



**Elondanga v Deputy County Commissioner & 3 others; Andati (Interested Party)
(Judicial Review E001 of 2024) [2024] KEELRC 1127 (KLR) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1127 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
JUDICIAL REVIEW E001 OF 2024**

**JW KELI, J
APRIL 30, 2024**

BETWEEN

SAMUEL AMAMBIA ELONDANGA APPLICANT

AND

DEPUTY COUNTY COMMISSIONER 1ST RESPONDENT

REGIONAL COMMISSIONER 2ND RESPONDENT

COUNTY COMMISSIONER, KAKAMEGA COUNTY 3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 4TH RESPONDENT

AND

JOHN BARASA ANDATI INTERESTED PARTY

RULING

(On the Notice of Motion Application dated 19th March 2024 by the Interested Party & his Oral application of 26th April 2024)

1. The ruling is on a Notice of motion application by the Interested Party dated 19th March 2024 and filed on an even date and the oral application by the Interested party’s Counsel Mr. Omwenga requetsinhg for leave to respond to the Supplementary Affidavit of S.I. Macharia sworn on 22nd April 2024. The Notice of Motion application sought the following orders: -
 - a. Spent.
 - b. That pending the hearing and determination of this application this Honourable Court be pleased to stay the directions issued on the 18/3/2024 referring the instant suit out of the Court negotiations.



- c. That the Honourable Court be pleased to grant an order setting aside directions issued on 18/3/2024 for this matter to proceed to out-of-Court settlement.
 - d. That the Honourable Court to issue orders for this matter to proceed to hearing of the main Application.
 - e. That the costs of the application be borne by the Respondents.
2. The Notice of Motion was premised on the grounds on the face of the application and the grounds in the supporting affidavit of the Interested Party sworn on 19th March 2024 as follows: -
- i. The matter came up for hearing on 18th March 2024 and he was in Court.
 - ii. He stated that he was never served with the pleadings of the instant matter, only for the 1st, 2nd 3rd, and 4th Respondents to apply for the matter to proceed to Out-of-Court settlement.
 - iii. He states that he was a stranger to the deliberations by the Respondents in making the oral application to have an out-of-Court settlement and the said orders which culminated in the Court directions for out-of-Court settlement were obtained unfairly and unconstitutionally as the applicant was not consulted.
 - iv. The main application raised constitutional and triable issues that can only be resolved through a hearing of the main application.
 - v. He alleges that the Court's directions of 18/3/2024 referring the matter to out of Court settlement within 21 days be set aside, as the said application was made out of ill motive and his constitutional rights stand to be violated if the Court does not set aside the directions for out of Court settlement.
3. The Court on 20th March 2024, directed that the application be served on all parties and each party to file its response, and slated the hearing interpartes for 26th April 2024, when the main application was also coming up for mention before the Judge to confirm out- of- Court settlement.

Applicant/Respondent's application to withdraw Chamber Summons Application seeking leave to institute Judicial Review Application

4. During the mention on the 26th April 2024, the Applicant/Respondent confirmed receipt of a Supplementary affidavit sworn by S.I. Macharia (the 2nd Respondent) on 22nd April 2024, to the effect that the appointment of the Interested Party as the Assistant Chief II of Matiha Sub-Location had been withdrawn, and the applicant/respondent applied to withdraw his Judicial Review application (the Chamber Summons).

Interested Party/Applicant's Objection

5. The Interested party/Applicant objected to the withdrawal of the Chamber Summons. His Counsel informed the Court that he wanted the Court to determine his application of 19th March 2024, because he had not been served with the pleadings nor been involved in the out-of-Court settlement, and argued that he was entitled to a fair hearing.
6. The Interested Party/Applicant sought for fourteen days to file a response to the Supplementary affidavit by S.I. Macharia, the 2nd Respondent, stating that the same raised constitutional issues to be determined by the Court.



