



**REPUBLIC OF KENYA**

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

**CAUSE NO. 305 OF 2019**

JACKSON MUTISO MWALALI.....1<sup>ST</sup> CLAIMANT  
JACQUILINE NJOROGE.....2<sup>ND</sup> CLAIMANT  
KENIX ONYANGO ODONDI.....3<sup>RD</sup> CLAIMANT  
JACOB ODHIAMBO.....4<sup>TH</sup> CLAIMANT  
MICHAEL MWANGI.....5<sup>TH</sup> CLAIMANT  
DUNCAN NGIGE.....6<sup>TH</sup> CLAIMANT  
GILBERT OCHIENG OWINY.....7<sup>TH</sup> CLAIMANT  
IRENE MUTHONI KAHENYA.....8<sup>TH</sup> CLAIMANT  
STEPHEN KARANJA GICHUNI.....9<sup>TH</sup> CLAIMANT  
HARLES MADOWO.....10<sup>TH</sup> CLAIMANT  
VASQUIZ OYARO.....11<sup>TH</sup> CLAIMANT  
WILSON WAMBUA.....12<sup>TH</sup> CLAIMANT  
ZETH O.MAGANYA.....13<sup>TH</sup> CLAIMANT  
GIDEON BIWOTT.....14<sup>TH</sup> CLAIMANT  
JOEL MAINA.....15<sup>TH</sup> CLAIMANT  
CHARLES CHENGO.....16<sup>TH</sup> CLAIMANT  
KENNEDY MARANGA.....17<sup>TH</sup> CLAIMANT  
JOHN MBATHA KIDOGO.....18<sup>TH</sup> CLAIMANT  
DANIEL MUTUA MUINDI.....19<sup>TH</sup> CLAIMANT  
EVANSON GITHINJI.....20<sup>TH</sup> CLAIMANT

- VERSUS -

RADIO FREQUENCY SYSTEMS LIMITED.....RESPONDENT

**RULING**

On 18.06.2019 it was ordered by consent of the claimants and the decree issued on 19.06.2019 for orders:

- a) That judgment be and is hereby entered against the respondent and in favour of the claimants for constructive termination of services with effect from 01.04.2019.
- b) That the respondent be and is hereby ordered to pay salary arrears from 1<sup>st</sup> April, 2018 to 30<sup>th</sup> April 2019 and terminal dues for all the claimants without interest thereon.
- c) That the judgment be and is hereby entered against the respondent and in favour of the claimants for total gross of Kshs. 29, 103, 892.50 all inclusive.
- d) That the above amount sum of Kshs. 29, 103, 892.50 be transferred from the respondent's account No. 0170296936184 in the name of Radio Frequency Systems Limited (the respondent herein) at Equity Bank Limited Community Branch, Nairobi, payable to the claimants' advocates bank account No. 2023782521 in the name of Ongicho-Ongicho & Co. Advocates, Barclays Bank, Queensway Branch, Nairobi within seven (7) days from the date of the order.
- e) That upon payment of (4) above the suit be and is hereby marked as settled.

A notice of motion was filed on 26.06.2019 through Coulson Harney LLP describing themselves as Advocates for Simon Horner, Director and Shareholder of the Respondent. The application was under Article 159(2) and 162 (2) of the Constitution, Section 16 & 22 of the Employment and Labour Court Act, Rule 33 of the Employment & Labour Relations Court (Procedure) Rules, 2016 and all enabling provisions of the law. The substantive prayers made for determination at this instant stage are for:

- 1) The Honourable Court be pleased to review or vacate its order adopting as a judgment of the Court the terms of a consent dated 18.06.2019 which was made between Ongicho – Ongicho & Company Advocates (the Advocate for the Claimants herein) and M.M. Gitonga & Company Advocates LLP (Who purported to be acting for and on behalf of the Respondent).
- 2) The Honourable Court be pleased to set aside and expunge from the Court record the following documents:
  - a) The consent dated 18.06.2019.
  - b) A notice of appointment of advocates dated 23.05.2019 and filed in the Honourable Court by M.M. Gitonga & Company Advocates LLP, purportedly on behalf of the Respondent.
  - c) A replying affidavit sworn by Michael Mwaura on 23.05.2019 and filed in this Honourable Court purportedly on behalf of the respondent.
- 3) The costs of this application be provided for.

