



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1383 OF 2016**

(Before Hon. Lady Justice Hellen S. Wasilwa on 1<sup>st</sup> September, 2017)

**RAFAEL MENDES ARAUJO.....CLAIMANT**

VERSUS

**RIFT VALLEY RAILWAYS (KENYA) LIMITED.....RESPONDENT**

**RULING**

1. The Application before Court is dated 19.10.2016 brought under Articles 27(1) & (2), 47(1), 50(10) & (8) of the Constitution of Kenya 2010, Sections 3, 12 and 20(1) of the Employment and Labour Relations Court Act No. 18 of 2014, inherent powers of the Court and all other enabling laws. The Applicant seeks for prayers:

***1. That this Honorable Court be pleased to grant leave to the Respondent's Advocates to cross examine the claimant on Paragraph 20 and 21 of the Replying Affidavit sworn on 3.8.2016.***

***2. That costs of the Application be provided for.***

2. The Application is based on the grounds that:

***a. On 3<sup>rd</sup> August, 2016, the Claimant swore the Replying Affidavit filed in Court on the same day in response to the respondent's application dated 27.7.2016.***

***b. Paragraphs 20 and 21 of the said Replying affidavit are misleading, ambiguous and an attempt to mislead the Court to grant the orders sought in the Notice of Motion Application dated 15<sup>th</sup> July, 2016.***

***c. There is need for the Claimant to clarify and/or substantiate the foundation of such allegations which can only be done if the Claimant is summoned for cross examination before Court.***

***d. There is need for the Court to establish truthfulness and accuracy of the Claimant's allegations in paragraphs 20 and 21 as the same are contested.***

***e. It is criminal for any person to lie in an affidavit.***

***f. It is in the interest of justice that this application be heard and allowed as prayed.***

3. The application is supported by an affidavit sworn by one Eunice Arwa the Company Secretary of the Respondent wherein she reiterates the grounds on the face of the application and adds that the Claimant is hell bent on misleading the Honourable Court by making unsubstantiated allegations to wit:

***a. The claimant alleges that he initiated the process of renewal of work permit without explaining how he did the same. Indeed, such explanation ought to conform with Form 25 pursuant to the Citizenship Immigration Act.***

***b. The Claimant further alleges that he was never employed by ALL – Americana Latina Logistica Rail Management and that he submitted his academic papers to the Respondent directly. However, he has failed to annex the evidence of academic qualifications.***

***c. Paragraphs 20(iv) and (v) are misleading and gave no basis at all hence the reason why the Claimant has failed to attach evidence to support those allegations. It is upon him to come to Court and clarify what he is alleging.***

***d. Notably the Claimant alleges having conducted an on-job training with three managers without specifying the same. All members of staff of the Respondent are identifiable.***

***e. The Claimant has failed to explain the nature of training he offered to Mr. Victor Ayiera neither has he attached any confirmation from the alleged trainee on the said allegations.***

4. The Respondent/Applicant states that the above form the basis of the Claimant's application dated 12<sup>th</sup> July, 2016, and the same are baseless, manufactured and intended to mislead the Court and as such seek for the prayers sought to be granted.

5. The Application is opposed by the Claimant who filed a Replying Affidavit wherein he states that in the impugned paragraph 20 he was simply alerting the Respondent of the need to initiate the application process for renewal of his work permit.

6. Further that in paragraph 21 of the affidavit in question he makes no reference to ALL and there is no evidence connecting his employment contract and ALL as alleged by the Respondent.

7. The Claimant/Respondent also holds the view that the instant application is an attempt by the Respondent/Applicant to shift the burden of proof by requiring him to prove the application for the work permit was initially made on the basis of ALL.

8. He admits that he did not annex academic qualifications to the impugned affidavit as evidence of the fact that he directly submitted his professional and academic qualifications to the Respondent by the e-mail correspondence which is annexed to the impugned affidavit.

9. The Respondent/Claimant also states that the Applicant is further shifting the burden of proof of the understudy programme to him whereas the law is clear that it rest squarely on the employer.

10. The Respondent/Claimant further states in his affidavit that the Applicant seeks to cross examine him on matters that are as a result of failures on their part and urge the Court to dismiss the application with costs.

11. I have examined the averments of both parties. What the Applicant seeks is to have the deponent cross examined on an affidavit sworn on 3/8/2016. This Court has a cardinal duty to examine transparency and openness which will lead to justice not only being seen to be done but to be done. When there is an affidavit a Litigant seeks to rely upon and which in the Respondent's opinion contain facts which need clarity. This will not only aid the parties but also the Court in reaching a just determination.

12. In this Court's view allowing cross examination on an affidavit will make issues clearer. In exercising my discretion I will allow the application to have the deponent cross-examined on the affidavit filed so that the Respondent can have an opportunity to test the truthfulness or otherwise of the matters so deposed upon.

13. Costs in the cause.

Read in open Court this **1<sup>st</sup> day of September, 2017.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Odaga for the Claimant – Present

No appearance for the Respondent