



**Muthoka v Kenya Medical Training College; Ethics and Anti- Corruption  
Commission (Intended Interested Party) (Constitutional Petition  
E018 of 2022) [2022] KEELRC 4089 (KLR) (4 April 2022) (Ruling)**

Neutral citation: [2022] KEELRC 4089 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CONSTITUTIONAL PETITION E018 OF 2022**

**M MBARŪ, J**

**APRIL 4, 2022**

**BETWEEN**

**MIRIAM NDUNGE MUTHOKA ..... PETITIONER**

**AND**

**KENYA MEDICAL TRAINING COLLEGE ..... RESPONDENT**

**AND**

**ETHICS AND ANTI- CORRUPTION COMMISSION .... INTENDED  
INTERESTED PARTY**

**RULING**

1. The Notice of Motion Dated February 28, 2022 is filed by the respondent and seeking the following orders:
  - a) the Ethics and Anti-corruption Commission (EACC) be and is hereby granted leave to be joined in the petition filed herein as an interested party in this suit.
  - b) upon granting the prayer No 1 above, the Honourable Court do give directions on how the Interested Party shall participate in the proceedings herein or such other further directions as the court may deem fit to give.
  - c) costs of this Application be in the cause
2. The Notice of Motion dated March 15, 2022 is filed by the intended interested party, the Ethics and Anti-Corruption Commission (EACC) and seeking the following orders;
  - a) Spent.



- b) the Commission be joined in these proceedings as an Interested Party or in any other capacity the court deems fit.
  - c) the Commission be duly served with all the pleading in this Petition as soon as practicable.
  - d) the Commission be granted leave to file pleadings, affidavits and such other necessary documents in response to the Petition and the pleadings thereof on such terms as the Court may direct or order.
  - e) Costs of this application be provided for.
3. The Application dated February 28, 2022 is based on the grounds that the EACC, pursuant to the Provisions of Article 79 of *the Constitution* and the *Ethics and Anti-Corruption Act*, is an independent constitutional commission that is responsible for enforcing the implementation of the *Leadership and Integrity Act*. That the EACC conducted investigations and issued a report with specific recommendations for independent action by the Respondent with Respect to the Petitioner's irregular appointment as a Corporation Secretary of the Respondent. The petitioner has made factual allegations against the conduct, involvement and role of the EACC with respect to the irregularities touching on her appointment and the joinder of EACC is necessary to enable the Court effectively adjudicate and settle all issues in the Petition.
  4. In the Supporting Affidavit of Dr Kelly Oluoch the applicant avers that in the course of the Petitioner's employment, the Inspector General of State Corporation conducted a special audit of the Respondent on various issues including the appointment of the Petitioner to the position of Corporation Secretary. A report was issued and copied to EACC, state corporation advisory committee, the auditor general and the ministry of health. The Report required the Respondent to undertake various actions and to liaise with various public bodies. Consequently, the EACC took interest in the matter of the recruitment of the Petitioner to her former position and conducted investigation into the matter. The EACC's conclusion was that the position of Corporation Secretary did not exist when the Petitioner was recruited, she did not meet all the job specifications contained in the job advertisement and that she was not a member of the Institute of Certified Public Secretaries of Kenya and only became a member on 28<sup>th</sup> February 2018.
  5. Following the above findings, the EACC recommended the revocation of the Petitioner's appointment.
  6. The instant Petition concerns a subject at the core of leadership and integrity of a public officer. Enjoining the EACC will ensure that the Court is fully appraised of and appreciates the factors that lead to the revocation of the Petitioner's appointment.
  8. EACC has an identifiable legal interest in the matter and has not demonstrated any vested interest or ill motive towards the Petitioner thus justified in law to be joined in these proceedings.
  9. The grounds on the face of the application dated March 15, 2022 are based on the grounds that the Commission on October 14, 2020, received a complaint of abuse of office and conflict of interest against Prof. Philip Kaloki, now the former Chairman of the Respondent and Peter Turn the former CEO/Director of the Respondent that the two influenced the recruitment of the Petitioner herein, as the Corporation Secretary despite her not being qualified for the position. The Commission conducted investigation into the matter whereby it was established that the Petitioner did not meet the job specifications as contained in the advertisement and the provisions of the Mwongozo, the Code of Governance for State Corporations. It wrote to the Chairperson of the Board of Directors



of the Respondent directing him to take the necessary administrative action in terms of revoking the appointment of the Petitioner as the Corporation Secretary.

