



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

**PETITION NO. E056 OF 2021**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF: ARTICLES 2(1), 3(1), 10(2), 19, 20, 21, 22, 23, 28, 31, 41, 159, 236, 258 & 259 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: THE ALLEGED VIOLATION OF ARTICLES 28, 31, 41 AND 236 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: THE VIOLATION OF SECTIONS 12, 45, 46, AND 47 OF THE EMPLOYMENT ACT, 2007**

**AND**

**IN THE MATTER OF: TORTIOUS INTERFERENCE WITH AN EMPLOYMENT CONTRACT**

**BETWEEN**

**MITCHELLE AYORO OSOK.....PETITIONER/APPLICANT**

**AND**

**PARLIAMENTARY SERVICE COMMISSION.....1<sup>ST</sup> RESPONDENT**

**STEPHEN NJENGA RUGE.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Petitioner is a former employee of the 1<sup>st</sup> Respondent, a constitutional commission established under Article 127 of the Constitution of Kenya, and whose operations are managed under the Parliamentary Service Act, Number 22 of 2019 as the 1<sup>st</sup> Respondent.
2. The 2<sup>nd</sup> Respondent is the Director of Legislative and Procedural Services of the 1<sup>st</sup> Respondent.
3. In the petition dated 19<sup>th</sup> April 2021, the Petitioner alleges that she was constructively dismissed by the 2<sup>nd</sup> Respondent who made the working environment hostile and uncondusive to work for the Petitioner, forcing her to resign from work.
4. Vide an application by way of notice of motion under Rule 7 of the Employment and Labour Relations Court Rules, 2016, Rule 5 (d) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012 and all other enabling provisions of the law, the 2<sup>nd</sup> Respondent seeks to have this Court strike out his name for these proceedings.
5. The application is grounded on the affidavit of Stephen Njenga Ruge, the 2<sup>nd</sup> Respondent and on the grounds on the face of the application. In a nutshell, the 2<sup>nd</sup> Respondent states that he has been wrongfully enjoined as a Respondent to the suit herein, that the Petitioner was an employee of the Parliamentary Service Commission and the 2<sup>nd</sup> Respondent is also an employee of the same Commission,

that there is no privity of contract between the Petitioner and 2<sup>nd</sup> Respondent and that the petition does not disclose any cause of action against the 2<sup>nd</sup> Respondent. He states that he is not a necessary party to these proceedings and does not have mandate to discipline any member of staff of the 1<sup>st</sup> Respondent.

6. The application is filed by Job Wambulwa, Advocate for the 2<sup>nd</sup> Respondent.

7. Vide another application dated 2<sup>nd</sup> August 2021, the Petitioner seeks the following orders -

i) Spent.

ii) *THAT this Honourable Court be pleased to issue an order barring the 2<sup>nd</sup> Respondent's Advocate JOB WAMBULWA or any other state officer from appearing for the 2<sup>nd</sup> Respondent in this matter on account of conflict of interest.*

iii) *THAT an order do issue directing the 2<sup>nd</sup> Respondent to engage any other Counsel who is not a State Officer or Public Officer to represent him.*

iv) *THAT this Honourable Court be pleased to find and hold that the continued appearance of the 2<sup>nd</sup> Respondent's Advocate and or any other State Officer in these proceedings is against the letter and spirit of Chapter 6 of the Constitution of Kenya.*

v) *THAT this Honourable Court be pleased to issue any other order that it may deem fit and just to grant.*

vi) *THAT costs of this application be provided.*

8. The grounds in support of the application and in the supporting affidavit of GILBERT MITULLAH OMWARE, Counsel for the Petitioner are that the 2<sup>nd</sup> Respondent having been sued in his personal capacity, cannot be represented by JOB WAMBULWA who is an advocate employed by the Parliamentary Service Commission on full time basis and is on full salary from the exchequer.

