



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 567 OF 2019

(Before Hon. Lady Justice Hellen S. Wasilwa on 14th October, 2019)

NEHEMIAH KIPROP KIPLAGAT1ST CLAIMANT
ELISHA DONALD KOLI2ND CLAIMANT
HUDSON LIHANDA3RD CLAIMANT
STANLEY OIRERE MOSOMI.....4TH CLAIMANT
GERALD KINGORI KARIUKI.....5TH CLAIMANT
ENOCK MONARI.....6TH CLAIMANT
MUNGA EDWIN ODHIAMBO.....7TH CLAIMANT
BERNARD OWITL.....8TH CLAIMANT
EDWIN ONGERI BOSIRE.....9TH CLAIMANT
MICHAEL MUTAHI10TH CLAIMANT
ASAPH JUMA KIVITE.....11TH CLAIMANT
VICTOR KIPKOGEI12TH CLAIMANT
MUNYAO ERICSON MUTUKU.....13TH CLAIMANT
SAMMY KIRWA KITUR.....14TH CLAIMANT
CLIVE OMARI RUOTI.....15TH CLAIMANT
JACQUILENE MORAA.....16TH CLAIMANT
EUNICE WAIRIMU WAITUIRI.....17TH CLAIMANT
CHARLES KIAGE MAKORI.....18TH CLAIMANT
WARUTERE DAVID MAINA.....19TH CLAIMANT

VERSUS

RULING

(Application dated 11/09/2019)

1. The Respondent/Applicant, Radio Frequency Systems (E.A) Limited filed a Notice of Motion application dated 11/09/2019 against the Claimants/Respondents Nehemiah Kiprof Kiplagat and 18 others.

2. It seeks to be heard for orders for various temporary injunctions against the Respondents, for the Court to review, vary and/or set aside the consent order issued on 02/09/2019 and expunge the Consent and the Replying Affidavit of Simon Wallington Horner filed on 02/09/2019 from the Court record. The Application is supported by the grounds that:-

1. This Honourable Court on 02/09/2019 adopted as a judgment of the Court the consent order and decree issued in Nairobi ELRC Cause Number 305 of 2019; Jackson Mutiso Mwalali & 19 others vs Radio Frequency Systems Limited by ordering that the said consent order applies mutatis mutandis in the matter herein.

2. The Honourable Court was apparently and deliberately misled by a fraudulent consent executed on 30/08/2019 by the firms of Midenga & Company Advocates (purportedly on record for the Respondent Company) and Omwanza & Areba Associates (on record for the Claimants).

3. The Respondent Company is a limited liability company with the Board of Directors as the management organ of the company and which organ has never approved or issued any instructions to the firm of Midenga & Company Advocates to act for and on its behalf in this matter.

4. The consent dated 30/08/2019 was irregularly and fraudulently authored, executed and adopted by this Honourable Court for the following reasons:-

a) The Respondent Company has never appointed Midenga & Company Advocates to represent it in its matter.

b) Any purported Letter of Instructions issued to Midenga & Company Advocates was not issued with the due authority/approval of the Respondent Company.

c) The Respondent Company has never appointed/authorized one Mr. Simon Horner to depone any affidavits on its behalf in this matter.

d) The Replying Affidavit purportedly deponed by one Simon Wallington Horner on 30/08/2019 purportedly on behalf of the Respondent Company does not state at what place the said affidavit was sworn contrary to section 5 of the Oaths and Statutory Declarations Act, Cap 15.

e) All the Respondent Company's decisions are sealed with official company seal which is in the custody of Michael John Mwaura, a director of the company, and who has never sealed any document in relation to this matter.

f) Any consent purportedly executed by Midenga & Company Advocates on behalf of the Respondent was not at any time authorized by the Respondent company.

g) In executing the consent and causing it to be adopted as an order of this Honourable Court, the firm of Midenga & Company Advocates misled this Honourable Court that it had authority to represent and bind the Respondent Company.

h) The Claimants were not employees of the Respondent Company in the period 01/04/2018 to 30/04/2019 and as such there was no employer-employee relationship between them and the Respondent Company and accordingly no constructive dismissal could be attributed to them.

5. The entire claim is an elaborate scheme hatched by the Claimants with the intention of defrauding the company of its liquidated assets.

