

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

ELRC CONSTITUTIONAL PETITION NO. E 015 OF 2025

(Before Hon. Justice Ocharo Kebira)

THOMAS MOSOMI OYUGI
PETITIONER

VERSUS

THE TEACHERS SERVICE COMMISSION.....1st
RESPONDENT

AND

NATIONAL ASSEMBLY2nd
RESPONDENT

CABINET SECRETARY, MINISTRY OF
EDUCATION.....3rd
RESPONDENT

THE ATTORNEY GENERAL.....4TH

RESPONDENT

AND

CPA DR. ADANO SALAD KADUBO, PHD.....

INTENDED INTERESTED PARTY

RULING

1 By a Notice of Motion Application dated 25th July 2025, the Intended Interested Party seeks the following orders:

- I. THAT this Application be dispensed with in the first instance.
- II. THAT Pending the *inter partes* hearing and determination of this application, there be a stay/arrest of the delivery of the ruling scheduled for 19th August,2025.
- III. THAT the Court be pleased to join **CPA DR. ADANO SALAD KADUBO, PhD**, as an interested party in the matter herein.
- IV. THAT upon being joined, the said Interested Party be granted unconditional leave to file a replying affidavit

and any other relevant documents within such a period as the Court may deem fit, to assist the Court in the determination of the petition.

V. THAT the costs of this application be provided for.

2 The evidentiary basis to support the application is in the form of the Intended Interested Party's affidavit dated 25th July 2025. It is appropriate to set out a relatively comprehensive summary of the applicant's deposition.

a. **That** he is interested in applying for the position of Secretary/Chief Executive Officer at the Teachers Service Commission.

b. **That** he has always been interested in the position and keen to succeed the outgoing CEO, Dr Nancy Macharia. At the time the position was advertised, the CEO was still in office, and her term was set to end on 6th June 2025. As such, there was no vacancy in the office of the Secretary of the 1st Respondent.

c. He expected that once the position became vacant, the 1st Respondent would advertise it in local newspapers with nationwide circulation, such as The

Daily Nation, The Standard, and The Star, considering that the role of Secretary/Chief Executive Officer at the Commission is a senior position.

d. **That** he was equally sure that the vacancy ought to be first declared in the Kenya Gazette.

e. **That** surprisingly, the position was only advertised in the My government newspaper on 6th May, 2025 and on the 1st Respondent's website.

f. **That** My government newspaper is not common and has no nationwide circulation, which is why he was not aware of the advertisement and declaration of the vacancy. The 1st Respondent ought to advertise in a newspaper with a countrywide coverage to reach as vast a population of potential applicants as possible.

g. **That** causing an advertisement without the occurrence of a vacancy or declaration of a vacancy

is unconstitutional as it amounted to recruitment for a non-existent position, contrary to the principle of the Rule of Law under Article 10 of the Constitution.

- h. **That** it is only fair and in the interest of justice that he and all other qualified and or interested persons, whenever they may be throughout the Republic of Kenya, be granted a fair and reasonable opportunity to submit their application for the position.
- i. That the Applicant seeks to be enjoined in these proceedings both on his own behalf and on behalf of the many other Kenyans who may have been interested in the position but found themselves in a similar predicament due to the 1st Respondent's bias, lack of transparency, and mischievous conduct in the process of filling the position of the Secretary / Chief Executive Officer.

j. **That** he stands to be affected by the decision of this Court. His interest will not be well articulated unless he appears in the proceedings.

k. **That** there is someone in the acting capacity position for the office of the Secretary / Chief Executive Officer at the 1st Respondent's. Consequently, there shall be no prejudice suffered by the 1st Respondent and or any other party if the orders sought are granted. There will be no disruption to the day-to-day operations of the Teachers Service Commission. The Court need to fairly and conclusively determine the constitutional issues before it by giving all persons a fair chance and opportunity to be heard.

l. **That** his participation in these proceedings will aid the Court to arrive at a just determination of the petition herein. He has come across new and compelling information/evidence, as well as authorities that have not been presented to the Court

by the current parties, which would assist in determining this matter in a just and fair manner.

m. **That** section 16[2] of the Teachers Service Commission Act is unconstitutional and, in consequence, the recruitment process of the Secretary/ Executive Officer of the 1st Respondent. The Recruitment process ran afoul of the National values and Principles of good governance, rule of law, Integrity, transparency and accountability.

n. **That** he supports the Petitioner's case herein.

