



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO 22 OF 2018**

**PROF. STANLEY KHAINGA, DR. LOISE KAHORO & DR. FERDINAND NANGOLE**

Suing as officials of the **KLENYA SOCIETY OF PLASTIC**

**AND RECONSTRUCTIVE SURGERY.....PETITIONERS**

**VERSUS**

**KENYA MEDICAL PRACTITIONERS & DENTISTS BOARD....1<sup>ST</sup> APPLICANT/ RESPONDENT**

**COLUMBIA AFRICA HEALTH CARE LIMITED.....2<sup>ND</sup> APPLICANT/RESPONDENT**

**AGA KHAN UNIVERISITY HOSPITAL NAIROBI.....3<sup>RD</sup> APPLICANT/RESPONDENT**

**DR. TILMAN STASC.....4<sup>TH</sup> APPLICANT/RESPONDENT**

**DIRECTOR OF IMMIGRATION SERVICES.....5<sup>TH</sup> APPLICANT RESPONDENT**

**DIRECTOR OF MEDICAL SERVICES.....6<sup>TH</sup> APPLICANT RESPONDENT**

**RULING**

**1. Before me is a Notice of Motion dated 3<sup>rd</sup> May 2018. The 1<sup>st</sup> Respondent/Applicant seek the following orders:-**

a) THAT the Affidavit of the Interested Party sworn by Dr. Muchai Gachago on 19<sup>th</sup> April 2018 and filed on 20<sup>th</sup> April 2018 be struck out.

b) THAT in the alternative to (1) above, the Affidavit of the Interested Party sworn by Dr. Muchai Gachago on 19<sup>th</sup> April 2018 and filed on 20<sup>th</sup> April 2018 be expunged from the Court records.

c) THAT the costs of this application be borne by the Interested Party.

**2. The application is premised on the grounds Nos. (a) – (h) on the face of the application. The application is further supported by an affidavit by Eunice Muriithi sworn on 3<sup>rd</sup> May 2018.**

**3. The Interested party is opposed to the 1<sup>st</sup> Respondent/Applicant application dated 3<sup>rd</sup> May 2018.**

**4. The 1<sup>st</sup> Respondent/Applicant contend, that the court joined the ophthalmological Society of Kenya to this petition, as an Interested party on 14<sup>th</sup> March 2018 and directed it to file its affidavit in support or in opposition to the petition. That through its official, Dr. Muchai Gachago, the interested party filed the affidavit sworn on 19<sup>th</sup> April 2018 and filed on 20<sup>th</sup> April 2018. In the petition the main contention in the petition is the licensing of foreign doctors to practice specifically, plastic surgery, in Kenya in private medical facilities.**

**5. It is contended by the Applicant, that the affidavit of Dr. Muchai Gachago, introduces new facts, evidence, grounds and issues concerning ophthalmologist which are not pleaded nor addressed in any way in the petition filed herein. It is urged the affidavit is an attempt to litigate**

its own case through the back door. It is further contended, that the contents of the affidavit and its annexures are therefore misconceived and an abuse of the court process and the interested party ought to have filed its own petition instead of introducing its own issues, grounds and affidavit evidence. It is further urged the 1<sup>st</sup> Respondent will be prejudiced if the affidavit of Dr. Muchai Gachago is admitted with its contents and annexures therein.

6. I have very carefully perused the application, affidavit in support, the grounds of opposition, the submissions by both sides and I find the issue arising for consideration to be as follows:-

**a) Whether the affidavit by Dr. Muchai Gachago of 19<sup>th</sup> April 2018 and filed on 20<sup>th</sup> April 2018 introduces new facts, evidence and issues not pleaded in the petition and whether the said affidavit can be struck out for being an abuse of court process?**

7. In the instant application the Respondents to the application has not filed his response to the application but has in his submissions listed grounds of opposition being Nos. (a) – (f). The main contention in the petition is the licensing of foreign medical practitioners and specifically plastic surgeons, to practice medicine in regard to plastic surgery either with Government or as private practitioners.