6. The immediate consequence of the consent dated 02/09/2019 is to compromise the fraudulent claims herein and require the Respondent to pay to them Kshs. 20,238,324.27, a substantial amount, as settlement sum. Indeed the Claimants have already served the impugned consent order on the Respondent Company's bankers, Equity Bank Limited-Community Branch, seeking to transfer the said funds from the company's account No. 070296936184 to account No. 1770279191186 of Omwanza & Areba Associates held at Equity Bank Limited, Parliament Corporate Branch Nairobi.

7. There is a real and present danger that unless the orders sought herein are granted, the Respondent Company will be unlawfully divested of Kshs. 20,238,324.27.

8. It is for the reasons stated above and in the circumstances the Applicant prays that the orders sought for in the Notice of Motion filed herewith are urgently granted.

9. The Claimants will not be prejudiced if the orders sought are granted by this Honourable Court. Conversely, the Respondent Company, its directors and shareholders stand to suffer immeasurable loss if the orders sought are not granted.

10. This Honourable Court has the powers to issue the prayers sought in the Application herein.

11. It is in the interest of justice that the prayers sought herein are granted.

3. The Applicants filed a Supporting Affidavit dated 11/09/2019 sworn by its Director and Shareholder, Michael John Mwaura who annexes the Company's Certificate of Incorporation and Memorandum and Articles of Association marked **MJM1** to prove its legal existence.

4. That the corporate department at Equity Bank Limited, Community Branch informed him about the order issued by the Court for the transfer of funds and that being unaware of the proceedings herein, he immediately instructed the company's advocates, M.M. Gitonga Advocates LLP to peruse the Court file and advise on the legality of the Court order and proceedings thereof.

5. That after perusal of the said order, it was apparent that it was procured fraudulently and unlawfully and that the company has never been served with summons to enter appearance in this matter or any other pleadings.

6. That any such purported participation is a forgery, fraud and misrepresentation by unauthorized third parties and that being in charge of the day to day operations of the company and the custodian of all its stamps, at no one time was the company served with a demand letter dated 02/08/2019 and thus the company's stamp on the said document is clearly a forgery.

7. He continues to aver that any decision binding the company is communicated officially in writing, signed by a Director and sealed with the official company seal which is currently in his possession. That the 2nd, 3rd, 7th and 11th Claimants wilfully resigned from the company in May 2018 for various personal reasons which the company accepted and that it cannot be said to have constructively dismissed them from employment on account of non-payment of salary for the period April 2018 to April 2019.

8. That the company has since instructed its Advocates, M.M. Gitonga Advocates LLP to act for and on its behalf in this matter and as a matter of most urgency, to immediately file the Application herein to set aside the impugned consent order.

9. Simon Wallington Horner filed a Replying Affidavit dated 16/09/2019 opposing the Application and averring that as the CEO of the Respondent, he is the custodian of its documents/records and seal.

10. That his position as the CEO was even confirmed by the High Court decision in **Nairobi High Court Misc. Civil Application No. 393 of 2017: Simon Horner vs. Michael John Mwaura & 3 others** in which he successfully sued Mr. Mwaura for forgery of the Respondent's documents. He avers that to secure the interests of the Respondent, he appointed M/S Midenga & Company Advocates to correspond on their behalf and pursue the matter to its logical conclusion.

11. That he is informed when the matter came up for directions ex-parte on 28/08/2019, Byram Ongaya J noting there had been a similar matter in *Nairobi ELRC Cause No. 305 of 2019*, encouraged parties to have an out of Court settlement and that he gave consent for the same for the expedient determination of the matter.

12. That he thus signed the pleadings and had them notarized on 30/08/2019 in the United Kingdom as evidenced in his Affidavit and that their Advocates eventually filed the pleadings and the consent letter which was adopted by parties on 02/09/2019.

13. He believes that Mr. Mwaura is stretching his luck too far by contesting notarization, which was properly done in accordance with the law and is filing frivolous applications previously determined by Byram Ongaya J as shown in annexure marked **SH-7**.

14. That Mr. Mwaura deliberately concealed material facts and misled the Court and obtained injunctive orders against the Respondent instead of giving it full facts. That Mr. Mwaura has unashamedly filed in Court forged letters of resignation purportedly authored by the Claimants herein as the said documents are not signed nor received by the Respondent in acknowledgement of resignation as purported.

15. That Mr. Mwaura is not interested in settling the employees' dues and is maliciously engaging the Court in his Ping-Pong games for his selfish gains and has alleged non-existent fraud by the Respondent without particularizing the same in the application or supporting affidavit which should thus be expunged.