9. That the said JOB WAMBULWA is required by law not to engage in any other gainful employment and such practice is likely to impair his judgment in the execution of the functions of his office as state officer. That such practice is against the spirit of Chapter 6 of the Constitution as it constitutes conflict of interest.

10. The Petitioner cities and relies on the decision of **Constitutional Petition 2014 of 2019, Office of the Director of Public Prosecutions v James Aggrey Bob Orengo, Daniel Oguoka Manduku and 2 Others (2021) eKLR.**

11. The application is opposed by the replying affidavit of Jeremiah Nyegenye, the Clerk of the Senate/Secretary to the Parliamentary Commission, the 1<sup>st</sup> Respondent. It is made on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

12. Mr. Nyegenye deposes that the 2<sup>nd</sup> Respondent having been sued in respect of acts done in the course of official duties delegated by the 1<sup>st</sup> Respondent, the 1<sup>st</sup> Respondent is under a constitutional and legal obligation to defend the actions taken.

13. He further deposes that Mr. Job Wambulwa is an Advocate employed by the Parliamentary Service Commission, the 1<sup>st</sup> Respondent as in house counsel in the Directorate of Litigation and Compliance and his role includes defending and representing the 1<sup>st</sup> Respondent, any of the two houses of Parliament and officers of the Commission acting in official capacity in any matters before the Court.

14. That the case of **Constitutional Petition 214 of 2019, Office of the Director of Public Prosecutions v James Aggrey Bob Orengo, Daniel Oguoka Manduku and 2 others [2021] eKLR** is distinguishable from the case at hand for the following reasons:

i) In that case, the 1<sup>st</sup> Respondent was representing a third party in his personal capacity whereas he was an elected senator. In the instant case, the advocate is within his mandate to represent the 1<sup>st</sup> Respondent and its officers including the 2<sup>nd</sup> Respondent.

ii) Secondly, in Petition No. 214 of 2019, the senator was not employed as an in-house counsel but was an elected senator and state officer whereas in the instant case, Mr. Job Wambulwa is an in-house counsel employed by the Parliamentary Service Commission.

iii) Thirdly, there existed conflict of interest because Mr. Orengo was going to defend the private interests of his client to stop the investigations into the loss of public funds at the Kenya Ports Authority whereas on the other hand he is an elected senator whose role includes representing public interest in ensuring prudent use of public funds. In the instant case, no circumstances demonstrate any conflict of interest and the applicant has not proved the same.

15. That the Petitioner has misdirected herself to the meaning of conflict of interest which is defined in the **Black's Law Dictionary** as a *situation that can undermine a person due to self-interest and public interest.*

16. He cites the case of **Philomena Mbeti Mwilu v Director of Public Prosecutions & 2 Others; Stanley Muluvi Kiima (Interested Party) [2018] eKLR** where conflict of interest was defined as:

*"A situation where one is confronted by 2 different interests so that serving one interest would be against the other interest."*

17. That in the case of **Philomena Mbete Mwilu v Director of Public Prosecutions & 2 Others; Stanley Muluvi Kiima (interested party) (supra)** where the Court was dealing with a similar issue it was held that a party alleging a conflict of interest bears the burden of presenting clear evidence that the person said to be acting in conflict of interest is acting in a manner prejudicial to the interests of the other party. That, it has not been succinctly demonstrated that there is any conflict of interest occasioned by the appearance of Mr Job Wambulwa as Counsel for the 2<sup>nd</sup> Respondent.

18. That the circumstances of the case do not disclose any conflict of interest because the advocate is allowed to represent the Respondents in public interest while discharging his duties.

19. That Mr. Job Wambulwa is not acting for a party outside the realm of his roles but is representing the interests of the Parliamentary Service Commission.

20. The two applications were disposed of by way of written submissions.

#### **Determination**

21. I have considered the pleadings and submissions of the parties. The issues arising for determination are whether the 2<sup>nd</sup> Respondent's name should be struck off these proceedings and whether Job Wambulwa, Advocate should be barred from representing the 2<sup>nd</sup> Respondent.