The application is based on the supporting affidavit of Simon Horner and upon the following grounds:

- a) The consent judgment and orders given on 18.06.2019 were entered into between the claimant's Advocates and M.M. Gitonga & Company Advocates LLP purportedly acting for and on behalf of the respondent. the consequence is that the claims in the suit were compromised and the respondent will be required to pay substantial amount of money as a settlement sum. The implementation of such a compromise and settlement will result in the respondent being divested of its assets and capital. Thus the settlement must be preceded by a decision of the respondent that specifically approves or ratifies it.
- b) The respondent is a juristic person and can only be represented in the proceedings by a director or an employee specifically authorised for that purpose. Such authorization is through the agency of its organs, the Board of Directors and the shareholders as regulated by the respondent's Articles of Association and the provisions of the Companies Act.
- c) The firm of M.M. Gitonga & Company Advocates are the advocates for Michael Mwaura, an individual director or shareholder of the respondent and in filing the notice of appointment in the present suit on 23.05.2019 they have falsely asserted that they represent the respondent in the proceedings. They have also filed a replying affidavit by Michael Mwaura purporting that it was made on behalf of the respondent.
- d) The respondent's organs have never considered or approved the appointment of M.M. Gitonga & Company Advocates LLP as the respondent's advocate; the filing of the notice of appointment in the suit; the making of the replying affidavit and filing it in the present suit.
- e) In making the consent and causing it to be recorded as an order of this Court, the firm of M.M. Gitonga & Company Advocates LLP misled the Honourable Court that it had authority to represent and bind the respondent.

f) The consent dated 18.06.2019 is null and void for the reasons that it was irregularly and fraudulently authored and adopted by M.M. Gitonga & Company Advocates LLP with the knowledge that it had no authority to act for and on behalf of the respondent; the claimant's Advocates entered the consent with full knowledge that M.M. Gitonga & Company Advocates LLP lacked authority to represent the respondent in these proceedings; the representation of the respondent in these proceedings is a live issue and notice thereof has already been given to the Honourable Court; the notice of appointment of advocate filed by M.M. Gitonga & Company Advocates LLP was filed without authority of the respondent; and M.M. Gitonga & Company Advocates LLP had no authority to compromise the suit on behalf of the respondent.

g) The decree flowing from the consent judgment of 18.06.2019 was extracted and on 21.06.2019, Equity Bank Kenya Limited by way of Real Time Gross Settlement (RTGS) effected transfer of the consent judgment sum of Kshs. 29, 103, 892.50 from the respondent's account number 0170296936184 held at Equity Bank Kenya Limited community branch, to the claimants' Advocates' bank account No. 2023782521 in the name of Ongicho-Ongicho & Company Advocates at Barclays Bank Queensway Branch, Nairobi.

h) The consent and the consequential judgment are for all intents and purposes void.

i) The claimants will not suffer prejudice if orders sought are granted because the Court by the order of 16.05.2019 preserved the sum of Kshs. 29, 103, 892.50 from the respondent's account number 0170296936184 held at Equity Bank Kenya Limited Community Branch, as security for a possible decree in the case.

j) The respondent will suffer loss if the orders now sought will not be granted.

k) At paragraph 28 of the supporting affidavit Simon Horner states thus, **"I am certain that Mr. Gitonga was purportedly appointed by Mr. Mwaura who failed to observe the respondent's Articles of Association while making the appointment."** Further at paragraph 37 he states, **"I do not dispute that the claimants have genuine concerns and some claims merit consideration. However, in settling the claim, the same must be done in a procedural manner and in accordance with the law and the respondent's Articles of Association."**

The respondent filed the grounds of opposition on 01.07.2019 through M.M. Gitonga & Company Advocates LLP and it was urged as follows:

a) Under section 34 of the Company's Act, 2015 on powers of directors to bind a Company, Michael John K. Mwaura, in his capacity as the respondent's company director has ostensible authority and power to appoint the firm of M.M. Gitonga & Company Advocates LLP and such authority or power is free from any limitation contained in the company's articles of association.