16. That Mr. Mwaura has mischievously not filed his impugned application under his own name as a necessary party so as to further delay determination thereof in abuse of Court process and that the Respondent cannot perform its obligations under different employment contracts it entered with the Claimants herein.

17. That Mr. Mwaura will not undergo any prejudice, loss or damage should the orders sought herein not issue and that it is the Respondent who will be further be exposed to further litigation and costs if the application is allowed. That it is fair and just that this Court dismisses/strikes out the applications with costs to vindicate his property rights and for protection of the law.

18. The Claimants/Respondents also filed their Replying Affidavit dated 16/09/2019 sworn by the 1st Claimant on behalf of the other Claimants. He avers that the appointment of Midenga & Company Advocates and the now purported appointment of M.M Gitonga Advocates LLP is proof of the continued infighting between the Respondent's directors that continue to infringe upon their rights as employees.

19. That this infighting has been evident since the suit filed in the High Court as *Misc. Civil Application No. 393 of 2017* and that he believes this Court has no jurisdiction to decide on infighting between directors, which should be canvassed in a different forum by the said directors. He confirms that they served upon Midenga & Company Advocates the summons to enter appearance which they responded to and that after negotiating with the Respondent's CEO, they reached a settlement favourable for all parties.

20. That he denies the existence of any letters authored by them purporting to resign from their work stations as shown in the attachments filed with this Application and that the Claimants have never signed nor approved for sending any resignation letters to the Respondent company.

21. That the deponent Applicant has before been found to have committed forgery in *Misc Application 393/2017* wherein he was found to have forged the signature of Mr. Simon Horner and the Court had directed that criminal charges be preferred against him.

22. That all the Claimants continue to be loyal employees of the Respondent and are only being victimised by the Applicant due to the personal infighting of directors and that some of the employees were paid their full sums in *ELRC Cause 305 of 2019* in their exclusion thus leaving them destitute and without pay. That the Claimants will be greatly prejudiced if the application is allowed as the continued infringement of their rights to fair labour practice continues unabated.

23. Mr. Mwaura then responded in his Supplementary Affidavit dated 26/09/2019 denying that Mr. Simon Horner has ever been the Respondent's CEO averring that the only managerial position provided under the articles of association is Managing Director.

24. That the said Mr. Simon has no legal capacity to work as he does not have a work permit as mandated by **Section 53(1) m of the Kenya Citizenship and Immigration Act, 2011** and that the Court must address this illegality. That Mr. Simon has since been domiciled in the UK from 2014 having failed to obtain a work permit and has not been involved in the management of the company since 2014 and that he cannot therefore assert any knowledge on the records of the employees and/or their resignations thereof.

25. That the said *Misc. Civil Application No. 393 of 2017* only sought to rectify the company's records at the Registrar of Companies and did not address the company's management as alleged.

26. That the affidavit sworn by Mr. Simon on 16/09/2019 does not state at what place it was sworn contrary to section 5 of the Oaths and Statutory Declarations Act, Cap 15. That the letters of resignation were drawn and sent through the official email address and could thus not be stamped electronically and that he personally acknowledged the same and directed the then GM to ensure their rightful dues were paid.

27. That the 6th Claimant was summarily dismissed on 17/05/2017 due to gross misconduct and that the claimants have no reasonable cause of action against the company. That it is also defamatory for Mr. Simon to state that he attempted to forge his signature averring that he has never been the subject of any criminal proceedings.

28. Mr. Simon then filed a Further Affidavit dated 01/10/2019 averring that he uses the title Managing Director interchangeably with that of CEO since he incorporated the respondent company himself in 2003. That he included Mr. Mwaura as a company director on humanitarian grounds so as to empower him and that Mr. Mwaura did not contribute even a dime towards setting up the company.

29. That Mr. Mwaura has never filed an appeal challenging the decisions of the causes mentioned herein whose issues are now res judicata and that he has been receiving letters from employees demanding immediate payment of their dues. He annexes document marked **SWH-5** showing various correspondents with the Communications Authority over his personal email and the domain of the Respondent's email which had been illegally taken over by Mr. Mwaura.

30. That he has never met the said GM in person and has never employed him and is the sole signatory of the Respondent's bank accounts, with the company being operational up to the end of 2017 when Mr. Mwaura engineered the forged documents to wrestle the company from him.

