



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**  
**PETITION NO. 228 OF 2016**

**BETWEEN**

**CONSUMER FEDERATION OF KENYA (COFEK)**

**suing through its officials namely STEPHEN MUTORO,**

**EPHRAIM KANAKE and HENRY OCHIENG.....APPLICANT**

**VERSUS**

**UNIVERSITY OF NAIROBI.....1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY FOR EDUCATION,**

**SCIENCE AND TECHNOLOGY.....2<sup>ND</sup> RESPONDENT**

**PROF. PETER. M.F. MBITHI.....3<sup>RD</sup> RESPONDENT**

**DR. IDLE OMAR FARAH.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. In **Meme vs. Republic [2004] 1 E A 124**, a decision cited with approval by the Supreme Court of Kenya in the case of **Communication Commission of Kenya & 4 Others vs. Royal Media Services Ltd & 7 Others [2014] eKLR**, the High Court observed that a party could be enjoined in proceedings:

- i. *[if] his presence will result in the complete settlement of all the questions involved in the proceedings;*
- ii. *... to provide protection for the rights of a party who would otherwise be adversely affected in law.*
- iii. *... to prevent a likely course of proliferated litigation”.*

2. Rule 7 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (“ the Mutunga Rules”) provides that a person may with the leave of the court make an oral or written application to be joined as an interested Party. This is besides the authority also donated to the court, under Rule 7(2) of the same rules, to join any Interested Party to proceedings before it. Rule 2 of the Mutunga Rules defines an Interested Party as 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”.*

3. The concept of an Interested Party has been expounded further by the decision of the Supreme Court of Kenya in the case of **Trusted Society of Human Rights Alliance –v- Mumo Matemo & 5 Others [2014]eKLR** where the court held that:

***“ [18] Consequently, an Interested Party is one who has a stake in the proceedings, though he or she was not 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”.***

4. It is with the forgoing principles and propositions of law in mind that, the application dated 29<sup>th</sup> June 2016 filed herein on the same date must be considered.

5. The application is by Dr (Fr) Wamugunda Wakimani and Prof. Timothy Waema. They both seek to be enjoined to the proceedings as Interested Parties. They are both employees of the 1<sup>st</sup> Respondent. Both are faculty. They claim that the Petitioner has unnecessarily dragged their names to the proceedings herein. They say the reference in the pleadings to and the exhibition of documents making reference to their names are both in bad faith.

6. Additionally, the two Applicants have grounded their application on the basis that they have been “negatively [sic] adversely mentioned by the Petitioner who has painted them in bad light” before the court. The Applicants also contend that the Petitioner has adduced misleading facts touching on the Applicants’ work arrangements and professional undertakings with the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> Applicant also alleges defamation.

7. The Applicants state that it is necessary that they be enjoined in the proceedings to enable them bring forth information and facts which will enable the court to understand and appreciate the Petition better. The Applicants also contend that any determination of the Petition in their absence (as parties) may lead to them to lose their employment and that they may never get a forum to set the record straight or avoid such disastrous consequences.

8. The background to the application is that the Petition herein was filed on or about 6<sup>th</sup> June 2016. It was filed as a public interest litigation. The Petitioner alleged that the 1<sup>st</sup> Respondent is being mismanaged and misgoverned by an nonfunctional and under-functional council (or Board) with the 4<sup>th</sup> Respondent as the chairperson. The Petitioner alleged that the Council of the 1<sup>st</sup> Respondent has been dysfunctional and does not work in the interest of the public despite benefiting from public funds. The Petitioner also alleged that the 1<sup>st</sup> Respondent as envisaged under Articles 10, 35, 46, 232 and 260 of the Constitution. The 2<sup>nd</sup> Respondent was accused of appointing a non-citizen to the council of the 1<sup>st</sup> Respondent and failing to implement a public service circular letter. The 4<sup>th</sup> Respondent was accused of being conflicted while the 3<sup>rd</sup> Respondent was accused of stage-managing the (re)appointment of the 1<sup>st</sup> Applicant as the Dean of students. Annexed to the affidavit in support of the Petition was a set of minutes of a special meeting of the 1<sup>st</sup> Respondent’s council which was convened to consider the disciplinary case of one Prof. Bernard N.K. Njoroge. By a majority vote, the minutes reveal the council resolved to recommend to the appointing authority the dismissal of the said Prof. Bernard N.K. Njoroge.

