REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 686 OF 2017

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE SALARIES AND

REMUNERATION COMMISSION.....RESPONDENT

AND

LAW SOCIETY OF KENYA.....PROPOSED INTERESTED PARTY

HON BENSON MUTURA.....PROPOSED INTERESTED PARTY

OKIYA OMTATAH OKOITI.....PROPOSED INTERESTED PARTY

UFUNGAMANO JOINT FORUM

OF RELIGIOUS ORGANISATIONS...PROPOSED INTERESTED PARY

EX PARTE: PARLIAMENTARY SERVICE COMMISSION

RULING

1. These proceedings were provoked by a Gazette Notice No. 6517 published in the Kenya Gazette of 7th July, 2017 which according to the ex parte applicant sought to vary, to their disadvantage and detriment, the remuneration and benefits payable to, or in respect of, state officers serving in Parliament, contrary to basic labour law and practice and the need to secure the independence of Parliament as a governance institution.

2. It was contended that the Respondent has no mandate to revise or set the daily subsistence allowance/per diem rates payable to state officers and/or public officers serving in Parliament or in the judiciary, this being a matter falling within the powers of the Parliamentary Service Commission and the Judicial Service Commission.

3. It was therefore contended that by abolishing and/or reducing the said facilitative allowances, the Respondent acted ultra vires its lawful mandate and encroached into/usurped the Applicant's mandate under Article 127(6) of the Constitution.

4. It was therefore the applicant's case that the impugned Gazette Notice is unreasonable, ignored relevant considerations and the law, is discriminatory, in bad faith, arbitrary, goes against the legitimate expectations of the Applicant and those affected, is irregular, ultra vires, illegal, null and void.

5. The ex parte applicant therefore seeks to have the said Gazette Notice quashed.

6. This ruling however arises from four applications by the proposed interested parties to be joined to these proceedings.

7. It is therefore important at this stage to set out the principles that guide the decision to join a party to these kinds of proceedings.

8. Order 53 rule 3(2) and (4) of the ***Civil Procedure Rules*** provides:

> ***(2) The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.***
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> ***(4) If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct.***

9. Therefore whereas subrule (2) of Order 53 rule 3 aforesaid restricts persons who should be served to those who are "***directly affected",*** subrule (4) on the other hand gives the Court wide discretion to order that the application be served on any other person notwithstanding that that person ought to have been served under subrule (2) or not and the Court's decision to do so is only subject to ***such terms (if any) as the court may direct.*** It is therefore my view that unlike under subrule (2) the Court has unfettered powers under subrule (4) and in my view this power is meant to ensure that justice is done. Therefore where the Court is of the view that a person ought to be joined to the proceedings the Court is properly entitled to direct that that person be joined notwithstanding that such a person has not made an application to Court. Under such circumstances a formal application is not necessary. This, in my view is my understanding of the Court of Appeal's opinion in **West Kenya Sugar Company Limited vs. Kenya Sugar Board & Another [2014] eKLR** where it expressed itself in paragraphs 18-19 as hereunder:

