



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NUMBER E188 OF 2021**

**BETWEEN**

**JOHN MWIVITHE MUTIE.....PETITIONER**

**VERSUS**

**1.THE SPEAKER, KIAMBU COUNTY ASSEMBLY**

**2.THE KIAMBU COUNTY ASSEMBLY SERVICE BOARD**

**3.SIMON KIMANI RUGU.....RESPONDENTS**

**AND**

**1.THE COUNTY SECRETARY**

**2.KIAMBU COUNTY GOVERNMENT**

**3.THE KIAMBU COUNTY PUBLIC SERVICE BOARD.....INTERESTED PARTIES**

**RULING**

1. The Respondents are represented by two Advocates, Mr. Mutuku and Mr. Ngaruiya.
2. The two filed separate Notices of Preliminary Objection, dated 22<sup>nd</sup> December 2021 and 17<sup>th</sup> January 2022.
3. It is not clear why two Advocates, representing the same Clients, should present two separate Notices of Preliminary Objection.
4. The Court delivered a Ruling on 4<sup>th</sup> March 2022, which primarily dealt with the Preliminary Objection of 22<sup>nd</sup> December 2021, but through oversight, did not go into the issues raised in the Notice of 17<sup>th</sup> January 2022.
5. The Court undertook to give a Ruling on that Notice, during the last mention before the Court, on 25<sup>th</sup> March 2022.
6. Citing Order 1 Rules 10 [2] and 11 of the Civil Procedure Rules, the Respondents state that the Interested Parties have been improperly joined to the Petition; they are strangers in the proceedings; and that orders cannot issue in favour of the Petitioner against these strangers.
7. It is submitted that proceedings herein, are proceedings against the Government, and ought to be brought against the Attorney-General, instead of the named individuals.
8. The reliefs sought in the nature of injunction and specific performance cannot issue against the Government; Courts can only issue declaratory orders. The orders sought are unattainable.
9. The Respondents submit that the Petition, together the Petitioner's Application of 11<sup>th</sup> January 2022, must fail on these grounds: -
  - a. The Petition is brought un-procedurally against strangers, without leave of the Court.

- b. It is commenced against the Government Proceedings Act.
- c. It is commenced against the wrong Parties.
- d. It seeks unattainable orders.

**The Court Finds: -**

10. The Parties named as Respondents and Interested Parties are not strangers to the dispute.
11. They are central to the dispute, and directly linked to the violations the Petitioner complains he was subjected to.
12. Order 1 Rules 10[2] and 11 of the Civil Procedure Rules has no application in proceedings brought before the Employment and Labour Relations Court.
13. Rule 18 of the Employment and Labour Relations Court [Procedure] Rules, 2016, which regulate the proceedings of this Court, allows for joinder of any persons who are interested in disputes before the Court.
14. Before the Court is a Constitutional Petition and not a Civil Claim.
15. Rule 7 of the E&LRC [Procedure] Rules, 2016 states that a Party who wishes to institute a Petition, shall do so in accordance with the Constitution of Kenya [Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution] Practice and Procedure Rules, 2012. The Rule does not make reference to the Civil Procedure Rules.
16. Rule 5 [a] under Part II of the Constitution of Kenya [Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution] Practice and Procedure Rules, 2012, states: -  
  

*“ where the Petitioner is in doubt as to the Persons whom redress should be sought, the Petitioner may join two or more Respondents in order that the question as to which of the Respondent is liable, and to what extent, may be determined as between all the Parties.”*
17. Rule 5[b] states: -  
  

*“ A Petition shall not be defeated by reason of the misjoinder of non-joinder of Parties, and the Court may in every proceeding deal with the matter in dispute.”*
18. On Interested Parties, Rule 7[1] and [2] allows for any Persons to apply to be joined as Interested Parties. The Court may of its own motion join any Person as an Interested Party.
19. The Interested Parties have not protested their being added to the Petition as such, and there is no basis for the Respondents to protest the Interested Parties' inclusion.
20. The Court is satisfied that the Persons named as Interested Parties, have an identifiable stake or legal interest or duty in the proceedings before the Court.
21. The provisional reliefs and substantive remedies sought by the Petitioner, are all attainable under Article 23 [3] of the Constitution. They are not limited by the Government Proceedings Act, as submitted by the Respondents.
22. There is no Rule requiring the Petitioner to seek leave in Petitioning the Court. There is no Rule requiring him to seek leave of the Court in bringing the Application before the Court, or in enforcing existing orders.
23. Proceedings against County Governments are not brought against, or defended by the Attorney-General. Article 156 of the Constitution which creates the Office of the Attorney-General states that, the Attorney- General is the Principal Legal Advisor to *the Government*, not to the *County Governments*.
24. Article 156 [4] [b] specifically states the Attorney- General shall represent the National Government in Court or in any other legal proceedings to which the National Government is a Party, other than criminal proceedings.
25. Counties are required to have their own Office of the County Attorney pursuant to the County Attorney-Act, 2020. This is the Office that is analogous to the Attorney- General at the National Government.
26. The functions of the Attorney-General are elaborated under Section 5 of the Office of the Attorney-General Act, 2012. The functions relate to the National Government, not the County Governments.
27. There is no requirement in law, for the Petitioner to bring in the Attorney-General or the County-Attorney, in this Petition.

28. The Respondents once again misapprehend the principles of devolution under Article 175 of the Constitution of Kenya, as they were found to have misapprehended in the first Notice of Preliminary Objection, in the Ruling of 4<sup>th</sup> March 2022. There is no requirement that the Attorney-General, is sued on behalf of County Governments, or that he represents County Governments in Court and other transactions.

***IT IS ORDERED: -***

*a. The Notice of Preliminary Objection filed by the Respondents through Mr. Mutuku, dated 17<sup>th</sup> January 2022 is rejected.*

*b. Costs to the Petitioner.*

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT CHAKA, UNDER MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 19TH DAY OF APRIL 2022.**

**JAMES RIKA**

**JUDGE**