



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 155 OF 2017

BETWEEN

DIANA GACERI KIGUNDA.....CLAIMANT

VERSUS

MOMBASA CONTINENTAL RESORT.....RESPONDENT

RULING

1. The Claimant filed her Statement of Claim in Person, on 1st March 2017. She filed an Application on 30th January 2018, seeking the following orders:-

- a) The Applicant herein, having appointed Benson Muriithi Kagai through a special power of attorney to act on her behalf in this cause, the said power of attorney annexed to this Application be deemed duly filed.
- b) The Applicant be granted leave to enlarge claim to include additions inadvertently omitted to enable this Court effectively determine the dispute.
- c) The attached Draft Amended Statement of Claim is deemed duly filed.
- d) Costs in the cause.

2. The Application is opposed through a Replying Affidavit, sworn by one Geoffrey Muema, on 4th March 2019. Muema does not identify what he is, in relation to the Respondent. The Replying Affidavit is therefore wholly defective, and of no assistance to the Court. It is hereby struck off the record.

3. The 1st prayer in the Application is that the power of attorney, donated by the Claimant to one Benson Muriithi Kagai is deemed duly filed. In effect the Claimant seeks to be represented in the proceedings by her Attorney-in-Fact, Benson Muriithi Kagai.

4. The question whether an Attorney-in-Fact, can practice law, has been answered in *Theuri v Republic [1990] KLR* and *Khanjra & Another v Safaricom Limited [2012] e-KLR*. The principles emerging from these decisions are, *inter alia*:-

- The power of attorney does not avail a litigant the right to appoint an unqualified person to act as the litigant's Advocate.
- Appointment under power of attorney does not confer upon the donee, the right to appear and plead the donor's case.

5. Following these decisions, it is clear that Benson Muriithi Kagai, is not permitted by the power of attorney, to represent the Claimant in this Cause.

6. An Attorney-in-Fact is not an Attorney-at-Law. The former is merely an agent of the donor, rather than a qualified Lawyer, authorized to represent Clients, in a profession policed through the Advocates Act, Cap 16 the Laws of Kenya.

7. Section 22 of the Employment and Labour Relations Court Act gives the right of audience before this Court, to specific Persons. These include: **Parties acting in Person; Parties represented by Advocates; Office Bearers or Officials of Trade Unions; and in cases of Companies, their Directors or Employees specially authorized for purpose.**

8. The Claimant herein acts in Person, and is allowed under the above provision of the law to so act. She is not however allowed to appear through proxies and other unqualified agents.

9. The Court is aware that in ***Benson Muriithi Kagai v Kenya Equatorial Hotels Limited t/a Mombasa Intercontinental Resort Limited [2014] e-KLR***, the Attorney-in-Fact, Kagai, acting in Person, sued his former Employer successfully for unfair termination. He was awarded a sum of Kshs. 720,000 by the Court.

10. The Respondent in the present Cause seems to be the same business involved in Kagai's own Cause above. In all likelihood, the donor and the donee of power of attorney were Co-Employees. If this is so, Kagai's attempt to join the current proceedings is a case of a former Employee, seeking to legally represent another former Employee, of the same Employer. Employees are not allowed under Section 22 of the Employment and Labour Relations Court Act, to represent fellow Employees in Court.

11. Whether the donor and the donee were Co-Employees however, does not affect the conclusion that the Claimant cannot be represented by Kagai, through the power of attorney filed in Court. Kagai is unqualified to practice law, and is not a Trade Unionist with a right of audience, before this Court. He may have successfully litigated his own Cause, but that does not confer on him the right to represent other Employees in Court. To represent the Claimant, he must study law, become admitted to the bar, after the rigours of pupillage, and take out a current practicing certificate, in full submission to the Advocates Act. He must be ready to discharge legal responsibility professionally, and to bear liability in event of negligence in his representation of the Claimant. He must have a right of audience conferred by the law, rather a mere power, conferred on him through a private arrangement. He remains an Attorney-in-Fact, rather than an Attorney-at-Law, with professional right and competence to practice law. The Court cannot allow him to act as an Officer of the Court, without the authority of the relevant law. To allow him, would be an abomination in the eyes of qualified Lawyers of this Country. There is adequate support to these conclusions, in the judicial authorities cited above. Alternatively, he must be appointed under the Labour Relations Act Number 14 of 2007, as an Official or Office-Bearer of a registered Trade Union, of which the Claimant is associated with, and given the authority to appear in Court by that Trade Union's General Secretary. What Kagai is attempting to do by this Application is irregular, illegal and capable of resulting in criminal prosecution against him.

12. The Court does not otherwise see any reason not to allow the Claimant leave to amend her Statement of Claim. She filed and signed her Application in Person. As observed at the outset there is no valid Replying Affidavit on record, laying the foundation for rejection of amendments sought. Rule 14 [6] allows a Party to amend its Pleadings after closure of the Pleadings, with the leave of the Court. The Court shall in granting leave, allow the other Party corresponding leave to amend its own Pleadings.

IT IS ORDERED:-

a) Prayer [1] of the Application filed by the Claimant on 30th January 2018 is rejected, and the power of attorney filed by the Claimant expunged from the record.

b) The Claimant is granted leave to amend her Statement of Claim, and the Draft Amended Statement of Claim shall be deemed as duly filed upon payment of the requisite fees.

c) The Respondent is at liberty to file an Amended Statement of Response within 14 days of receiving the Amended Statement of Claim duly filed.

d) Costs in the cause.

Dated and delivered at Mombasa this 19th day of July 2019.

James Rika

Judge