10. The jurisprudence expected to emerge in the determination of these proceedings is a matter of public interest and is likely to have an impact in the implementation of Chapter Six of *the Constitution*, the *Leadership and Integrity Act* and *Public Officer Ethics Act* and other integrity laws. There is a need to enjoin the Commission to these proceedings as it is desirous of filing relevant proceedings with a view to assisting this Court to effectually and completely adjudicate upon and settle all questions arising in the Petition.
11. The Application is further supported by an affidavit sworn by Jackson Gichuki Mwai where he reiterates the grounds on the face of the application.
12. In Response to the Application dated February 28, 2022, the Petitioner filed a Preliminary Objection dated March 22, 2022 where she points out that the Application has been filed in contravention of rule 7 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) practice and Procedure Rules*, 2013 which requires that an interested party may with leave of court apply to be joined as an interested party or the court may on its own motion join an interested party to the proceedings before it. The Notice of Motion has no legal anchor as it has been brought by the wrong party and as such it should be struck out with costs.
13. The Petitioner opposed the Application dated March 15, 2022 in her Replying Affidavit dated March 22, 2022 and avers that the EACC did not discover anything new that had not been uncovered by the Inspectorate of State Corporation and that the actions of the EACC were not done in good faith and go against the principle of issue-estoppel. She was not responsible at all for her recruitment and her duty was to submit her application and attend the interview if shortlisted. The EACC has no HR role at the Kenya Medical Training College. The instant Petition is not a public interest matter but rather an employer-employee matter regulated by the *Employment Act* and other laws that govern employment.
14. The Applicant has simply restated the provisions of *the Constitution* but has in no way mentioned its stake and relevance in this matter. The EACC brings no new evidence or information that in this matter that is not already before this court and will therefore suffer no prejudice if denied joinder. The Applicant has not met the threshold set out by the Supreme Court, for the joining of an interested party, in the decision of *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others*.
15. The mandate of the Applicant as a Commission under section 13 of the *Ethics and Anti-Corruption Commission Act* does not include representation of employers in employment matters. The mere mention of a recommendation by the Applicant does not make it to have an identifiable stake in the proceedings and the Court should dismiss the application with costs.
16. The two applications were disposed of by way of oral submissions.
17. The Petitioner filed two sets of written submissions in support of its preliminary objection dated March 22, 2022 and in opposition to the Notice of Motion dated March 15, 2022.
18. The Respondent submitted that the Preliminary objection by the Petitioner is not proper in terms of principles addressed in *Mukhisa Biscuit Manufacturers Ltd. v West End Distributors Ltd.* [1969] E.A. 696. Leave of court is not required before joinder. That on February 24, 2022, after the court delivered a ruling on a Preliminary Objection, the Respondent applied for joinder of EACC and the question of leave was addressed. On the allegation that the Respondent is the wrong party to seek joinder counsel submitted that parties have a duty to assist the court to reach a just determination. It is clear that the



EACC has legal interests in the matter. The Petitioner has made allegations against the EACC and there shall be prejudice if EACC is not enjoined.

