



Migiro & 12 others v Attorney General; Omanga (Proposed Appellant); Muthaura (Proposed Interested Party) (Petition E002 of 2021) [2022] KEELRC 1560 (KLR) (2 June 2022) (Ruling)

Neutral citation: [2022] KEELRC 1560 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
PETITION E002 OF 2021**

**HS WASILWA, J
JUNE 2, 2022**

BETWEEN

LAMECH MIGIRO & 12 OTHERS PETITIONER

AND

ATTORNEY GENERAL RESPONDENT

AND

JOHN KENEDDY OMANGA PROPOSED APPELLANT

AND

WILSON MUTHAURA PROPOSED INTERESTED PARTY

RULING

1. The ruling herein relates to two separate preliminary objections by the proposed interested party dated November 12, 2021 and filed on November 16, 2021 and the other one by the Honourable Attorney General dated November 29, 2021 and filed on November 30, 2021.
2. The proposed interested party's preliminary objection is in response to the proposed petitioner's application dated November 2, 2021, based on the following grounds;
 - a) The application lacks a foundational basis as it has been made by a non-party to these proceedings. There is no formal application for joinder nor is there an order for joinder of the proposed petitioner. Therefore, the application is competent.
 - b) The honorable court lacks jurisdiction to hear and determine the application as framed since it amounts to a contempt of court application which should be placed before the trial court that issued the contested orders that have allegedly been disobeyed.



- c) The application as framed seeks for and has been granted on an interim basis substantive orders to be issued against a proposed interested party and non-parties to the proceedings.
 - d) The application as framed seeks reliefs that are not within the scope of the petition by seeking for a temporary injunction while no prayer for a permanent injunction has been prayed for in the petition in the same manner as sought in the application.
 - e) The application seeks to retrain, prevent or otherwise affect the affairs, operations and activities of various entities that are not party to the suit.
 - f) The application is against an agent of disclosed principal.
 - g) The application filed before the court is incompetent and unsustainable.
 - h) The purported application is an abuse of court process.
 - i) Due to the foregoing, the application before This honourable court should be dismissed with costs to the proposed interested party.
3. The second preliminary objection is by the Attorney General filed on the November 30, 2021, done in opposition to the joinder application of Dr John Kennedy Omanga, the proposed petitioner herein and based on the following grounds.
- a) That, the enjoined petitioner John F Kennedy Omanga as enjoined in the cause lacks the standing to take over the matter as he was not a party at its institution.
 - b) That, the fundamental rights and freedoms of the petitioners are distinct and separate and grievances arising from alleged violation of rights and freedoms cannot be transferred to another petitioner.
 - c) That John F Kennedy Omanga (enjoined petitioner) lacks the constitutional capacity espoused in the *locus classica* of Anarita Karimi Njeru v Republic Misc Cr Application 4 of 1979 and cannot be a petitioner in the matter as he has not suffered a violation of his fundamental rights and freedoms under the constitution.
 - d) That John F Kennedy Omanga (enjoined petitioner) cannot act on behalf of KTDA and lacks the required standing to challenge internal operations of KTDA in the matter as he does not have the authority of the Board of KTDA written and under seal of KTDA to file the suit and any application therein.
 - e) That the enjoined petitioner is seeking to upend orders of the court that denied the petitioners conservatory orders in *Lameck Migiro and 12 others v AG ELRC Pet 2 Of 2021* delivered virtually on April 27, 2021. The enjoined *Res Judicata*.
4. The preliminary objections were disposed of by way of written submissions.

Proposed interested party’s Submissions.

5. The interested party herein submitted that it is opposed to the proposed petitioner’s application of November 2, 2021 which seeks inter alia to stop it from pursuing the staff rationalization program, effecting any proposals or outcome of the alleged staff rationalization program and any further implementation of section 34 of the Tea Act 2020. The basis upon which the preliminary objection was raised was on the fact that the petitioners had earlier on sought for conservatory orders vide the application dated January 28, 2021 filed together with the petition herein and disallowed by this court



and have once again sought for these same orders in different wordings hidden under the contempt of court application, when the previous application had been dismissed by this court.

6. It was submitted that, this court lacks jurisdiction to hear and determine the application herein. He relied on the case of [Phoenix of EA Assurance Company Limited v S M Thiga t/a Newspaper service](#) [2019] eKLR where the court held that;

“In common English parlance, ‘Jurisdiction’ denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside *ex debito justitiae*”

7. Accordingly, it was submitted that the basis for the applicant/proposed petitioner’s application is on the orders issued by the High Court in Meru and those issued by justice R Langat Korir at High Court in Bomet, which application now seeks to compel the proposed interested party to comply with the court orders which were never issued by this court nor adopted by this court. It further argued that this application as is couched was for enforcement of orders which ought to have been filed in Meru and or Bomet High Court. It therefore submitted that this court lacks jurisdiction to determine this Application as the orders forming the substratum of the application were neither issued by this court nor adopted as such contrary to the provisions of section 13 of the [Employment and Labour Relations Court Act](#) as read with Order 40 rule 3 of the [Civil Procedure Rules](#), which emphasizes on the orders to be enforced by the court that issued them.

