

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 208 OF 2019 CONSOLIDATED WITH PETITION NO. 185 OF 2010

THE SALARIES AND REMUNERATION COMMISSION.....1stPETITIONER

OKIYA OMTATA OKOITI.....2nd PETITIONER

VERSUS

PARLIAMENTARY SERVICE COMMISSION.....1st RESPONDENT

CLERK OF THE SENATE.....2nd RESPONDENT

JUSTIN MUTURI.....3rd RESPONDENT

DR. NAOMI SHABAN.....4th RESPONDENT

BETH MUGO.....5th RESPONDENT

ADAN KEYNAN.....6th RESPONDENT

BENSON MOMANYI.....7th RESPONDENT

GEORGE KHANIRI.....8th RESPONDENT

AISHA JUMWA.....9th RESPONDENT

AARON CHERUIYOT.....10th RESPONDENT

DR. LORNA MUMELO.....11th RESPONDENT

JEREMIAH NYEGENYE.....12th RESPONDENT

THE CLERK OF THE NATIONAL ASSEMBLY.....13th RESPONDENT

THE CONTROLLER OF BUDGET.....14th RESPONDENT

THE CABINET SECRETARY, NATIONAL TREASURY.....15th RESPONDENT

THE HON. ATTORNEY GENERAL.....16thRESPONDENT

AND

PARLIAMENT.....1st INTERESTED PARTY

MEMBERS OF PARLIAMENT.....2nd INTERESTED PARTY

TRANSPARENCY INTERNATIONAL KENYA.....3rd INTERESTED PARTY

KATIBA INSTITUTE.....4th INTERESTED PARTY

LAW SOCIETY OF KENYA.....5th INTERESTED PARTY

AND

PETER KUBEBEA, KENNEDY MASIME,

SAMUEL KIMEU-Suing as the officials of

National Tax Payers Association.....INTENDED INTERESTED PARTY

RULING

The Application

1. By a Notice of Motion dated 11th June 2019, the National Tax Payers Association (hereinafter “the Applicant”), which is an association duly registered under the Societies Act,[\[1\]](#) seeks to be enjoined in these Petitions as an Interested Party.
2. The application is supported by the grounds on the face of the application and the annexed affidavit of Peter Kubebea, the Association’s Chairperson dated 11th June 2019. He averred that the Association’s mandate under its Constitution is to work in partnership with both National and County Governments on public accountability in collection and utilization of taxes. He stated that the association also works with taxpayers to monitor management of public resources and advocates on accountability in delivery of public services.
3. He deposed that the association is aggrieved by the decision of Members of Parliament to unilaterally award themselves house allowance benefits. He averred that the mandate to make such a decision lies with the first petitioner. He also averred that it is necessary for the association to be enjoined in this suit as the said benefit to Members of Parliament adversely affects the Association and taxpayers.
4. In addition, Mr. Kubebea deposed that under to Article 260 of the Constitution, Members of Parliament are State Officers, whose remuneration and benefits are set by the first Petitioner as provided under Article 230(4) (a) of the Constitution as read with Article 259(11) of the Constitution.
5. He averred that Article 127(6) of the Constitution stipulates the role of the Parliamentary Service Commission and added that reviewing and setting salaries of State Officers is not the mandate of the Parliamentary Service Commission, hence, the said action is illegal. He also deposed that the house allowance will exacerbate the existing anomaly of high wage bill which stood at Ksh. 733 billion for the year 2017-2018 in excess of the limits stipulated in the Public Finance Management Act[\[2\]](#) which provides that the expenditure on public wage bill should not exceed thirty five percent (35%) of total revenue.
6. Mr. Kubebea also averred that if the Respondents have their way, an additional 1.2 billion will be forced on the taxpayers at the expense of development. He deposed such eventuality would perpetuate inequality in Kenya, as the current minimum wage is Ksh. 13,572 per month, thus forcing the persons paid the minimum wage to dig deeper into their pockets to sustain the lifestyle of the Members of Parliament, which will deepen poverty levels.
7. **Jeremiah Nyengeny**, the Secretary to the Parliamentary Service Commission which is the 1st Respondent herein, swore a replying affidavit dated 20th June 2019 in opposition to the application. The crux of the affidavit is that the applicant has not satisfied the necessary tests to qualify to be enjoined as an Interested Party.
8. However, the substance of his affidavit are legal submissions as opposed to factual issues and a replica of their detailed submissions dated 11th June 2019. It will add no value to reproduce them here since we will be addressing the party’s submissions shortly.
9. Counsel representing all the other parties informed the court that they were not opposing the application, but they did not file any papers.