3 The Respondent opposed the application through an application sworn by DR. Jamleck Muturi John, MBS, sworn on 16th September 2025, on the following principal grounds;

a. That the instant application does not meet the threshold for joinder application set out in the Supreme Court of Kenya decision in the case of

Francis Kariuki Muruatetu v Republic & 5 others [2016] eKLR.

b. That the purpose, object and scope of the instant application violates the duty and role of an Interested Party as set out by the Supreme Court of Kenya in the case of **Methodist Church in Kenya v Fugicha & 3 others [2019] KESC 59[KLR]**

c. That the Applicant has not placed forth any material or evidence to demonstrate that his participation in the matter as an Interested Party will add novel, critical and weighty issues to facilitate complete adjudication of the matter before the Court, as his submissions are merely a replica of those by the Petitioner.

d. That, save for the alleged personal interest in becoming the Secretary/Chief Executive Officer of the Commission, the Applicant adds nothing new to the instant petition and application. The grounds in

support of the application are strikingly similar to those already elucidated by the petitioner in both his application and petition.

e. The Intended Interested Party admits and discloses in Paragraph 19 of the supporting affidavit that he seeks to be joined intentionally to support the Petitioner. Furthermore, the averments in paragraphs 19 [a] to [h] of the supporting affidavit are exact reproductions of the petitioner's petition and application.

f. That it is clear that the Intended Interested Party is solely interested in becoming the Secretary/ Chief Executive Officer of the 1st Respondent. Personal interest in the position in itself is not a justifiable ground for joinder in the instant proceedings, as the interest is neither legal nor identifiable, nor does it demonstrate a duty.

g. That in the event of non-joinder, the applicant has not demonstrated the prejudice he may suffer. As

such, he has not shown sufficient cause to be joined in the proceedings.

h. That the nature of the instant petition is that of a public interest litigation, while the application by the Intended Interested Party is purely to further his personal interest in becoming the Secretary/ CEO of the 1st Respondent. The two positions cannot marry.

4 The 2nd,3rd and 4th Respondents did not file grounds of opposition or replying affidavits to the Interested Party's application.

The Intended Interested Party's Submissions.

5 Counsel for the Intended Interested submitted that the law for joinder of Interested parties for constitutional petitions is set out in the Constitution of Kenya [Protection of Rights and Fundamental Freedoms] Practice and procedure Rules, 2013. Section 2 thereof defines an Interested Party as,

a person or entity that had an identifiable stake, legal interest, or duty in the proceedings before the court but is not a party to the proceedings or may not directly be involved in the litigation.

6 Counsel further submitted that Rule 5[d][ii] bestows on the court to order at any stage of proceedings, either upon or without the application of either party, and on such terms as may appear just that the name of any person who ought to have been joined, or whose presence before the court may be necessary to enable the court adjudicate upon and settle the matter, be added.

7 Counsel submitted that the issue of joinder of an interested party was elaborately dealt with by the Supreme Court in the case of **Trusted Society of Human Rights Alliance v Matemo & 5 others [2014] eKLR**, where it stated;

“18. 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.”

8 It was further submitted that the Supreme Court in the case of **Francis Kariuki Muruatetu Ltd & another v Republic & 5 others [2016] eKLR** set out the principles applicable in an application for joinder as an Interested Party. The Applicant must demonstrate an interest or stake he or she has in the matter; the prejudice to be suffered in case of non-joinder; and the submissions he or she intends to make before the court, which must not be a replication of what the other parties will be making before the court.

9 The Applicant, unlike the Petitioner herein, is interested in applying for the position in question. He has a discernible stake and interest, as well as a duty to ensure that the veracity of matters laid before the Court is carefully ascertained. He has always been interested in the position of Secretary/Chief Officer of the 1st Respondent and is

keen to succeed the outgoing CEO. Due to the manner in which the 1st Respondent handled the matter, the advertisement for the position, and the timeline, his application lapsed before he could submit it.

- 10 It was contended that the Intended Interested Party would suffer prejudice in the event of non-joinder. His interests, along with those of other Kenyans in similar circumstances, would not be adequately articulated unless they are represented in the proceedings. His interests and those of other Kenyans who intended to apply but were excluded differ from those of the Petitioner in this matter. Both he and the other individuals are at risk of suffering irreparable loss.
- 11 The Petitioner herein has not indicated his interest in the position in question; the Applicant is apprehensive that the parties herein will inadequately articulate and canvass issues affecting him and the other Kenyans, who had an intention in applying for the position.

