



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 737 OF 2019

GEOFFREY NGANGA TAMBARA.....CLAIMANT

VERSUS

RADIO FREQUENCY SYSTEMS LTD.....1st RESPONDENT

SIMON HORNER.....2nd RESPONDENT

MICHEAL JOHN MWAUR.....3rd RESPONDENT

RULING

1. Geoffrey Nganga Tambara (Claimant) commenced legal proceedings against the Respondents on 1 November 2019 alleging breach of contract and unfair termination of employment.
2. On 10 December 2019, the Claimant filed a motion under a certificate of urgency seeking certain interim reliefs.
3. The Claimant also sought an order allowing him to serve the Respondents through substituted service.
4. Upon service, the 1st and 2nd Respondents entered a *Memorandum of Appearance* through the firm of Midenga & Co. Advocates on 24 December 2019.
5. On 18 January 2020, the firm of Cheloti Karanja Advocates filed a *Memorandum of Appearance* to come on record for the 1st and 3rd Respondents.
6. When the Claimant's application came up for hearing on 16 January 2020, a dispute arose between Mr. Midenga and Mr. Cheloti as to the representation of the 1st Respondent.
7. The Court consequently directed Mr. Cheloti to file an affidavit to demonstrate that he had instructions to represent the 1st Respondent.
8. The Claimant was also granted leave to file a further affidavit ahead of hearing on 13 February 2020.
9. The 3rd Respondent filed an affidavit on 24 January 2020 together with case law digest, and the Court heard arguments on 13 February 2020 (Ruling was reserved for 17 March 2020 but because of the intervening declaration of COVID19 pandemic, it could not be delivered. The Deputy Registrar, however, gave parties notice of the delivery of this Ruling in Court but they did not respond).
10. A fresh invitation was sent to the parties on the delivery of the Ruling through video link.
11. It is not in dispute that a vicious war has been going on in this Court are differently constituted and the High Court between the 2nd and 3rd Respondents who directors of the 1st Respondent.
12. The High Court, in High Court Misc Civil Application No. 393 of 2017, *Simon Horner v Michael Njuguna Mwaura & Ors* (2018) eKLR addressed the question of the 1st Respondent's directorship and found that the 3rd Respondent had fraudulently caused a change in the shareholding of the 1st Respondent and ordered the rectification of the records.
13. This Court differently constituted in Cause No. 305 of 2019, *Jackson Mutiso Mwalali & Ors v Radio Frequency Systems Ltd* found on 19 July 2019 that the 3rd Respondent as a director of the 1st Respondent had the authority to instruct an advocate to act on its behalf.

14. The Court now finds itself confronted with a dispute as which of the directors of the 1st Respondent has the authority to instruct an advocate to act on its behalf.
15. The 3rd Respondent urges the Court to follow the path by Court in the *Jackson Mwalali case* and hold that he has the authority to instruct advocates to act for the 1st Respondent and that it is the firm of Cheloti Karanja Advocates which is properly instructed to be on the record.
16. He further asserted that as the Executive Director of the 1st Respondent he had the authority to instruct an advocate to act on its behalf.
17. The 2nd Respondent, on the other hand, contended that as the majority shareholder and Chief Executive Officer of the 1st Respondent, he has the authority to instruct the firm of Midenga & Co. Advocates to act on its behalf.
18. The 2nd Respondent relied on a decision of this Court (differently constituted) rendered on 14 October 2019 in Cause No. 567 of 2019, *Nehemiah Kiprof Kiplagat & Ors v Radio Frequency Systems Ltd* endorsing the conclusion by the High Court that he was the Chief Executive Officer of the 1st Respondent with the proper mandate to instruct an advocate to act.
19. Apart from the Court decisions, the Court has looked at the *Articles of Association* of the 1st Respondent. It does not provide for the position of Executive Director and therefore the 3rd Respondent cannot purport to instruct an advocate on the basis of such a non-existent executive directorship.
20. Clause 13 of the Articles of Association provides for the manner of making a decision. It states that shareholders would have equal votes subject to shareholding.
21. It is not in dispute that in terms of the High Court judgment, the 2nd Respondent has more shares than the 3rd Respondent.
22. Impliedly and logically, were a vote in respect to the instructing an advocate to act on behalf of the 1st Respondent, the 2nd Respondent vote would triumph having the majority shares.
23. The Court, therefore, finds that it is the advocate instructed by the 2nd Respondent who is properly on record for the 1st Respondent.
24. Before concluding, it would be remiss for the Court not to observe that the 2nd and 3rd Respondents vicious war over the control of the 1st Respondent in light of the findings by the High Court may not bode well for the 1st Respondent, and more so when no appeal has been preferred against the judgment.
25. Further, the continued battles over the control over the 1st Respondent within the employment arena has the probability of leading to conflicting and out-rightly inconsistent legal conclusions to the detriment of the parties.
26. The 2nd and 3rd Respondents should also look keenly at the definition of an *employer* in section 2 of the Employment Act, 2007 as they persist in the boardroom battle and the effects execution of a judgment may have on them as individual directors.
27. On the basis of the foregoing, the Court finds that *Midenga & Co. Advocates*, having been instructed by the 2nd Respondent, the majority shareholder of the 1st Respondent is properly on record for both the 1st and 2nd Respondents.
28. The firm of Cheloti Karanja Advocates will in effect continue acting for the 3rd Respondent.
29. The pending application on record and the Cause should now be processed for hearing.

Delivered through Microsoft teams/email, dated and signed in Nairobi on this 5th day of June 2020.

Radido Stephen

Judge

Appearances

For Claimant	Mr. Andiwo instructed by O & M Law Advocates
For 2 nd Respondent	Mr. Midenga instructed by Midenga & Co. Advocates
For 3 rd Respondent	Mr. Cheloti instructed by Cheloti Karanja Advocates
Court Assistant	Judy Maina