> **"[18]. In the absence of rules regulating the procedure, a person who is not a party to the judicial review application and who intends to oppose the application can approach the court in any manner of approaching the court permitted by the law. He can file an affidavit giving reasons why he considers himself to be a proper person and the grounds on which he intends to oppose the application. In the absence of rules, leave of the court to file such affidavit is not required. Further, a requirement for leave would mean that an application for leave has to be heard and determined before the hearing of the application which may result in unnecessarily protracted proceedings. The affidavit should be served on all parties in good time before the hearing of judicial review application. In this case, such an affidavit was filed and served. The learned judge, erroneously in our view, considered the filing of an affidavit without leave as act of abuse of process of the court. At this stage and where the issue is a simple one, the court can on perusing the affidavit and replying affidavit or upon hearing brief arguments and without going into the merits, determine on *prima facie* basis whether or not a person intending to be heard is a proper person. If the decision is in favour of the person applying, the court should in the second stage consider the grounds of opposition on the merits at the appropriate time.**
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> **[19] The phraseology *"and appears to the High Court to be a proper person"* in rule 6 of Order 53 necessarily raises the question of *locus standi* in the same manner as the phrase *"it considers that the applicant has a sufficient interest"* under the English rule. In Inland Revenue Commissioners case (supra) the House of Lords held in essence that, except in simple cases where it was appropriate at the earliest stage to find that the applicant for judicial review has no interest at all or sufficient interest, it was wrong to treat *locus standi* as a preliminary issue and in such cases the question of sufficient interest must be taken together with the legal and factual context of the application. In Inland Revenue Commissioner case, Lord Wilberforce put it this way at p. 630 in:**
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> ***"There may be simple cases in which it can be seen at the earliest stage that the person applying for judicial review has no interest at all, or no sufficient interest to support the application, then it would be quite correct at the threshold to refuse him leave to apply. The right to do so is an important safeguard against the courts being flooded and public bodies harassed by irresponsible applications. But in other cases this will not be so. In these it will be necessary to consider the powers and duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties, and to the breach of those said to have been committed. In other words, the question of sufficient interest cannot, in such cases be considered in the abstract, or as an isolated point. It must be taken together with the legal and factual context."***
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> **From what we have said above, those words apply with equal force to the case of a person seeking to be heard as a proper person in opposition to application for judicial review. It follows that where the case is not so obvious the final determination of the question whether a person seeking to be heard in opposition is a proper person should be made after the judicial review application has been heard on the merits and after his grounds of opposition have been heard. Furthermore, from close reading of rule 6 of order 53 together with rule 3(2) and 3(4) it seems that the phrase "*proper person*" is wider in scope of class of persons than the phrase "*all persons directly affected*". We say so because although the application ought to be served on "*all persons directly affected*", rule 3(4) gives court discretion at the hearing to order service on any other person "*whether or not he is a person who ought to have been served under the foregoing provisions of this rule*."**

10. However where an application is made under subrule (2), it is incumbent upon a person who alleges that he or she ought to have been served to show how the proceedings directly affect him or her. The mere fact, however that a person has made such an application does not preclude the Court from invoking its unfettered discretion under subrule (4) to have such a person joined to the proceedings even if the applicant does not satisfy the Court that the person is directly affected thereby. The word "direct" is defined by ***Black's Law Dictionary***, 9th Edn. page 525 as "straight; undeviating, a direct line, straightforward, immediate." It must be kept in mind that judicial review orders are concerned with the decision making process rather than the merits of the decision. Therefore judicial review proceedings ought not to be modified into a vehicle through which matters which ought to be ventilated in other forums are to be determined. This was the position in **John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003,** where it was held that for the Court to require the alternative procedure to be exhausted where the alternative procedures are more

convenient and appropriate prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort. Similarly, in **The Republic vs. The Rent Restriction Tribunal and Z. N. Shah & S M Shah Ex Parte M M Butt Civil Appeal No. 47 of 1980** the Court of Appeal held that if there is an equally convenient, beneficial and effective remedy available a Court will generally decline to exercise its discretion in favour of an applicant for a prerogative order.

11. Since judicial review orders are concerned with the decision making process rather than the merits of the decision, a party who contends that he or she is directly affected by the proceedings ought to bring himself or herself within the ambit of the judicial review jurisdiction and ought not to apply to be joined thereto with a view to transforming judicial review proceedings into ordinary civil litigation. In my view, for a party to be joined to the proceedings under Order 53 rule 3(2) aforesaid the applicant ought to disclose to the Court how he or she is directly affected. The Court cannot be expected to act in the dark by joining such a person with a view to satisfying itself as to the effect of the orders sought on the applicant at a later stage of the proceedings.

12. However, the decision whether or not to join a party is an exercise of discretion and if no substantial purpose or benefit will be gained by the joinder of a person to the proceedings and where the said joinder will militate against the expeditious disposal of the said proceedings which by their nature ought to be heard and determined speedily, the Court will be reluctant to join the intended party to the proceedings.