b) The firm of M.M. Gitonga & Company Advocates LLP is properly on record for the respondent having been duly instructed through a letter of authority dated 21.05.2019 signed by director and sealed with the respondent company seal. The letter was duly signed by Michael John K. Mwaura as director and is binding on the respondent company. The letter was done in good faith to protect the interests of the respondent in the suit.

c) M.M. Gitonga & Company Advocates LLP as duly appointed counsel had due written authority to consent on behalf of the company.

d) The applicant is not a party to the suit and has no *locus standi* to sue on behalf of the respondent company as it is a separate legal entity from its members or directors. The proper party to challenge the appointment of M.M. Gitonga Advocates LLP is the respondent company itself.

e) The applicant has not demonstrated that the respondent company is unable to internally address the wrong purportedly committed against it or sue in its own name. Nonetheless, the applicant can only sue on behalf of the respondent through a derivative suit.

f) The Court is *functus officio* and the application does not disclose any grounds or meet the threshold and pre-requisites for setting aside a consent judgment.

g) The applicant refused, disregarded and neglected the orders by the Honourable Court directing the directors of the respondent company to meet with the employees' counsel to discuss the outstanding dues payable to them, and as such he cannot be allowed to approbate and reprobate on the validity of the claims and amounts payable to each of the employees.

h) The application is malicious and is intended to prolong the suffering and pain of the employees and it is therefore unjust and prejudicial to the welfare of the said employees.

i) The *ex parte* orders issued 26.06.2019 restraining the disbursement of the decretal sum to the claimants were issued on the basis of material non-disclosure by the applicant and should be set aside forthwith.

The claimants filed on 28.06.2018 the replying affidavit of the 1<sup>st</sup> claimant. The claimants' case is that the respondent's directors are erroneously raising boardroom issues which do not touch on the claimants' terminal dues and rights as the former employees of the respondent and the Court lacks jurisdiction to deal with the commercial dispute between the directors about internal company issues. Further the claimants urge as follows:

a) The application confirms that the claimants are indeed owed terminal dues and benefits.

- b) The judgment by Kasango J in High Court Miscellaneous No.393 of 2017 urged the two directors to pay the staff and to meet their obligations as per their internal mechanisms.
- c) Both directors admit that the claimants are owed terminal dues as per their respective affidavits on record.
- d) The application is an afterthought meant to delay settling of the claimants' benefits and dues.
- e) The funds were already transferred to some claimants and the application is clearly belated.

The Court has considered the parties' respective positions and submissions. The Court makes findings as follows:

1) The Court has considered rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 on review of a decree or order. Whereas rule 33(1) provides that a person who is aggrieved by a decree or an order may apply for a review, rule 33(3) is clear thus a party seeking review shall apply by way of a notice of motion. The Court finds that for a person to apply for review of a decree or order, the person must not of necessity be previously a party to the suit. The applicant describes himself as the chief executive officer, shareholder and director of the respondent. The applicant has not been enjoined as a party to the present suit. However, as submitted for the applicant, in **Ngororo –Versus- Ndutha & Another (1994)eKLR**, the Court of Appeal held that it was any person, even not being a party to the suit but whose direct interest is being affected by the judgment therein that is entitled to apply for review. The Court finds that the applicant in the manner he has described himself would have his interest directly affected and accordingly, he has established *locus standi* to apply for review.

2) The Court has considered section 34 of the Companies Act, 2015. The section states that in favour of a person dealing with a company in good faith, the power of the directors to bind the company or authorise others to do so is free of any limitation contained in the company's constitution. There is no dispute that Michael John Mwaura is a director of the respondent and under his hand and the seal of the respondent dated 23.05.2019, M.M. Gitonga Advocates LLP was appointed to act in the matter. The Court considers and returns that in view of section 34 of the Act and that appointment of Advocate, M.M. Gitonga Advocates LLP was duly appointed to act for the respondent and had full authority to enter the consent order in issue. By reason of section 34, recourse would not be taken to the constitution of the respondent to determine whether the director had such authority especially as against the claimants entering the consent through their advocate as recorded in court and culminating into the decree. It is sufficient that it is established and it is not in dispute that the person who appointed the respondent's advocates to act was the respondent's director.