19. The intended interested party submitted that the court should take note that the Respondent is a premier trainer of health workers and has 72 branches country wide. It is a big consumer of public funds as a state corporation. The intended interested party received complaints on the recruitment of the Petitioner and after conducting investigations established that the Petitioner was not qualified for appointment as the Company Secretary for the Respondent. Based on this discovery and pursuant to sections 42 and 44 of the *Leadership and Integrity Act*, the EACC wrote to the Respondent instructing them to take the necessary action and revoke the appointment of the Petitioner. The intended Interested Party intends to get involved in the instant matter and bring evidence to the court that will assist it in arriving at a just conclusion.
20. In the Supreme Court case of *Francis Kariuki Muruatetu & Another v Republic & 5 others* Petition 15 as consolidated with 16 of 2013 [2016] eKLR where the court laid down the requirements for being enjoined as an interested party. The Interested party herein has met that test and shall be prejudiced if not enjoined.
21. The petitioner submitted that the Respondent was the wrong party to file the application for joinder of EACC. He relied on the case of *Amir Suleiman v Amboseli Resort Limited* (2004) eKLR. The law is clear that only the court on its own motion or an interested party can move to enjoin a party to a suit. The Petition herein does not seek orders that will be enforced by the EACC. The instant Petition challenges the decision made by the Respondent and is anchored on Articles 47, 50 and 41 of *the Constitution* and Section 41 of the *Employment Act*. The EACC did not participate in the decision making of the Respondent save for making a recommendation. They did not terminate the Petitioner's employment and hence have no matter herein to address. The EACC shall suffer no prejudice if not enjoined as an interested party.

### Determination

22. Having considered the Applications, Preliminary Objection, Affidavits and submissions by the parties herein, the singular issue for determination is whether the two applications have raised sufficient grounds required to enjoin a party to a suit.
23. The Supreme Court in the case of *Francis Kariuki Muruatetu & Another v Republic & 5 others Petition 15 as consolidated with 16 of 2013* [2016] eKLR set forth the elements applicable as follows:
  - ...One must move the Court by way of a formal application. Enjoinment is not as of right, but is 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 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.

24. The EACC is established under the *Ethics and Anti-Corruption Commission Act*. Section 11 of this act describes its functions as follows:
25. In addition to the functions of the Commission under Article 252 and Chapter Six of *the Constitution*, the Commission shall—
  - (a) in relation to State officers—
    - (i) develop and promote standards and best practices in integrity and anti-corruption;
    - (ii) develop a code of ethics;
  - (b) work with other State and public offices in the development and promotion of standards and best practices in integrity and anticorruption;
  - (c) receive complaints on the breach of the code of ethics by public officers;
  - (d) investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under this Act, the *Anti-Corruption and Economic Crimes Act* or any other law enacted pursuant to Chapter Six of *the Constitution*;
  - (e) recommend appropriate action to be taken against State officers or public officers alleged to have engaged in unethical conduct;
  - (f) ...“
25. In the case of *Trusted Society of Human Rights Alliance v Mumo Matemu* (2014) eKLR , the Supreme Court expounded that an interested party is the one who has a stake in the proceedings and would be affected by the decision of the court.
26. Does the intended Interested Party herein meet the above test?
27. It is not in dispute that the Respondent terminated the Petitioner’s employment emanating from investigations conducted by the EACC where it established that she was not qualified for the position and that the position did not exist at the time she was appointed. The letter of Revocation of appointment reads as follows

Please refer to my letter Ref No KMTC/ADM/CON/1AA/VOL 3/ (10) dated December 29, 2021 where I informed you that in a letter Ref.No EACC.7/10/1 VOLXLVIII (153) of 20<sup>th</sup> December 2021, the Ethics and Anti-corruption Commission (EACC) had reminded me of their mandate to oversee and enforce implementation of the *Leadership and Integrity Act* which sought to ensure that state and public officers upheld high standards of integrity and ethical conduct while discharging public duty. The Commission pursuant to its mandate under section 4(2) and 42(10) of the *Leadership and Integrity Act* 2012, therefore undertook investigations into allegations that your appointment as Corporation Secretary was irregular.

