



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 249 OF 2018

SAMUEL KAMAU KARIUKI.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

RULING

1. The Respondent objects to the Claimant's request to call to the stand the Children's Officer Nyeri at the material time. Mr. Allan Sitima submitted that he wanted to come on record alongside Miss Sylvia Ngere appearing for the Respondent. He proceeded to submit on the Objection by the Respondent. The objection is to the effect that the Respondent's case and the Claimant's cases were both closed and today the Respondent anticipated the court would be giving directions on the disposal of the submissions by parties. He argued that in such a scenario as this, the Claimant could be trying to fill in gaps that have arisen after hearing the defence case. The Respondent thus urged the court to disallow the reopening of the case as the Claimant had not moved the court appropriately.

2. Mr. Davidson Warutere for the Claimant on his part objects to the appearance of Mr. Sitima in the matter. He argues that the counsel who entered appearance in her name for the Respondent is Ms. Sylvia Ngere and she is the person who ought to respond. He argued that if she was the one urging the objection it would be clear she understood the matter as the witness in court was summoned to appear repeatedly but since he was in the Northern Frontier he was unavailable until today. He submitted that the court gave directions for his appearance today and the Respondent could not now object. He argued that the objection was subverting the orders of this court made in respect of the matter.

3. In reprise Mr. Sitima argued that the Claimant could not casually reopen the case which had been concluded. He urged the court to disallow the attempt and uphold the objection raised. He stated that the interests of justice were not for the allowing of the introduction of new evidence at this juncture.

4. It is clear that the court is being asked to somewhat reopen the case. The parties had presented witnesses and cross-examined the witnesses availed by each side. The children's officer had been indicated as a possible witness and summons were issued to compel his attendance but he did not appear prompting the request that was made prior to the mention today. The court gave directions that he appears today. Previously, the court had directed that a witness statement be filed providing the content of his testimony on application by the Claimant. Despite this request being granted, the Claimant did not avail a statement for the witness. The Rules of this Court permit the calling of another witness. Rule 14(9) provides that a party may, with the leave of the Court, call other witnesses. This is in addition to the witnesses who are regular. However, the Court is enjoined under Rule 25 to do the following:-

25. (1) *The Court shall give such directions as may be necessary to enable the parties to prepare for and conduct the hearing.*

(2) *The Court shall, at the beginning of the hearing, explain the order of the proceedings which it proposes to adopt.*

(3) *Evidence before the Court may be given orally or if the judge so orders, by affidavit or a written statement, and the Court may*

at any stage of hearing, require the attendance of a deponent or an author of a written statement for the purposes of examination of the facts deponed or written.

(4) *The Court shall conduct the hearing in a manner it considers most suitable to the just handling and recording of proceedings and shall, if appropriate, avoid legal technicalities and formalities.*

(5) *The Court may use electronic modes of presentation and recording of evidence.*

(6) *The Court may require a witness to give evidence on oath or affirmation and shall, for that purpose, administer the oath or*

affirmation.

(Underline mine)

From the foregoing, it is clear the Court can entertain a witness such as the one proposed. However, there must be a basis such as the statement or directions by court in line with the Rules. It is noteworthy that the court is enjoined to avoid legal technicalities and formalities. Granted that the witness was summoned pursuant to a request by the Claimant and there is no statement, in my view, this would fall outside the purview of the Rules. As to appearance by Mr. Sitima, whereas lead counsel are not frowned upon, it would have been better if Miss Ngere had appeared and articulated these concerns as she an able advocate of the High Court of Kenya. The outcome would not have been any different.

5. The summons that were issued for his attendance are contrary to Rule 20 and do not accord with Form 5 of the First Schedule. As such, the summons are not proper summons. The objection is upheld and parties are to proceed to file submissions in the manner to be agreed upon.

It is so ordered.

Dated and delivered at Nyeri this 25th day of September 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar