



Mohammed v Teachers Service Commission & another (Employment and Labour Relations Petition E070 of 2023) [2024] KEELRC 194 (KLR) (8 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 194 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E070 OF 2023**

MN NDUMA, J

FEBRUARY 8, 2024

BETWEEN

MUMINA HIRBO MOHAMMED PETITIONER

AND

TEACHERS SERVICE COMMISSION 1ST RESPONDENT

KENNETH MARANGU 2ND RESPONDENT

RULING

1. The 2nd respondent/applicant, Kenneth Marangu brought this application seeking to have his name struck out from the petition.
2. The application is premised on grounds 1 to 9 set out on the face of the chamber summons and buttressed in the supporting affidavit of the applicant the gist of which is that the substratum of the suit is based on an employee and employer relationship between the petitioner and the 1st respondent, TSC. That the applicant is not an employee of the applicant and no reasonable cause of action has been disclosed against the 2nd respondent. That the 1st respondent is a corporate body pursuant to Article 253 of *the Constitution* capable of suing and being sued and the 1st respondent is vested with mandate to delegate the performance of its functions to any member, officer, staff or agent. That the 2nd respondent merely chaired the impugned disciplinary committee that dismissed the petitioner as mandated by the 1st respondent and that cannot attract any actionable cause against him in person. That the petitioner has not acted in good faith in dragging the 2nd respondent to this suit. That the court allows the application accordingly.
3. The petitioner filed a replying affidavit to the application in which he alleges that judgment was entered against the applicant by Hon. Justice Byrum Ongaya J. on 10/3/2023 in a similar case being ELRC Pet. 159 of 2022 (Rose Mwendu Mutisyav TSC and Kenneth Marangu).



4. That, the declaration by the court in that matter is set out in the replying affidavit to the effect that the 2nd respondent lacked any constitutional and lawful authority to chair a disciplinary panel and make decision on behalf of the 1st respondent (TSC) to dismiss the petitioner from TSC service.
5. That the delegated authority to the applicant by the 1st respondent in this matter was void abinitio since the parliament had not in terms of section 11 of the *Statutory Instruments Act*, 2013 approved the delegation. That the 2nd respondent cannot escape liability in view of the aforesaid judgment in a similar matter. That the application be dismissed.
6. The parties have filed their respective submissions which the court has carefully considered together with their depositions.
7. The issue of a joinder of a party is governed by order 1 Rule 3 of the *Civil Procedure Rules*, which provide:-

"All persons may be joined as defendant against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions (i) alleged to exist whether jointly severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise."
8. The issue of joinder was well elaborated by the Court of Appeal in the case of Civicon Limited and 2 others, Civil Appeal No. 45 of 2014 [2015] eKLR where Makhadia, Ouko (as he then was) and M'Inoti JJA cited with approval the case of *Gurtner v Circuit* (1968) IA II 328 where Denning MR. R. stated as follows:-

...The only reason which makes it necessary to make a person a party to an action is that he may be bound by the result of the action, and the question to be settled therefore, must be a question in the action which cannot be effectively and completely settled unless he is a party.
9. Applying this test on the facts set out in the present petition, it is the court's considered finding that the declaratory orders sought against the 1st respondent are sufficient to resolve the dispute between the petitioner and his employer, the 1st respondent without citing the 2nd respondent as a party. It would suffice to have the 2nd respondent be called as a witness if at all in this matter without dragging him to the suit as a party.
10. In the court's view and finding, the 2nd respondent is not a necessary party in this matter since the role the 2nd respondent played rightly or wrongly was done on behalf of the 1st respondent and we find that the petitioner has not disclosed sufficient justification in this matter to join the 2nd respondent, an employee of the 1st respondent in this matter.
11. This suit cannot be won or defeated by the joinder or non-joinder of the 2nd respondent.
12. It is in public interest and justice that employees in public service are not unnecessarily dragged to litigation for only exercising duties rightly or wrongly delegated to them by their principals.
13. Accordingly, the application has merit and is granted with costs to the 2nd respondent.
14. The court strikes out the 2nd respondent from the suit as prayed.

It is so ordered

MATHEWS N. NDUMA

JUDGE



DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF FEBRUARY, 2024

Appearances

Mr. Mulaku for Respondents/applicant

Ms. Njeri Ngunjiri for Petitioner

Ekale: Court Assistant