- 12 He intends to convince the Court that it has the jurisdiction to entertain the petition herein and the instant application. Furthermore, the impugned recruitment is contrary to both the provisions of Kenyan law and the principles of natural justice, as well as the stipulations outlined in the Teachers Service Commission's Human Resource Policies & Procedures Manual for Secretariat Staff.
- 13 The failure to advertise the vacancy in a medium with National coverage was contrary to the requirement in paragraph 16[1] of the Manual.
- 14 The 1st Respondent's action and omission regarding the advertisement is against the constitutional provisions against conflict of interest, and requires that the appointment of officials into the public service be done through an open, competitive, and merit-based process.
- 15 He intends to argue that he is representing the interests of young members of the society who, like him, are aggrieved by the blanket requirement of 10 years'

experience, which is discriminatory to qualified and interested but younger members of the public.

- 16 He intends to argue further that the advertisement vaguely stated under paragraph 5 thereof that the compensation and benefits for the position will be in accordance with the guidelines issued by the Salaries and Remuneration Commission, contrary to paragraph 16[2] of the 1st Respondent's Human Resources Policies & Procedure Manual, as read together with Section 37[4][e] of the Public Service Commission Act, which requires that an advertisement shall, inter alia, set out the proposed remuneration for the position.

The 1st Respondent's Submissions

- 17 The 1st Respondent submitted that the Applicant's application does not meet the threshold for joinder applications set out in the case of Francis Kariuki Muruatetu & another vs Republic and 5 others [2016] eKLR.

- 18 The application by the Applicant is a replica of the petition. There is nothing novel in the submissions of the Intended

Interested Party. The Applicant fails on the doctrine of relevance. He hasn't demonstrated that his participation will add novel, critical and weighty issues to facilitate complete adjudication of the matter.

19 The Applicant's interest is not only remote but also distant from the instant matter. He will not suffer any prejudice as the petition may as well be determined in favour of the party he supports. To support this point, reliance was placed on the case of **Kensalt Limited v Water Resources Management Authority [2018] KESC 56 [KLR]**.

20 It was further submitted that the object and scope of the instant application violates the duty role of an Interested Party, as set out in the case of **Methodist Church in Kenya v Fugicha & 3 others [2019] KESC 59[KLR]**.

21 The Applicant has, in his submissions, framed new issues not pleaded, canvassed or raised by the primary parties to the petition, thus extending the scope of the litigation

before the Court contrary to the principle set out in the Muruatetu case [supra].

Analysis and Determination

22 I have carefully considered the Intended Interested Party's application, the grounds on which it is based, the affidavit in support thereof, the replying affidavit filed by the 1st Respondent, and the submissions submitted by the Counsel for the parties, and a single issue for determination emerges: does the Intended Interested Party's application meet the legal threshold to warrant the orders sought.

23 The Constitution of Kenya [Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules, 2013 have made a significant contribution to the procedure for invoking fundamental rights under Article 22 of the Constitution of Kenya, 2010. Within the procedural framework, the vital power of the Court to determine who should be joined as a party to constitutional proceedings is set out under Rule 5[d][ii] thereof that:

“The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as appear just-

ii. Order that the name of any party who ought to have been joined, or whose presence before the court may be necessary in order to enable the court to adjudicate upon and settle the matter, be added.”

23. It is critical to point out that in constitutional proceedings of the type exemplified herein, it is desirable that the broadest possible participation should be allowed. In the case of **Meme v Republic & another [2004] 1KLR**, the Court stated;

“More fundamentally, however, was our concern that constitutional litigation, which touches on the public interest in such a central governance issue as corruption in public office, should not be restricted in its scope as a private matter, but should instead be opened up to all relevant stakeholders. We consider

the Constitution as such a vital framework of governance that any litigation touching upon it ought to involve any interested parties. So important is this principle that, in our view, the participation of interested parties in constitutional litigation should never be kept under restrictions of any technical rules. As constitutional interpretations and litigations are important matters embraced by the High Court's jurisdiction, we hold that this Court must retain a broad discretion for entertaining applications such as the one that has been brought by the Kenya Anti-Corruption Commission, by way of chamber summons."