8. The instant petition is filed by the officials of the Kenya Society of Plastic and Reconstructive Surgery. Under paragraph 8 of the petition it is pleaded:-

**"THAT the Petitioners institute their suit in their personal capacity and on behalf of all Kenyan trained medical students studying Plastic, Reconstructive and Aesthetic Surgery in their capacity as officials of the Petitioner society; Kenya society of Plastic, Reconstructive and Aesthetic Surgery to protect the locally trained doctors from influx of foreign doctors thus denying the local ones income and job opportunities."**

9. The prayers in the petition relate to the 4<sup>th</sup> Respondent as a foreign doctor practicing plastic surgery in Kenya in a private medical facilities in his practice in the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' employment. In the petition under prayers Nos. 3 and 4 the prayers sought are:-

**a) A permanent Injunction restraining the 1<sup>st</sup> and 6<sup>th</sup> Respondents from issuing a private practitioners medical license for the year 2018 and thereafter to the 4<sup>th</sup> Respondent or any other foreign medical practitioner or dentist and restrain the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and any other private medical facility from employing the 4<sup>th</sup> Respondent or any other foreign medical practitioners or dentist.**

**b) A permanent Injunction restraining the 6<sup>th</sup> Respondent from issuing or renewing a work permit for the 4<sup>th</sup> Respondent and or any medical practitioner or dentist undertaking private medical practise in Kenya."**

10. On perusal of the affidavit sworn by Dr. Gachago, it is clear it is sworn on behalf of the ophthalmological Society of Kenya. In the affidavit under paragraph 5, the orders and prayers sought relate to those of ophthalmological Society, which prayers are not sought in the petition?

11. The Interested party in his submission contend, it has not introduced new matters to the petition, through his affidavit dated 19<sup>th</sup> April 2018 and avers the affidavit is necessary and helpful to the court, as it will enable court to resolve issues in this petition. It is further urged the affidavit is not embarrassing as it is not evasive nor does it obscure or conceal the real questions in issue. It is further urged the same is not ambiguous nor does it raise immaterial matters and as such it does not enlarge the issues, nor create trouble nor does it have intention to delay the hearing of the instant petition, as he seeks to hijack the petitioners' petition.

12. The Interested party in its affidavit ought as interested party to have responded to matters pleaded in the petition without introducing new facts and issues not pleaded in the petition and annexures thereto. I find by introducing new unpleaded matters the interested is seeking to litigate its own case through this petition. His acts are contrary to interest of an interested party in a petition, as he seeks to hijack the petitioners' petition.

13. The constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedures Rules, 2013 defines an interested party as "a person or entity that has an identifiable or legal interest or duty in proceeding before the court but is not a party to the proceedings or may not be directly involved in the litigation." I find whereas the interested party herein may have an identifiable stake in the matter by being a society of doctors, its affidavit takes the form of a fresh petition on top of an existing petition, which tables new issues before this Court. This renders the interested party a direct litigant contrary to the interpretation of "interested party" in the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

14. The Supreme Court in **Francis Kariuki Muruatetu & another vs Republic & 5 others, Supreme Court Petition No. 15 of 2015 as Consolidated with Petition No.16 of 2015 [2016] eKLR**, in addressing the issue of interested parties stated that:

**"[41] Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the Court. The determination of any matter will always have a direct effect on the primary/principal parties.**

**...[42] Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must**

demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court. [43] Consequently, the issues of constitutionality of the death penalty and/or its abolition, are not issues presented by the petitioners before this court. Any interested party or amicus curiae who signals that he or she intends to steer the Court towards a consideration of those 'new issues' cannot, therefore, be allowed."

15. I find, that it would be against the interest of justice, if an interested party in a matter would seek to introduce a new issue and urge to ventilate on the same when the same is not contained in the petition. The Interested party, attempt to introduce new issues in this matter can't be entertained.

16. In **Sammy Ndung'u Waity & another vs Independent Electoral Boundaries Commission & 5 others Election Pet. No. 2 of 2017 [2017] eKLR** the court dismissed the Intended interested party's Notice of Motion with costs to the Respondent on the grounds that it introduced new facts and issues. It stated at paragraph 57 and 58 that:

"Such attempt to introduce new issues was considered by the Supreme Court in the case **Raila Amolo Odinga & Another vs Independent Electoral and Boundaries Commission & 3 others [2017] eKLR** viz: "The applicant, in essence is introducing new facts and issues that were not before court. It follows that he is not in a position to advance any submission that will be helpful to the court as it resolves the main question at hand. He is, in effect introducing a new petition, and pre-empting the duly-lodged cause of the parties in the main proceedings. This cannot be allowed. Moreover, we are also not convinced that the applicant would suffer any prejudice, if his intervention is denied. Accordingly, we dismiss this application." That quotation is very apt to the matter before me. The intended interested party cannot, at this late stage introduce new facts and issues that are not in the petition. That introduction would be prejudicial to the Respondents."

