



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 60 OF 2014

BETWEEN

ATHUMANI LALI.....
CLAIMANT

VERSUS

NYALI INTERNATIONAL BEACH HOTEL RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Nyamai from Nyamai & Associates purporting to represent the Claimant

Mr. Otieno Advocate, instructed by Omondi Waweru & Company
Advocates for the Respondent

RULING

1. Does Article 22 of the Constitution of Kenya, grant every other person, the right to bring Court Proceedings, on behalf of other persons, and act as an Advocate of the High Court of Kenya?

2. This Claim was filed by one Mr. Nyamai, instructed by an entity named Nyamai and Associates, Labour and Industrial Consultants, of P.O. BOX 8942-00100, Nairobi, purporting to act for the Claimant. The Statement of Claim is drawn by Nyamai and Associates seeking terminal due for the Claimant against his former Employer the Respondent herein, computed at Kshs. 2,876,199. The Claim was filed on 5th May 2014 by Nyamai and Associates, and Mr. Nyamai has been appearing in Court for the Claimant at every mention.

3. The Matter was scheduled for hearing on 5th December 2014 when it was brought to the attention of the Court by Mr. Otieno Advocate for the Respondent, that in fact, Mr. Nyamai is not an Advocate; he claims to be a Labour Consultant. Mr. Nyamai does not deny that he is not an Advocate; he does not deny that he is not a Trade Union Representative; he submits he

is a Labour Consultant, and that Article 22 of the Constitution enables him to appear in Court, and represent the Claimant, because the Claimant has no knowledge of the law governing his Grievance.

4. Mr. Otieno asks the Court to rule on the validity of the Claim, before any further step is taken in prosecuting the Claim.

The Court Finds:-

5. Section 22 of the Industrial Court Act 2011 governs representation of Parties, in any proceedings before the Industrial Court, or before what the Act terms as ‘Subordinate Industrial Court.’ A Party to the proceedings may-

- Act in person;
- Be represented by an Advocate;
- Be represented by an office bearer or official of the Party’s Trade Union or Employers’ Organization; and,
- If the Party is a juristic person, represented by a Director or an Employee specially authorized for that purpose.

This law is in similar terms with Section 23 of the Labour Institutions Act 2007, which is now repealed.

6. Section 30 [1] of the Labour Institutions Act 2007 states that subject to the laws governing the public service, there shall be appointed a Commissioner for Labour; a Director of Employment; and such other Officers as may be necessary for purposes of administration of laws relating to labour and employment. Officers appointed under this law may be designated by the Cabinet Secretary for Labour, as Labour Officers, Employment Officers or Medical Officers.

7. Under Section 31 of the Labour Institutions Act 2007, the Minister shall appoint a Registrar of Trade Unions, Deputy Registrar, Assistant Registrars and other Officers as may be required under the Act, for purposes of the Act.

8. The Officers appointed under Section 30 [1] of the Labour Institutions Act have the right, subject to such controls as may be exercised by the Public Prosecution Authorities, to appear before the Industrial Court, in enforcement of Labour Standards. They are central to Labour Administration and Inspection. They can appear in Court and prosecute Wage Offences, or even file Claims on behalf of Employees, for payment of dues, terminal dues and compensation. The Officers in the Registrar of Trade Unions’ Office appear before the Industrial Court in their mandate of registration and regulation of Trade Unions.

9. In the context of the Labour Relations Act 2007, ‘Authorized Representative’ under Section 2 of the Act means-

- a. The General Secretary of a Trade Union;

- b. The Employer or the Chief Executive Officer of an Employer;
- c. The Secretary of a Group of Employers;
- d. The Chief Executive or Association Secretary of an Employers' Organization; or
- e. Any person appointed in writing by an Authorized Representative, to perform the functions of the Authorized Representatives

10. Advocates have the right to represent their Clients at the Industrial Court, and are regulated by the Advocates Act Cap 16 the Laws of Kenya, in doing so. There are very strict regulations on training, admission, practice, remuneration and disciplining of Advocates. The bar, no pun is intended, is very high. There are criminal sanctions against persons who hold themselves out as qualified Advocates.

11. Section 9 of the Advocates Act stipulates that no Person shall be qualified to act as an Advocate, unless that Person:-

- a. Has been admitted as an Advocate;
- b. His name is on the Roll of Advocates; and,
- c. Has in force a Practising Certificate.

12. An Advocate must have his name duly entered upon the Roll of Advocates, or Upon the Roll of Advocates having the rank of Senior Counsel.