13. In an application of this nature, the applicant ought to adduce some material upon which the Court can determine whether the applicant is directly affected by the proceedings. In judicial review especially where a party's interests can be catered for by another party participating in the proceedings, there would be no reason to join the party intending to join the proceedings as a party thereto. It is therefore upon the applicant to satisfy the Court that the issues he or she intends to raise, which issues are relevant to the matter for determination before the Court, cannot adequately be canvassed by any of the parties before the Court.

14. In this case the Law Society of Kenya (hereinafter referred to as "the Society") seeks to be joined to these proceedings as an interested party. The Society's case, as presented by **Mr Nzamba Kitonga**, SC was that there were previous legal proceedings being Petition No. 281 of 2013 in which the Society took the position that the purported increment in remuneration of members of Parliament was unlawful and unconstitutional. The Society therefore sought to be permitted to participate in these proceedings as an interested party in order to bring to light the relevance of the said proceedings in order to enable the Court make a full determination since in the society's view, the matter is not only *res judicata* but amounts to an abuse of the Court process.

15. It was also submitted that the Society is charged with assisting in public interest litigation in law and the Constitution. This case, it was submitted is a public interest matter touching on the law and the Constitution hence the Society is entitled to join.

16. Thirdly, it was submitted that since the matter touches on the deployment of public funds, the Society under its objectives ought to be permitted to join these proceedings. It was however disclosed that considering the position taken by the Society in the said petition, the Society cannot properly be considered as an *amicus* but as an interested party.

17. This application was opposed by the ex parte applicant on the ground that this Court does not require the participation of the Society in order to determine the relevance of the proceedings in the petition to these proceedings but that had the Society sought to be joined to these proceedings as an *amicus* the ex parte applicant would not have objected to their joinder herein.

18. I agree with the ex parte applicant that the mere fact that a matter is *res judicata* does not necessarily warrant the parties in the earlier proceedings being joined in the subsequent judicial review proceedings, if that issue can be properly brought to the Court by any other party to the proceedings. However, if that cannot be done, it is my view that *res judicata* being an issue of both law and fact may require that a party to the earlier proceedings be joined to judicial review proceedings.

19. In this case the Attorney General is as yet not a party to these proceedings. Although the Law Society of Kenya has urged the Court to join him to these proceedings no one can tell whether he will in fact participate herein.

20. Apart from that section 4 of the ***Law Society of Kenya Act***, sets out the objectives of the Society as inter alia, to assist the Government and the courts in all matters affecting legislation and the administration and practice of the law in Kenya and to protect and assist the public in Kenya in all matters touching, ancillary or incidental to the law. I agree that ordinarily these objectives ought to qualify the Law Society of Kenya as an *amicus*. However it is contended that the Society has already taken a stand on the issue.

21. In **Trusted Society of Human Rights Alliance vs. Mumo Matemo & 5 Others, Petition No. 12 of 2013** it was held that:

> **"On the other hand, an amicus is only interested in the Court making a decision of professional integrity. An amicus has no interest in the decision being made either way, but seeks that it be legal, well informed, and in the interest of justice and the public expectation. As a friend of the Court, his cause is to ensure that a legal and legitimate decision is achieved."**

22. As this Court held in **Judicial Service Commission vs. The Speaker of the National Assembly & Another Petition No. 518 of 2013**:

> **"*The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2012*, defines an interested party as "a person or entity that has an identifiable stake or legal interest in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation". From the foregoing it is clear that an interested party as opposed to an amicus curiae or a friend of the court may not be wholly indifferent to the outcome of the proceedings in question. He is a person with an identifiable stake or legal interest in the proceedings hence may not be said to be wholly non-partisan as he is likely to urge the Court to make a determination favourable to his stake in the proceedings. *Amicus curiae* on the other hand is defined as a "an expert on an issue which is the subject matter of proceedings but is not party to the case and serves to benefit the court with their expertise." *Amicus curiae* is therefore a person who shows that he is possessed of some expertise relevant to the matters for determination before the Court. Such a person as is expected of**

experts is required to be non-partisan and his role is meant to enable the Court get a clear picture of the issues in dispute in order for the Court to arrive at an informed and just decision. Therefore the mere fact that the applicant herein may be partisan does not necessarily render him unsuitable to be joined in these proceedings as an interested party."