17. I note the interested party in this matter is seeking to go against all laid down procedures regarding litigation and seek to litigate its case with the petitioner's case. The High Court while citing the Supreme Court decision in the **Muruatetu case/mandatory death penalty case held in Japhet Muroko & another vs Independent Electoral and Boundaries Commission (IEBC) & 3 others [2017] eKLR**, that:-

"29. Participation of an interested party should not amount to introduction of new causes of action altogether. In the **Muruatetu case**, referred to above, the court thus stated: [42] Therefore in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court. [43]....Any interested party or amicus curiae who signals that he or she intends to steer the Court towards a consideration of those 'new issues' cannot, therefore, be allowed."

18. The present application is brought pursuant to order 2 Rule 15(1) (c) and (2) and order 19 Rule 6 of the Civil Procedure Rules 2010. **Order 2 Rule 15(1)(c) and (d)** provides as follows:-

"(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be".

**Order 19 Rule 6** states:-

"The court may order to be struck out from any affidavit any matter which is scandalous, irrelevant or oppressive."

19. Upon consideration of the interested party's affidavit dated 19<sup>th</sup> April 2018, I find if the same is admitted with its contents and annexures therein the 1<sup>st</sup> Respondent will be prejudiced.

20. The High Court in expounding on the principles, that underlie the striking out of pleadings stated in **Transcend Media Group Limited vs Independent Electoral & Boundaries Commission (IEBC) [2015] eKLR** that:-

"A pleading tends to prejudice, embarrass or delay fair trial when (i) it is evasive; or (ii) obscuring or concealing the real question in issue between the parties in the case. It is embarrassing if (i) It is ambiguous and unintelligible; or (ii) it raises immaterial matter thereby enlarging issues, creating more trouble, delay and expense; or (iii) it is a pleading the party is not entitled to make use of; or (iv) where the defendant the party is not entitled to make use of; or (iv) where the defendant does not say how much of the claim he admits and how much he denies. See **Strokes vs Grant (1878) AC 345; Hardnord vs Monk (1876) 1 Ex. D. 367; Preston vs Lamont (1876)**. A pleading which tends to embarrass or delay fair trial is described is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses, trouble and delay and that which contains unnecessary or irrelevant allegations which will prejudice the fair trial of the action and lastly a pleading which is abuse of the process of the court really means in brief a pleading which is a misuse of the Court machinery or process. See **Trust Bank Limited vs Hemanshu Siryakat Amin & Company Limited & Another Nairobi HCCC No.984 of 1999**."

21. I therefore find the interested party's affidavit sworn by Dr. Gachago smartly and/or craftily introduces new facts and new issues to advance its own cause and is parallel to the material issues in the petition as it raises legal issues concerning ophthalmologists which are not

pleaded in the instant petition and which cannot be litigated in the instant petition. The Interested party, through its affidavit introduces new annexures, pleading its own case and as such enlarges the issues before this court by thus creating more delay and expense. If the Interested party's affidavit is admitted to this petition, it will prejudice and delay fair trial of this petition and constitute an abuse of the process of the court by introducing a multiplicity of issues not contemplated to be addressed and considered in this petition. On the other hand, I find, that the Interested party would not be prejudiced if its affidavit is not admitted as there is nothing, that would bar the Interested party from filing its own separate petition pursuing its rights, if it deems fit so to do.

22. Upon considering the Applicant/1<sup>st</sup> Respondent application dated 3<sup>rd</sup> May 2018 the same is meritorious. I proceed to make the following orders:-

**a) The affidavit of the Interested party sworn by Dr. Muchai Gachago on 19<sup>th</sup> April 2018 and filed on 20<sup>th</sup> April 2018 be and is Hereby struck out.**

**b) Cost of the application is awarded to the Applicant/1<sup>st</sup> Respondent against the interested party.**

**Dated, signed and delivered at Nairobi this 29<sup>th</sup> day of July , 2019.**

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**J .A. MAKAU**

**JUDGE**