#### **Whether the 2<sup>nd</sup> Respondent is a necessary party to these proceedings**

22. The Petitioner submits that the 2<sup>nd</sup> Respondent is a necessary party to the suit herein. That Rule 5(d) of the Mutunga Rules, 2013 under which the 2<sup>nd</sup> Respondent's application has been brought permits the Court to strike out a party who has been improperly joined to a suit.

23. The Petitioner submits that Rule 5(d)(i) of Mutunga 2013 Rules is similar to Order 1 Rule 10(2) of the Civil Procedure Rules 2010 which provides that -

**(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.**

24. The Petitioner submits that the 2<sup>nd</sup> Respondent has been sued in his personal capacity on grounds of his tortious interference with the Petitioner's employment contract. The Petitioner cites the case of **Civil Appeal No. E291 of 2021; IEBC v David Ndiu and Others [2021] eKLR**.

25. Counsel further relies on the decision in **David Ndiu & Others vs Attorney General and Others, Petition No. E282 of 2020 (consolidated with petition Nos. 397 of 2020, E400 of 2020, E401 of 2020, E402 of 2020, E416 of 2020, E426 of 2020 and 2 of 2021)**.

26. The 2<sup>nd</sup> Respondent is the Director, Legislative and Procedural Services in the employment of the 1<sup>st</sup> Respondent.

27. **Rule 5(b) of Mutunga Rules, 2013** is clear that –

*“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”*

28. In **Zephir Holdings Limited v Mimosa Plantations Limited, Jeremiah Mataqaro & Ezekiel Misanqo Mutisya [2014] eKLR, Misc. Civil Application No. 248 of 2012** Gikonyo J. while considering the issue of joinder and mis-joinder, held that;

*“A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under Order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties.”*

29. The Petitioner further relies on the case of **William Kiprono Towett & 1597 Others v Farmland Aviation Ltd & 2 Others 120161 eKLR, Civil Appeal No. 247 of 2011** where the Court held that;

*“Most critically Order 1 Rule 9 of the Civil Procedure Rules (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. We reproduce the same hereunder- No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”*

30. In **Local Building and Construction Limited v Institute of the Blessed Virgin Mary Loreto Msongari & 2 others (2019) eKLR**,

Civil Suit No. 11 of 2015 the Court held that;

*“Order 1 rule 9 and Article 159 is intended to ensure that each party is afforded a fair trial guaranteed under Article 50 (1) of the Constitution. But a fair trial does not exist in a vacuum, it is governed by rules which by themselves ensure that each party is given the opportunity to present or defend his case fairly. That is the purpose of a trial court. It must make sure that the parties are given ample opportunity to ventilate the issues arising from their case. What the said rules must not do is to become an end in themselves and impede a fair trial and that is why Article 159(2) (b) of the Constitution provides that justice shall be administered without undue regard to technicalities. When a case is decided in accordance with substantial justice as depicted under the abovementioned article, justice will not only be seen but will be seen to have been done.”*

31. For the Respondents, it is submitted that the Petitioner was employed by the 1<sup>st</sup> Respondent and not the 2<sup>nd</sup> Respondent. That the 2<sup>nd</sup> Respondent is a public officer and not a state officer as repeatedly averred by the Petitioner. That there is no privity of contract between the Petitioner and the 2<sup>nd</sup> Respondent.

32. The Respondent submits that there is no cause of action against the 2<sup>nd</sup> Respondent and he ought to be struck out as a party to the suit.

33. The prayers sought in the petition are all against the 1<sup>st</sup> Respondent except prayer 3, which seeks a declaration against the 2<sup>nd</sup> Respondent.

34. However, the foundation of the petition is the alleged tortious actions of the 2<sup>nd</sup> Respondent which according to the Petitioner, induced her to repudiate her contract of employment with the 1<sup>st</sup> Respondent.