Their findings subsequently established that the position of Corporation Secretary did not exist in the KMTC staff Establishment and Organisational Structure in 2015, when you were engaged. Further, that at the time of your appointment as the corporation secretary, you were not as per the advertisement circulated as you did not have a certificate in



Certified Public Secretaries since you were not a member of the Institute of Certified Public Secretaries of Kenya...Investigations established that you became a member of the Institute of Certified Public Secretaries of Kenya on February 28, 2018, well after your appointment. The Commission further informed that it was empowered under section 4 (4) of the [Leadership and Integrity Act](#), 2012 to require public entities to carry out such functions and exercise such powers as may be necessary to enforce compliance with the leadership and integrity requirements. It therefore directed that the KMTC Board was obliged, as a statutory requirement, to take the necessary corrective administrative measures...

28. From above, it is clear that the role of the EACC is on integrity and anti-corruption. It has powers to investigate and recommend appropriate action to be taken against State officers or public officers alleged to have engaged in unethical conduct. The Petitioner in the instant case seeks reinstatement to the position of Corporate Secretary. The termination clearly revolves around the issue of integrity.
  29. As alleged by the Respondent, the issue as to whether there was abuse of office and conflict of interest by Prof. Philip Kaloki, now the former Chairman of the Respondent and Peter Turn the former CEO/ Director will be a major issue in the instant petition. If the petition succeeds and the Petitioner is reinstated back to her former office, the same will impact on the recommendations of the EACC. The jurisprudence that will emerge from this court may also guide it in future investigations and recommendations.
  30. It is clear that the EACC has a stake in the instant petition as an interested party.
  31. On the second test, the EACC having undertaken an investigation on allegations of abuse of office and made its recommendations it would be relevant to the court to interrogate such matter in the presence of the maker. It will be prejudicial on the EACC if not enjoined as an interested party.
  32. On the last element, the court notes that the EACC conducted investigations that led to the conclusion that the Petitioner had not qualified for the position, that the position did not exist and that the Respondent's former CEO and Chairman colluded and influenced her appointment. It shall expound on whether the actions of the said officers went against the [Leadership and Integrity Act](#). such contribution is important to these proceedings as it will aid the court in reaching a just conclusion.
  33. The Petitioner shall suffer no prejudice if the EACC is enjoined herein as an interested party since there will be a chance to respond to any matter introduced by such party.
  34. On the preliminary objections by the petitioner as to whether a respondent is the right party to seek to enjoin an interested party, the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules](#), 2013 defines an interested party to mean;  

“interested party” means a person or entity that has an identifiable stake 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;
  35. On this basis, Rule 7 allows a person/party/entity to enjoin an interested party upon making oral or written application. The respondent made an oral application seeking the joinder of the EACC as an interested herein following court ruling delivered on February 24, 2022. The court directed parties to file a formal application, which is herein done.
- 7.
- (1) A person, with leave of the Court, may make an oral or written application to be joined as an interested party.



(2) A court may on its own motion join any interested party to the proceedings before it.

36. Further, Rule 5 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 give the all-powerful cover that the non-joinder, misjoinder and addition of a party in error is not fatal to the proceedings and the court well apprised can issue directions without compromise on the substantive issue at hand.
37. Objections made are found without merit. The EACC shall be enjoined herein as an interested party.
40. Accordingly, the court makes the following orders:
- a) The Application by the intended Interested Party, EACC dated March 15, 2022 seeking to be enjoined as an interested party is allowed and EACC is enjoined as an interested party;
  - b) The Interested Party to file and serve its response to the Petition within 14 days from the date of this ruling;
  - c) Objections by the petitioner are hereby dismissed; and
  - d) The Parties herein shall bear own costs.

**DELIVERED IN COURT AT NAIROBI THIS 4<sup>TH</sup> DAY OF APRIL, 2022.**

**M. MBARŪ JUDGE**

In the presence of:

Court Assistant: Okodoi

..... and .....