23. It is therefore my view the Law Society of Kenya is a proper party to be joined to these proceedings and I hereby direct that the Law Society of Kenya will be the 2nd interested party.

24. With respect to the application by **Hon Benson Mutura**, it was contended that the applicant was the immediate former Member of Parliament for Makadara Constituency in Nairobi City County and as the former MP for Makadara and as a Kenyan he has a duty under Articles 3, 22 and 258 of the Constitution to defend and enforce the Constitution and enforce the Bill of Rights which includes ensuring that all public officials follow the law and public funds are not misappropriated, stolen or used corruptly.

25. According to him, having sat in the House of Parliament throughout the deliberations of the subject matters herein he is well versed and competent to inform the Honourable Court of the correct position. He disclosed that by a letter dated 10th September, 2014 he took up the issue of mileage with the Speaker of the National Assembly pointing out to him the exorbitant payments that Members of Parliament were taking home to the detriment of the Kenyan tax payers. By a letter dated 15th October, 2015 he requested the Salaries and Remuneration Commission to abolish the payment of mileage claims to the Members of Parliament noting that the system used was prone to abuse as Members of Parliament were not required to prove that they had indeed travelled to their local Constituencies for reimbursement of mileage expenses.

26. According to the applicant, his views to the *ad hoc* Committee on Members Welfare partly informed the publication of the impugned Gazette Notice No. 6517.

27. I must disabuse the notion that under Articles 3, 22 and 258 of the Constitution all Kenyans have a right to be joined to judicial review proceedings. If that was the criteria for joinder to such proceedings, the whole purpose of judicial review proceedings would be lost due to the sheer number of litigants. Apart from the said Articles, an applicant must show that the issues he intends to raise which must be germane to the determination of the application are unlikely to be raised by any of the partes to the proceedings.

28. In light of the alleged role played by the applicant in the decision to publish the impugned Gazette Notice, I allow **Hon. Benson Mutura** to be joined as the 3rd interested party herein.

29. As regards the application by **Rashmin Chitnis, Rev. Japhet Kiambi, Charles K. Wambugu, Rev. Mukundi Cheche, Rev. Dr. Willy Mutiso & Rev. Dr. Stephen Kanyaru** who operate under the auspices of Ufungamano Joint Forum of Religious Organisations, it was contended that the said organisation has been at the forefront in the fight against the reversal of the recommendations of the Respondent by the political class and is better placed to contribute to the proceedings herein and to enable the Court make an informed determination. According to the applicant unless they are joined to these proceedings, the already overburdened tax payers will be denied a chance to raise their voice in outrage against the ex parte applicant for seeking to suspend the implementation of the said Gazette Notice.

30. According to the applicants, they have been at the forefront in the agitation for the realization of the Constitution of Kenya, 2010 and therefore feel that they have a duty under Articles 3, 22 and 258 of the Constitution to defend and enforce the said Constitution and enforce the Bill of Rights which includes ensuring that all public officials follow the law and public funds are not misappropriated, stolen or used corruptly.

31. It is not in doubt that all Kenyans have the duty under the aforestated constitutional provisions to uphold, promote and protect the Constitution. However it would be unrealistic to allow all Kenyans to be joined to judicial review proceedings. In my view whereas the locus to institute proceedings geared towards the protection of the Constitution is justifiably wide and must not be unduly restricted, the decision to join judicial review proceedings ought not to be equated to the right to commence such proceedings otherwise expedition in determining such proceedings which is one of the hallmarks of judicial review proceedings would be lost.