13. Section 10 lists Officers who are not necessarily Advocates as defined by the Act, and who may act as Advocates. These include:-

- a. Officers in the Office of the Attorney- General and the Director of Public Prosecutions;
- b. Principal Registrar of Titles or any Registrar of Titles;
- c. Officers of Local Governments [County Governments]; and
- d. Such Officer, being a Public Officer in a Public Corporation, as the Attorney General may, by notice in the gazette specify.

Officers under this law are not allowed to charge legal fees for representation. Most Officers mentioned in the Employment and Labour Laws, Officers whose roles relate to enforcement of Labour Standards, appear in Court and act as Parties' Representatives, under specific legislation. The Statutes extend the right of audience before the Industrial Court, to authorized Trade Unions' and Employers' Representatives, because these groups are indispensable in the administration of industrial justice.

14. The Labour and Employment Laws may create other subgroups and intermediaries – such as Employment Agents, Labour Consultants- but nowhere are such subgroups allowed to practice as Advocates, in Court or act as Trade Unions' and Employers' Representatives. The Advocates Act, and this Court, takes a very grim view of unqualified Persons forcing their way, into judicial proceedings. Sections 33 and 43 of the Advocates Act make it a criminal offence, for unqualified individuals and juristic persons to hold themselves out as Advocates.

15. Article 22 of the Constitution is not aimed at allowing every other person to practise law, or act as an Advocate, or Authorized Representative of Trade Unions or Employers' Groups at this Court. There would be no need to have the professional restrictions in the Advocates Act, and the Labour and Employment Statutes discussed above, if the Industrial Court is meant to be a free port in practising of Labour Law, under Article 22.

16. The Article merely reinforces access to justice, by recognizing individual and associational standing before Courts, in enforcement of bill of rights. It does not invalidate the regulation of the Legal Profession, the exercise of legitimate Trade Unionism and Industrial Relations. It is not an avenue for everyman to become a Lawyer, a Trade Union or Employers' Group Representative, appearing before the Industrial Court and representing Employees and Employers.

17. In the specific case, Mr. Nyamai is not qualified to practice law. He is not an Authorized Representative of any Trade Union or Employers' Group. He is not a Party to the Claim, and does not represent any Public Interest. The Claimant is described as a Male Adult of sound mind. It is not shown why, assuming these proceedings are brought pursuant to Article 22 of the Constitution, and the enabling Constitution of Kenya [Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules 2013, the Claimant is deemed incapable of acting in his own name. In fact, it is not true that the Claimant has not come to Court in his name. The Claim is in the name of the Claimant, but filed by an unqualified person. Mr. Nyamai did not attempt to show in what way the Claimant is incapable of presenting his Claim in person, arguing rather unconvincingly that Article 22 allows Mr. Nyamai to represent the Claimant because the Claimant is not knowledgeable. Mr. Nyamai did not even show to the Court that he is indeed a Labour Consultant; which law allows him to engage in such consultancy; whether representation of Employees in Court is part of that consultancy; and which law regulates the profession of Labour Consultancy.

18. This is not a Petition brought pursuant to Article 22 and the aforesaid Practice and Procedure Rules. It is a Claim for terminal dues, based on a contract of employment. It is based on the Employment Act 2007, the Industrial Court Act 2011, and the Industrial Court (Procedure) Rules 2010. It is a private dispute, between an Employer and Employee, in which Mr. Nyamai has no legal standing. Even if this was a Petition under Article 22, Mr. Nyamai has not shown any associational standing or any direct or indirect nexus to the Claimant, and to the Claimant's grievance. He has not demonstrated any form of *locus standi*, or right of representation. He has no right to appear for the Claimant under the Statutes and the Constitution. If he wishes to appear before the Court he must do so as a Party, an Individual acting in the Public Interest, an Advocate, Authorized Representative of a Trade Union or Employers' Group. Under different circumstances, this Court does not doubt Mr. Nyamai could face prosecution for holding himself out as an Advocate. There shall be no

need to direct investigations along that line, as the concerned Parties seem to have proceeded with this matter out of a misapprehension of the law. If the situation persists however, the right Bodies to pursue further actions are the Law Society of Kenya, the Centre for Trade Unions and the Federation of Kenya Employers. The Court relies on these Bodies to know the *bona fides* of the Persons appearing before it. It is their duty to protect the integrity of Labour Law Practice.

IT IS ORDERED:-

[a] The Claim was filed by an unqualified person, and is therefore incompetent, and struck out, with costs to the Respondent.

Dated and delivered at Mombasa this 15th day of December 2014.

James Rika

Judge



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