9. None of the reliefs sought touch on either of the Applicants.

10. The Applicants are however worried that in their absence adverse orders may be made. The Applicants speculatively state that if the Petition is successful then they may be susceptible to actions in court or dismissal from employment. They want a chance to explain themselves.

11. Mr. Kiptoo, learned Counsel for the Applicants stated that they stood to suffer prejudice if they were not enjoined to the instant petition. Counsel added that the court would benefit from the Applicants' participation.

12. Mr. Kiptoo received unsolicited support from the Respondents' counsel who submitted that there was an allegation that the Interested Parties were being treated differently and it was in the courts interest to hear the Applicants.

13. Mr. Aketch, for Petitioner, opposed the application. Counsel stated that the Petition did not in any way touch on the Applicants. The Petitioner, the court heard was simply seeking to show bad governance. Counsel added that the Applicants' participation was not necessary in reaching any determination as the Respondents were in a position to avail all the evidence required. Mr. Aketch stated that the Applicants stood to suffer no prejudice if the application was disallowed.

14. It is now clear that parties are not to be enjoined in proceedings as a matter of course. A party must illustrate the stake claimed in the litigation prior to being enjoined. Merely because a party's name is mentioned or referred to by a party will not suffice. The question to be asked by the court is what is a party's stake in the litigation. Secondly, will the party be of any assistance if enjoined. Thirdly, does the party stand to suffer any prejudice if the application is denied and, if so, how will the party be affected.

15. I have perused the Petition. I have also considered the submissions by counsel. I have further reflected on the matter.

16. The Petition in the main has absolutely nothing to do with the Applicants. The substratum of the Petition is that the Respondents stand accused of bad governance. As an example of such bad governance the 3<sup>rd</sup> Respondent is accused of having favoured the Applicants. The Applicants state that they want to counter such allegations. I hold the view that this would be unnecessary. The 3<sup>rd</sup> Respondent and the 1<sup>st</sup> Respondent as well are in a perfect if not better position to demonstrate or answer any questions or allegations of bias and favoritism. They are the ones accused and not the Applicants. There was indeed no suggestion that the Respondents story was likely to be asymmetrical to that of the Applicants.. I do not view it that the Applicants owe the court any duty at all.

17. A look and review of the reliefs sought is also significant. The reliefs sought read as follows:

- a. ***That the Honourable Court be pleased to declare that the Council of the 1<sup>st</sup> Respondent, as constituted is unlawful.***
- b. ***That the Honourable Court be pleased to order and hereby orders that the 4<sup>th</sup> Respondent cannot hold both positions of Chairman of Council and Chairman of the University of Nairobi Enterprise Service Ltd due to severe conflict of interest.***
- c. ***An order of Certiorari to issue to quash the letter dated 26<sup>th</sup> May 2016 recommending immediate dismissal of Prof. Bernard Njoroge.***
- d. ***An order of mandamus to issue compelling the 1<sup>st</sup> Respondent to comply with the applicable law and circular by the Chief of Staff and Head of the Public Service dated 3<sup>rd</sup> February 2016.***
- e. ***That the Honourable court be pleased to issue an order to reconstitute the 1<sup>st</sup> Respondents council.***
- f. ***That the Honourable court be pleased to issue any other or further remedy pursuant to Article 23(3) that the Honourable Court shall deem fit to grant.***
- g. ***An order that the Respondents do pay the costs of this Petition.***

18. None of the above reliefs would in any way affect or touch on the Applicants. The Applicants did not state with any specificity how any of the reliefs if granted would affect them save to make a speculative suggestion that a decision in this case may prompt actions against them. I am not convinced that any decision of this court on the petition will specifically affect the Applicants.

19. From the pleadings, I am unable to find that the Applicants have any legitimate stake or interest in the

matter before the court given also the nature of the constitutional reliefs sought by the Petitioner.

20. I conclude that the application for joinder is not well founded and I would dismiss the same.

21. Application dated 29<sup>th</sup> June 2016 is dismissed but with no order as to costs.

**Dated, signed and delivered at Nairobi this 30<sup>th</sup> day August, 2016**

***J.L.ONGUTO***

**JUDGE**