Answer to objection to the withdrawal application by the Respondents (State Counsel, Mr. Simiyu)

7. The State counsel agreed with the Ex parte Applicant's Counsel on the withdrawal of the Judicial Review Chamber Summons stating that the cause of action that led to the institution of the case was the Interested Party's appointment, which has since been withdrawn by the appointing authority.
8. The State Counsel stated that there is no foundation for another application and the Interested Party's application of 19th March 2023 had been overtaken by events. He contended that the decision was made, the interested party was notified and he was always in Court, and his advocate only came to Court after directions to refer the matter to out-of-Court negotiations had been issued.
9. That there is no suit to hinge the Interested Party's application and it would be better for the Interested Party to file a fresh application.

Answer to objection by the Ex parte Applicant

10. The Ex parte Applicant states that the application of 19th March 2024 has no basis as the suit has been withdrawn because the appointment decision which caused the Ex parte Applicant to come to Court, has been withdrawn, and that he cannot be forced to be in Court

Rejoinder by Interested party

11. The Interested Party/Applicant states that the decision had not been communicated to him and there is no authority to make a decision when a matter is pending in Court and there is a procedure that must be followed.

Determination

Issues for determination.

12. The Court having considered the Interested party's application, and the oral submissions by the parties, was of the considered opinion that the issue placed before the Court for determination is whether the Interested Party's application to set aside the out-of-Court settlement and right to reply to the supplementary affidavit by the 2nd Respondent is merited after the main application is withdrawn. The case was still at stage of leave application when it was referred to out of Court settlement.

Whether the Interested Party's application to set aside the out-of-Court settlement and right to reply to the supplementary affidavit by the 2nd Respondent is merited after the main application is withdrawn?

13. The Ex parte Applicant filed an application dated 14th February 2024, for leave to institute judicial review for an order of certiorari and order of stay to quash the respondents' decision to interview and hire the interested party to the position of Assistant Chief II for Matiha Sub-Location.
14. The matter was slated for an Ex parte hearing on the application for leave on 27th February 2024.
15. On 27th February 2024, the hearing did not proceed, and the Ex parte applicant was granted leave to file a further verifying affidavit, and the respondents were likewise given time to file their response.
16. The hearing of the application resumed on 18th March 2024, when the Respondents informed the Court that, they were in the process of canceling the Interested Party's appointment and prayed for 21 days for an out-of-Court settlement, which was granted by the Court, and a mention slated for 26th April 2024, to confirm whether there was a settlement or for the Court to issue hearing directions.



17. It is important to note that on the date of 18th March 2024 when the matter was referred to out of court settlement, the Interested Party was present in Court in person.
18. It was after the Court referred the matter for out-of-Court settlement that the Interested Party filed the application dated 19th March 2024.
19. During the hearing on 18th March 2024, the Interested Party did not inform the Court that he had not been served with the pleadings in the suit but he in one way or another was present in Court when the respondents informed the Court that they were in the process of canceling the Interested Party's appointment.
20. The Interested party filed the present application stating that he is a stranger to the deliberations of the application for an out-of-Court settlement and that the main application raises triable issues that can only be resolved in a hearing and his rights stand to be violated if the Court does not set aside the orders for an out-of-Court settlement.
21. The applicant/respondent's application for leave was seeking Judicial review orders of certiorari to quash the interested party's appointment as an Assistant Chief II.
22. The respondents who are the makers of the decision of recruitment of the interested party prayed that the matter be referred to an out-of-Court settlement. In essence, the employers of the Interested party, requested that the application be referred to an out-of-Court settlement. The Court allowed the respondent's application for out-of-Court settlement within 21 days.
23. The 2nd Respondent filed a supplementary affidavit sworn on 22nd April 2022, confirming that indeed the interested party's appointment was revoked (SIM-2) after considering the application for leave for judicial review (SIM-1), and that the interested party was informed of the same (SIM-3).
24. The interested party alleged that he was not consulted before the decision to refer the matter to an out-of-Court settlement was made by the respondents, and his rights stand to be violated.
25. 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 the proceedings before the Court but is not a party to the proceedings or may not be directly involved in the litigation."
26. In *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* [2014] eKLR, Supreme Court Petition No 12 of 2013, [2015], the Supreme Court stated: -