24. However, in my view, the discretion must be engaged in a manner that will not stifle the applicability of other constitutional requirements, such as expeditious disposal of matters set out under Article 159 of the Constitution, and statutory provisions that speak to this, for instance, the overriding objectives of this court. The Constitution of Kenya [Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules, in

the context of an application like the instant one, through the Rule mentioned herein above, and the definition supplied for the term “Interested party”, balances the tension between the principle enunciated in the **Meme** case [supra], and the need not to stifle the applicability of the other constitutional, and statutory requirements, and their intended goals.

25. It bears repeating that the discretion to allow an application for joinder of a party into a constitutional litigation is not a discretion exercisable at large. It is exercised in favour of an Applicant seeking joinder only where their application meets the delineated criteria. Upon reviewing the submissions by Counsel for the parties, it was apparent that this was common cause.

26. On the principles guiding the joinder of new parties in ongoing constitutional litigations, the Supreme Court, in **Kensalt Limited v Water Resources Management Authority [2018] KESC 56 [KLR]**, citing the case **Francis Kariuki Muruatetu and another v Republic**

and Four others, Supreme Court Petition No. 15 of 2015, the

“17. One case in which this Court has in the past devoted its attention to joinder in ongoing causes is Francis Kariuki Mureatetu and Another v Republic and Four Others, We may regard that as laying down clear guiding principles, in the mode of common law practice, as sanctioned by the express terms of the Constitution of Kenya, 2010, Articles 163;In this context, we cite from paragraph 37 of the said decision: “The following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party: One must move the Court by way of a formal application. Enjoinment is not as of right, but at the discretion of the Court, hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

- i. The personal interest or stake that the 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.

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

iii. 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 other parties will be making before the Court.”

27. The Applicant submitted that he would suffer prejudice if he is not granted joinder. He has been interested in the position of Secretary/Chief Executive Officer of the 1st Respondent. The 1st Respondent's actions, which he considers unconstitutional and contrary

to the stipulations of its own Human Resource Policy and Practice manual, of not advertising the position through any medium other than My Government, contributed to his failure to apply. His desire remains just a dream. This is the interest he wishes to articulate if enjoined.

28. The gravamen of the Petition before this Court is the constitutionality or otherwise of Section 16 of the Teachers Service Commission Act. I find it considerably difficult to see how this interest relates directly to the subject matter of the Petition. At best, the interest is too peripheral.

29. I have thoroughly examined the supporting affidavit submitted by the Intended Interested Party and hold the clear view that it is not evident whether he was even qualified to apply for the position. He remains silent regarding his academic qualifications and has not provided any academic certificates, if he possesses any. His interest has not been demonstrated as existing. Therefore, this Court is reluctant to engage in speculation.

30. The Intended Interested Party, in his supporting affidavit, states that his participation in this matter will serve to bolster the Petitioner's case. This declaration merely indicates that he is not motivated by any personal interest. If this were the capacity he intended to assume, the most suitable role for him in the proceedings would be as a witness for the Petitioner. Ultimately, the Intended Interested Party has not sufficiently demonstrated a personal interest, which is not remote in the context of this petition.

31. Having failed to demonstrate that he has a personal interest in the Petition, which is sufficient and not remote or imaginary, the question whether he has shown that he will suffer prejudice if the order for joinder is not granted cannot be challenging. The straightforward answer is, he hasn't.

32. It was assertively stated that he possesses judicial precedents and new information, which he intends to present to facilitate the Court in reaching a just decision in this matter. These are decisions and information that the Petitioner has not disclosed. Surprisingly, this assertion is

unfounded. The supporting affidavit does not reveal any new information. Furthermore, the submissions lack authorities that support principles different from those cited by the Petitioner or other authorities that speak to the matters raised in the petition, but which have not been cited by the Petitioner.

33. Furthermore, as Counsel for the 1st Respondent asserts, the issues raised by the Intended Interested Party once enjoined in the Petition are largely the same as those extensively presented by the Petitioner in his petition. The submissions he plans to make before this Court do not seem to differ from those already submitted by the Petitioner. Consequently, the petition can be justly decided without his involvement as a party to the proceedings.

34. By reason of the foregoing premises, I come to the inevitable conclusion that the Intended Interested Party's application dated 25th July 2025 is hereby dismissed.

35. Orders accordingly.

**Read, signed and delivered virtually in Mombasa this
28th Day of October 2025.**

OCHARO KEBIRA

JUDGE

ORIGINAL