The Submissions

10. The Applicant’s counsel cited the definition of an Interested Party in Rule 2 of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013[\[3\]](#) and the definition in the Black’s Law Dictionary[\[4\]](#) and submitted that the Applicant’s interest in the matter is sufficiently identifiable.
11. He submitted that the Applicant is an umbrella body consisting of 12 members who ordinarily pay taxes, and, that, remuneration of members of Parliament and the Respondents is drawn from taxes. He argued that one of the Applicant’s objectives is to create awareness on the importance of paying taxes and to demand accountability on the use of taxes on behalf of members of the public. To buttress his argument, he cited the Supreme Court decision in *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others and Michael Wainamina Mwaura (as Amicus Curiae)*[\[5\]](#) which outlined the principles set out in *Franci Kariuki Muruatetu & Another v Republic & 5 Others*[\[6\]](#) on tests for joinder of Interested Parties.
12. He further submitted that a person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally, that is, by curtailing his legal rights. To fortify his argument, he cited *Judicial Service Commission v Speaker of the National Assembly & Another*,[\[7\]](#) which held that an interested party is a person with an identifiable stake or legal interest in the proceedings; hence, he may not be non-partisan as he is likely to urge the court to make a determination favourable to his stake in the proceedings. He also placed reliance on *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others*[\[8\]](#) that laid down the tests for joinder of an Interested Party. He argued that in determining whether an applicant has a legal interest, the true test; lies not so much in an analysis of what are the constituents of the applicant’s rights, but rather on what would be the result on the subject matter of the action if those rights could be established.

13. Counsel also relied on *Kenya Medical Laboratory Technicians and Technologists Board & 6 Others v Attorney General & 4 Others*.^[9] The crux of this decision was that a case may be appropriate for intervention if it raises one or more issues of public importance and there is a risk that this public interest may not be sufficiently well-addressed by the submissions of the parties alone.

14. Lastly, counsel relied on *Francis Kariuki Muruatetu & Another v Republic & 5 Others*^[10] for the proposition that a party must, in its application set out the case and or submissions it intends to make before the court, and demonstrate the relevancy of those submissions. Further, it should demonstrate that those submissions are not a mere replication of what the other parties will be making before the court.

15. The 1st Respondent's counsel also cited the definition of Interested Party in Rule 2 of the Constitution of Kenya (Protection of the Fundamental Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and the Supreme Court decision in *Francis Kariuki Muruatetu & Another v Republic & 5 Others* (supra) in which the Supreme Court dismissed a similar application and proceed to re-state the grounds upon which an Interested Party may be joined into a suit.

16. He also relied on *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others* (supra) and submitted that the applicant has not established an identifiable stake in the suit nor have they demonstrated that they will suffer any prejudice.

17. Further, he submitted that the applicant has not set out the submissions it intends to make. To support this position he relied on *Shirving Supermarket Limited v Jimmy Ondicho Nyabuti & 2 Others*.^[11] Lastly, counsel argued that the applicant's submissions will be a replica of the Petition, and, in particular, the issues raised have been pleaded in the two Petitions among them the usurpation of powers of the Salaries and Remuneration Commission, use of taxpayers money and the high wage bill.

The Determination.

18. Both parties essentially relied on substantially the same authorities, but as expected, each party tried to persuade the court that the authorities support their respective positions. We will also rely on the same decisions, particularly the Supreme Court decisions. We are conscious that Article 163 (7) of the Constitution explicitly provides that all courts, other than the Supreme court, are bound by the decisions of the Supreme court. The binding nature of the Supreme Court decisions under Article 163 (7) of the Constitution is absolute. Article 163 (7) is an edict firmly addressed to all courts in Kenya that they are bound by the authoritative pronouncements of the Supreme Court^[12] and that where the issues before the court were determined by the Supreme Court, it is not open to this court to examine the same with a view to arriving at a different decision.^[13]

19. In *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others*, (supra) the Supreme Court had the following to say:-

"...Consequently, an interested party is one who has a stake in the proceedings, though he or she was not a party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause..."

20. In *Francis Kariuki Muruatetu & another v Republic & 5 others* (Supra) cited by both parties, the Supreme Court also addressed the same issues. The Supreme Court defined an intervener and an interested party as defined in the Black's Law Dictionary as follows:-

"Black's Law Dictionary, 9th Edition, defines "intervener" as one "who voluntarily enters a pending lawsuit because of a personal stake in it."