32. As already mentioned hereinabove, the purpose of the judicial review process is to determine the process through which the decision was arrived at and not its merits. This Court will therefore not determine whether the salaries and benefits in issue are warranted. If the Court finds that the process was not adhered to, save for issues dealing with jurisdiction, the Court would simply set aside the decision and direct that a lawful process be undertaken. Public interest however is just like public policy. Whereas the Courts have recognised that the latter may be a factor to be considered in the exercise of discretion, it is an indeterminate principle or doctrine which has been branded an unruly horse, and when you get astride it, you never know where it will carry you. See **Kenya Shell Limited vs. Kobil Petroleum Limited Civil Application No. Nai. 57 of 2006 [2006] 2 KLR 251.**

33. It is now trite that contravention of the Constitution or a Statute cannot be justified on the plea of public interest as public interest is best served by enforcing the Constitution and Statute as was held in **Republic –vs- County Government of Mombasa Ex-Parte – Outdoor Advertising Association of Kenya (2014) eKLR** thus:-

"I have no hesitation in finding that the respondent's decisions of the 29th May 2013 and the 8th October 2013 were made in breach of the rules of natural justice for the hearing of the affected persons and in contravention of their legitimate expectation created by the provisions of the Physical Planning Act and borne of the development approvals given by the national Roads Authority and the respondent's predecessor upon payment of the requisite licence fees. There can never be public interest in breach of the law, and the decision of the respondent is indefensible on public interest because public interest must accord to the Constitution and the law as the rule of law is one of the national values of the Constitution under Article 10 of the Constitution. Moreover, the defence of public interest ought to have been considered in a forum where in accordance with the law, the ex-parte applicant members were granted an opportunity to be heard. There cannot be public interest consistent with the rule of law in not affording a hearing to a person likely to be affected by a judicial or quasi

judicial decision."

34. In my view to invoke the issue public outrage in the proceedings of this nature would be an appeal to the emotions of the Court rather than the law and in my view whereas such consideration may well be relevant in a merit investigation, it is, with due respect, not such an important factor in proceedings of this nature to warrant the joinder of a person.

35. Accordingly I do not see any justification for joining the said applicants to these proceedings. Their application is therefore disallowed.

36. The other application for joinder is brought by **Okiya Omtatah Okoiti**. According to him, grave matter which is before the Court is of huge public interest as it affects the enjoyment of rights and fundamental freedoms enshrined in the Bill of Rights, and other provisions of the Constitution, and touches on the basic structure of the Constitution of Kenya 2010.

37. According to the applicant, he has since 2008 been involved in litigation concerning the subject matter herein, and the instant proceedings have a direct negative bearing on the decision of a three-judge bench of this Court in the case of **Okiya Omtatah Okoiti & 3 Others vs. Attorney General & 5 Others [2014] eKLR**. It was his case that he has an identifiable stake or legal interest and duty in these proceedings due to the decision of a three-judge bench of this Court in the case of **Okiya Omtatah Okoiti & 3 Others vs. Attorney General & 5 Others [2014] eKLR.**

38. In light of my decision in the application by **Hon. Benson Mutura**, I agree that in the absence of the Attorney General in these proceedings, the participation of the applicant herein may be necessary. Accordingly, **Okiya Omtatah Okoiti** is hereby joined as the 4th interested party herein.

39. I also agree that the Hon. Attorney General ought to be joined as a party to these proceedings. Accordingly unless he opines otherwise, the Attorney General shall be the 1st interested party to these proceedings.

40. I must point out that the mere fact that parties are joined to the proceedings at this stage does not amount to a bar to the Court from removing them from the proceedings if their presence clearly becomes unnecessary or untenable. Accordingly, the parties including the interested parties will be expected to restrict themselves to the matters relating to the process rather than the Respondent's decision on merit and the Court will not permit itself to be engaged in merit oriented issues which do not strictly fall within the purview of judicial review jurisdiction.

41. The costs of these proceedings shall be in the cause.

42. It is so ordered.

Dated at Nairobi this 31st day of January, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kajwang, Mr Kaluma and Mr Miyare for the ex parte applicant

Mr Wandabwa for the Respondent

Mr Nzamba Kitonga for the 2nd interested party

Mr Miano for Mr Kibe Mungai for the 3rd interested party

CA Ooko