31. That Mr. Mwaura who has a bad history of forgery of Respondent's records cannot be trusted and the purported resignation letters by the Claimants being forgeries, one cannot tell when the Claimants ceased being employees of the Respondent. He also annexes his latest work permit marked **SWH-6** stating that Mr. Mwaura raises the issue of work permits ingeniously to defeat the course of justice.

Application dated 16/09/2019

32. The Respondent/Applicant's Counsel Midenga & Company Advocates filed a Notice of Application dated 16/09/2019 seeking for Orders that the Court be pleased to discharge, vary and/or set aside its orders issued on 11/09/2019 together with costs. The application is supported by the Respondent's CEO, Simon Horner's Replying Affidavit dated 16/09/2019 opposing the Application dated 11/09/2019.

33. That Mr. Mwaura has approached the Court in bad faith and with unclean hands and does not deserve the reliefs claimed at all. That the Respondent is apprehensive that unless the orders sought in this application are granted, it will suffer further injustice, utmost prejudice/ financial loss and inconvenience.

Oral Submissions

34. The Applicant's advocate submitted in Court that they had attached resignation letters, some which had been hand delivered and others sent through email and that Mr. Mwaura has been in charge of the day to day operations of the company since 2015. That Mr. Simon has a pending matter against him in Criminal No. 830/2019 and he is now trying to wipe out the company's account using former employees and that the 2nd Claimant is even deceased and could not have issued instructions herein.

35. With directions of the Court, Simon Wellington Horner via skype confirmed that he swore the affidavits filed in Court and that his last work permit expired on 11/11/2017. In cross-examination, he stated that he always had a work permit when he was in Kenya, which did not specifically indicate for which company. That he was 100% in charge of the day to day operations of the company and not Mwaura and that he has 9 companies in Kenya. That the employee records are in safe custody in Kenya stating that his nominee has the records and that the employees do not have work cards because they do field work and cannot clock in and out.

36. He confirmed that employees worked by signing in at the gate and that his official email was simon@systems.co.ke. That no email was sent to him on 01/05/2018 by the 2nd Claimant, that he was last in Kenya in January 2019 and that he was in and out of Kenya in 2016, 2017 and 2018. That when he was out of the company, employees communicated to him through whatsapp and that he also never saw any email from the 3rd Claimant.

37. That he knows the 2nd Claimant died on 13/09/2019 and that for all the Claimants, the last working day was December 2018 except for the 16th Claimant but that he had no evidence of the same.

38. He also confirmed that he signed the Claimants' employment letters and never received resignation letters from any of them and that he has been signing company documents as CEO and director since 2003. In re-examination, Mr. Simon confirmed that he is the one who authorised payment on behalf of the Respondent in relation to the consent.

39. I have examined the averments of both Parties herein. From Appendix SWH 1, the Respondent herein is a Company Limited by shares whose directors are Simon Horner and Michael Mwaura each with 1 share each.

40. In **Miscellaneous Civil Appeal No. 383/2017 between the said Simon Horner and Michael John Mwaura & Others**; the Court made a finding that the shareholding of the Company is as follows:-

"Simon Horner – Director and Chief Executive Officer – 40 ordinary shares, John Mwaura – 30 ordinary shares, Estate of the late Samson Mburu – 30 ordinary shares." This shows that Simon Horner is the majority shareholder.

41. The judgement in this matter was delivered by Hon. J. Kasango on 20/9/2018 and has not been appealed against and therefore the position that Simon Horner is Chief Executive Officer of the Respondent stands.

42. As Chief Executive Officer and Managing Director of the Respondent and main shareholder, the said Horner has confirmed to this Court that he authorised the consent filed before this Court.

43. This Court has no doubt that the said consent was authentic and not fraudulent as submitted by the Applicants herein.

44. This matter was also considered by my brother J. Ongaya in **Nairobi ELRC Case No. 305/2019 Jackson Mutiso Mwalali & 19 others vs Radio frequency Systems Limited** and he opined as follows:-

"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.."

45. I do not wish to revisit the sentiments of my brother nor sit on appeal on the above findings, which I find to be free and authentic. Based on that position, I have no reason to doubt the consent filed before this Court, which has been adopted as an order of this Court on 2/9/2019.

46. I therefore find the application to set aside the consent not merited and the same is dismissed accordingly.

Dated and delivered in open Court this **14th day of October, 2019.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Omwanza Nyamweya for Claimant/Respondent – Present

Kinyua holding brief Midenga for Respondent – Present

Omwenga for Respondent/Applicant – Present