[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."
27. Additionally, the Supreme Court in *Methodist Church in Kenya v Mohamed Fugicha & 3 others* [2019] eKLR, in determining whether substantive orders could be granted in a matter where a cross-petition had been introduced to a constitutional matter by way of an affidavit by an interested party, in its majority decision, the Court stated as follows: -

“(51) The interested party's case brought forth a new element in the cause: that denying Muslim female students the occasion to wear even a limited form of



hijab would force them to make a choice between their religion, and their right to education: this would stand in conflict with Article 32 of the *Constitution*...

- (53) ... Yet this Court has been categorical that the most crucial interest or stake in any case is that of the primary parties before the Court. We did remark, in *Francis Kariuki Muruatetu & another v Republic & 5 others*, Sup. Ct. Pet. 15 & 16 of 2015 (consolidated); [2016] eKLR, as follows (paragraphs 41, 42):

“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. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.

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...”

- (54) In like terms we thus observed in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*, Civil Appeal No 290 of 2012 (paragraph 24):

“A suit in Court is a ‘solemn’ process, ‘owned’ solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings.”

28. It flows from the foregoing decisions that an Interested Party is a peripheral party in a suit who is not at liberty to introduce new issues for determination by the Court, the Court is only mandated to rule on issues raised in the pleadings by the principal parties.
29. In the instant suit, the Applicant/Respondent (“the principal party”) pleaded in his application for leave to institute Judicial Review, to quash the interested party’s appointment as an Assistant Chief II. The appointment of the interested party has since been withdrawn and as argued by the respondents and the applicant, the applicant’s application for leave for judicial review has no basis as it was hinged on an issue that has been determined and therefore has no legs to stand on.
30. The Court further notes that as at time the parties sought to proceed to out-of-Court settlement, the Court had not determined the question of leave to file the judicial review proceedings. The application for leave was pending. The Court holds there was no suit before the Court.



31. The Interested Party pleaded a case which was different from the Exparte Applicant's case alleging that he was not consulted on the decision to refer the application to an out-of-Court settlement; he alleges that the same was unfairly and unconstitutionally procured; his rights are on the verge of being violated and that the Court should give a ruling on his application and determine the main suit, which he alleges raised constitutional issues.
32. The Ex-Parte applicant sought to withdraw his application for leave to commence judicial review proceedings. This was after an out of Court process with the respondents. The interested party's application raises issues un-pleaded in the main application and cannot be entertained by this Court, more so when the principal party has withdrawn his application for leave. The Court relying on the Supreme Court's decisions above more so, *Methodist Church in Kenya v Mohamed Fugicha & 3 others*(supra), "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...".
33. The Court adopts the Supreme Court's position above and finds that the Interested Party's application has no legs to stand on, the main application having been withdrawn and the Court is only called upon to consider issues raised by the Principal parties which in the present have been settled. There is no basis to grant leave to institute the judicial review proceedings.
34. In the upshot, the Interested Party's application dated 19th March 2024 is dismissed for being improper. The Court notes that in the event the Interested Party is aggrieved with the decision by the employer(respondents) he is at liberty to file his case for determination on merit. There is no suit before the Court to sustain the Interested Party's application of 19th March 2024 or request to respond to the Supplementary affidavit of S.I. Macharia.
35. The Court allows the application for withdrawal of the Chamber summons application dated 14th February 2024 with no order as to costs.
36. Subsequently the application dated 19th March 2024 is also dismissed for being improperly filed as there was no suit before the Court. No order as to costs.
37. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF APRIL 2024.

J.W KELI

JUDGE

In the presence of: -

Court Assistant: Lucy Macheso

For Applicant/Respondent: Munyendo

For Respondents: Simiyu

For Interested Party/Applicant:- Omwenga