"A party who has a recognizable stake (and therefore standing) in a matter"

21. The Supreme Court rightly stated that 'enjoinment is not as of right' and proceeded to lay down the basis upon which an application for joinder of an interested party is to be considered. It laid down the following considerations:-

a) The personal interest or stake that a party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.

b) The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.

c) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the others parties will be making before the Court.

22. Consistent with the above considerations, we may usefully add that the test is not according to or against the wishes of the Applicant or the Petitioner or any of the parties in the proceedings. It is whether the the intended interested party has an identifiable stake, or a legal interest or duty in the proceedings and must satisfy the above considerations.

23. A person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally that is by curtailing his legal rights.^[14] In determining whether or not an applicant has a legal interest in the subject matter of an action sufficient to entitle him to be joined as an interested party, the true test lies not so much in an analysis of what are the constituents of the applicant's rights, but rather in what would be the result on the subject-matter of the action if those rights could be established.^[15]

24. Paraphrasing the words of the Supreme Court in *Francis Kariuki Muruatetu & another v Republic & 5 others* (Supra), an applicant is required to demonstrate the personal interest or stake he has in the matter and must set it out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral. The prejudice to be suffered must also be demonstrated to the satisfaction of the court and it must be clearly outlined and not something remote. Lastly, an applicant must in its application, set out the case and/or submissions it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.

25. We have carefully studied the above tests and in particular, the last test. The Applicant has not in its application set out its case or the submissions it intends to make before the court. It has not demonstrated the relevancy of the submissions or established that they are not merely a replication of what the other parties will be making before the court. Our reading of the two Petitions and the grounds relied upon by the applicant leave us with no doubt that the Applicant is citing substantially if not wholly the same grounds already cited by the two Petitioners.

26. It is important to distinguish between two kinds of interested party interventions, those where the intervener is seeking to represent the public interest, or merely his or her own private interest. Generally speaking, a case may be appropriate for an intervention if it: (i) raises one or more issues of public importance; and (ii) there is a risk that this public interest may not be sufficiently well-addressed by the submissions of the parties alone. In short, any would-be public interest intervener must ask how they might assist the court in the case; or how they might 'add value' to the court's consideration of the issues before it. We are afraid, much as the Applicant attempted to demonstrate that the Petitions raise matters of public interest, it has not demonstrated how it will add value to the case or that the public interest will not be sufficiently addressed by the submissions by the parties before the court.

27. We have carefully considered all the grounds cited by the Applicant and weighed them against the considerations laid down by the Supreme Court decisions discussed above. We are not satisfied that the applicant has demonstrated that the application meets the said tests.

28. Accordingly, we find and hold that the Notice of Motion application dated 11th June 2019 is not merited. We dismiss the said application with no orders as to costs.

29. Orders accordingly

Signed, Delivered, Dated at Nairobi this 31st day of July 2019

P. NYAMWEYA

W. KORIR

J. MATIVO

JUDGE

JUDGE

JUDGE

[1] Cap 108, Laws of Kenya.

[2] Act No. 18 of 2012.

[3] The Rule defines an Interested Party as follows:- "Means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation."

[4] It defines an Interested Party as "a party who has recognizable stake (and therefore standing) in the matter."

[5] [2017] e KLR.

[6] [2016] e KLR.

[7] [2013]e KLR.

[8] [2015] e KLR.

[9] [2017] e KLR.

[10] [2016] e KLR. (Supra)

[11] [2018]e KLR.

[12] *Fredrick Otieno Outa vs Jared Odoyo Okello & 3 Others* {2017}eKLR

[13] See *Justice Jeane W Gacheche & 5 Others vs Judges and Magistrates Vetting Board & 2 Others* {2015}eKLR citing Sir Charles Newbold, P in *Dodhia vs National & Grindlays Bank Ltd & Another* {1970} E.A. 195

[14] This is the test was applied in *Amon v. Raphael Tuck and Sons Ltd.*, 1956 - 1 All ER 273.

[\[15\]](#) See *Dollfus Mieg et Compagnie S.A.V. Bank of England*, 1950-2 All ER 605 at p. 611. **See also:** *Gokaldas Laximidas Tanna v. Store Rose Muyinza*, H.C.C.S No. 7076 of 1987 [1990 – 1991] KALR 21.