35. It is my view that unless the 2<sup>nd</sup> Respondent is found culpable of the averments against him by the Petitioner, the prayers against the 1<sup>st</sup> Respondent would all crumble. Conversely, should the 2<sup>nd</sup> Respondent be culpable, then the 1<sup>st</sup> Respondent would be liable. The 1<sup>st</sup> Respondent has not been accused by the Petitioner of any direct violation of her rights, but is sued as the employer of both the Petitioners and the 2<sup>nd</sup> Respondent.

36. The 1<sup>st</sup> Respondent is therefore vicariously joined to the petition on allegations of violations by the 2<sup>nd</sup> Respondent.

37. It is therefore my finding that the 2<sup>nd</sup> Respondent is the main party to the suit and the 1<sup>st</sup> Respondent is only sued because of its vicarious liability over the alleged violations by the 2<sup>nd</sup> Respondent. The presence of the 2<sup>nd</sup> Respondent is therefore necessary to enable the Court effectually and completely adjudicate upon and settle all questions involved in the suit in the manner provided in Order 1 Rule 10(2) of the Civil Procedure Rules 2010.

38. The 2<sup>nd</sup> Respondent is also a proper party in terms of the holding of Gikonyo J. in **Zephir Holdings Limited v Mimosa Plantations Limited, Jeremiah Mataqaro & Ezekiel Misanqo Mutisya (supra)** where the Court stated:

*“A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under Order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties.”*

39. For these reasons, I find no merit in the 2<sup>nd</sup> Respondent’s application dated 2<sup>nd</sup> June 2021.

#### **Whether Job Wambulwa, advocate, should be barred from representing the 2<sup>nd</sup> Respondent**

40. Job Wambulwa, Advocate, is an employee of the 1<sup>st</sup> Respondent, just like the Petitioner was, and like the 2<sup>nd</sup> Respondent is.

41. Under the Employment and Labour Relations Court Act and the Civil Procedure Act and the Rules made thereunder, a party may appear in person or by a recognized agent. For a corporation, appearance or representation may be by an officer of the corporation duly authorized under the corporate seal.

42. In the instant suit, the 2<sup>nd</sup> Respondent is sued for acts alleged to have been committed in the course of his employment with the 1<sup>st</sup> Respondent. The prayers against the 1<sup>st</sup> Respondent accrue from the alleged commissions of the 2<sup>nd</sup> Respondent. Should the 2<sup>nd</sup> Respondent be found culpable it is the 1<sup>st</sup> Respondent that would have to pay any decree that may be issued by the Court.

43. It is therefore not possible to separate the interests of the 1<sup>st</sup> Respondent from those of the 2<sup>nd</sup> Respondent in the manner in which they have been sued in the instant suit.

44. In view of the fact that the 1<sup>st</sup> Respondent has been sued in a vicarious capacity for alleged omissions of the 2<sup>nd</sup> Respondent, by defending the 2<sup>nd</sup> Respondent, the 1<sup>st</sup> Respondent would also be defending itself. Further, all the acts that the 2<sup>nd</sup> Respondent is accused of were carried out within the course of his employment and he is therefore entitled to representation by the 1<sup>st</sup> Respondent.

45. The 1<sup>st</sup> Respondent is therefore within its right to defend the 2<sup>nd</sup> Respondent through its in-house counsel.

46. I find no conflict of interest or impropriety in the defence of the 2<sup>nd</sup> Respondent by in-house counsel for the 1<sup>st</sup> Respondent. The application dated 2<sup>nd</sup> August 2021 by the Petitioner requiring that JOB WAMBULWA to be barred from representing the 2<sup>nd</sup> Respondent is therefore without basis and is accordingly dismissed.

### **Conclusion**

47. Having found the application dated 2<sup>nd</sup> June 2021 by the 2<sup>nd</sup> Respondent and the application dated 2<sup>nd</sup> August 2021 by the Petitioner without merit, the two applications are dismissed with each party bearing its costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18<sup>TH</sup> DAY OF FEBRUARY 2022**

**MAUREEN ONYANGO**

**JUDGE**

### **ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**