**
- c. Costs (b) above shall be paid within the next 30 days and after which interests at court rates shall accrue;**
- d. Objections made vide Notice dated 12th February, 2021 are found with merit to the extent that the court lacks jurisdiction to address complaints between advocate/client;**
- e. the intended interested party, Rift Valley Railways Workers Union (K) lack the requisite standing to move the court as herein done; and**
- f. Costs awarded to N.O. Sumba & Co. Advocates and assessed at ksh.30, 000.**

DELIVERED IN OPEN COURT AT NAIROBI THIS 4TH DAY OF MARCH, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

..... and