3) The applicant and his co-director Michael John Mwaura are in agreement that the respondent owes the claimants. The applicant at paragraph 37 states, **"I do not dispute that the claimants have genuine concerns and some claims merit consideration. However, in settling the claim, the same must be done in a procedural manner and in accordance with the law and the respondent's Articles of Association."** The applicant has not shown how the claimants' claims are affected by the Articles of association. Of paramount importance, the applicant in his capacity as chief executive officer of the respondent has not suggested even a single triable issue in view of the claimants' claims in the suit and which the applicant appears to be well aware about. In consideration of substantive justice as per Article 159 of the Constitution and the applicant having not raised not even a single triable issue, the claimants are found genuine in urging that the internal disputes between the respondent's directors should not be allowed to interfere with their claims and favourable decree herein because granting the application would amount to unfair delay of their enjoyment of the successful litigation. The Court finds that the applicant appears to urge that the consent order as applied be set aside to allow him and the co-director to resolve their internal issues as company directors and the Court returns that resolution of the co-directors' disputes would clearly be outside the jurisdiction of the Court. Resolution of such disputes amount to a fresh cause of action outside the scope of the present suit.

4) The Court has considered the respondent's Articles of association and returns that the applicant has not cited any provision requiring a board resolution prior to a director acting or taking steps such as giving instructions in legal proceedings. Instead the clause on **"Indemnity"** provides, **"Every Director, Managing Director, Agent, Auditor, Secretary and other officer for the time being of the Company shall be indemnified out of the assets of the Company against any liability incurred by him in defending any proceedings, whether civil or criminal, relating to anything done or not done by him on behalf of the Company in which judgment is given in favour or in which he is acquitted or in connection with any application under section 402 of the Act in which relief is granted to him by the Court and he shall not be liable for any loss, damage or misfortune which may happen to or be incurred by the Company in the execution of the duties of his office or in relation thereto. This Article shall however only have effect in so far as its provisions are not avoided by section 206 of the Act...."** The Court returns that by implication and in view of that indemnity clause, a director of the respondent has the general authority to act and represent the respondent in a legal proceeding like the present one. Thus the director validly appointed advocates to act for the respondent.

5) As submitted for the applicant and as was held in **Flora Wasike –Versus- Wamboko (1988)eKLR**, a consent judgment or order may be set aside by a court upon grounds of fraud; mistake; misapprehension; collusion; an agreement contrary to public policy; absence of sufficient material facts; ignorance of material facts; and any other reason which may enable a court to set aside an agreement. In the circumstances of this case the Court has found that M.M. Gitonga & Company Advocates LLP had genuine authority to act in the matter as authorised by the director and the submission for the applicant that M.M. Gitonga & Company Advocates LLP knew that the director lacked authority to appoint him to act is found not justifiable because the appointment to act was clearly by the respondent through the director and under seal of the respondent.

6) In **Kenya Commercial Bank Ltd –Versus- Specialised Engineering Co. Ltd (1982)KLR**, it was held that a duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side. In the present case the Court finds that the respondent's advocate was duly appointed per the notice of appointment on record and no such limitation in authority to act was notified to the claimants as at the time or before the judgment was entered by consent of the advocates for the parties.

7) As urged for the respondent in the suit, the applicant cannot be allowed to approbate and reprobate and in particular, cannot urge that a board resolution was required to enter the consent and at the same time, without such board resolution, urge that the consent should be set aside.

8) The Court considers that the disputes between the directors would be left for resolution in accordance with the respondent's internal mechanism and applicable law.

In conclusion the application dated 25.06.2019 and filed on 26.06.2019 is hereby determined with orders:

1) The application is dismissed with costs.

2) Taking all circumstances of the case into consideration, the Kshs. 29, 103, 892.50 paid in the claimant's advocates' bank account No. 2023782521 in the name of Ongicho-Ongicho & Company Advocates at Barclays Bank Queensway Branch, Nairobi shall not be disbursed, expended or utilised until after the close of 23.07.2019 and as a measure for parties to have time to study this ruling and appreciate its full effect.

**Signed, dated and delivered in court at Nairobi this Friday 19<sup>th</sup> July, 2019.**

**BYRAM ONGAYA**

**JUDGE**