8. It was submitted, without prejudice to the court’s lack of jurisdiction that, the application herein is defective and fatally incompetent having been filed by an individual who is a non-party to the proceedings. It was argued that since the joinder application is yet to be heard and determined the applicant remains a non –party without any authority to seek for substantial orders at this stage. It was further argued that as much as there were *ex parte* orders granted to the proposed petitioner/applicant to be joined to this suit, the same orders have not been sought for joinder of the proposed interested party save for their application of November 2, 2021 which is yet to be prosecuted, therefore that no substantive orders ought to be made in respect of the proposed interested party before he is joined in this suit.

9. The proposed interested party cited the case of [Zephir Holdings Limited v Mimosa Plantations Limited & 2 Others](#) [2014] eKLR, where the court held that;-

‘Any party, who comes in a proceeding after pleadings have been closed, will only join on application except where the court makes the joinder *suo moto* or the party comes as an objector to attachment of the suit property. A proceeding is not jumped into in a haphazard manner. Equally, except a proceeding in the nature of objection to attachment or any other instance provided in law, a party does not become a party until there is an order of joinder whether on application or *suo moto* by the court. I should state here that even *amicus curiae* will join on the order of the Court. See the practice in constitutional petitions for example. Therefore, in ordinary circumstances, admission to a judicial proceeding especially where you are not the primary party is an important aspect in adjudication of cases which follows after the principle that “presence of proper parties before the court is *sine qua non* exercise of jurisdiction by the court”, and that principle will be defeated if parties were to enter existing proceeding without permission of the court or anyhow”



10. The proposed interested party further emphasized that no substantial orders can be granted against an interested party and in this they relied on the case of Wilfred G Gisebe v Chepkwony Chumo & 2 others; Cheruiyot Henry Kiptanui (Interested party) [2019] eKLR where the court faced with an application by the plaintiff against an interested party held that;

“For one to get an injunction, one needs to demonstrate a *prima facie* case with a probability of success against the defendant. I however do not see how the plaintiff will succeed if the title holder is not a substantive party in the suit. The interested party only came to the suit because he noted that the plaintiff is litigating over land owned by him without the plaintiff making him a party. He was thus perfectly entitled to apply to be an interested party. But if the plaintiff wants the title, which is in the name of the interested party, he needs to make the interested party a substantive defendant, so that he can seek orders against him. Without that being the position, I do not see how the plaintiff will succeed in his claim for the title. In my view, no *prima facie* case has been established by the plaintiff and the prayer for an injunction is therefore dismissed.”

11. The proposed interested party also submitted that the application by the proposed petitioner/ applicant is beyond the scope of the petition since no prayers in the main petition have been sought in relation to the temporary injunction the proposed petitioner is seeking. He added that the prayers sought in the interim should not be greater than the prayers sought in the main suit as was held in Indian madras High Court case of KPM Aboobucker v K Kunbamoo and Ors, AIR 1958 Mad 287, [1958] 1 MLJ 303, where the Justice Rajagopalan stated,;-

“Whether it was really a case of jurisdiction or one of discretion, the scope of both of which was governed by order 39, rule 1(a) and whether the proposition laid down by the learned chief justice in the first sentence of the passage I have extracted above is not too wide as it stands, if taken out of its context, may have to be considered should occasion arise for it. However, if I may say so with respect, I find myself in complete agreement with the principles that underlies the second sentence in the passage I have extracted above, that an interim relief granted during the pendency of a suit should not be of greater scope than what could be granted in the suit itself, after the party has established his right in the suit to that relief. In my opinion that would be some relevant fact to take into account in deciding whether court should or even could grant such an interim relief, especially so when the person against whom the interim Injunction is sought is not a party to the suit, and against who no relief could be granted in the suit itself.”

12. It was thus submitted that the petition does not have any prayers as against the proposed interested party as such to enable the proposed petitioner enjoy the interim orders sought could mean allowing them greater reliefs than the scope of the petition.

13. It was also submitted that the application is fatally incompetent for seeking orders against an agent of a disclosed principal, him being an employee of KTDA as its Group Chief Executive Officer. He relied on the case of Antony Francis Wareheim t/a Wareheim & 2 others v Kenya Post Office Savings Bank, Civil Appeal No 5 and 48 of 2002 consolidated where the Court held that;-

“It was also *prima facie* imperative that the court should have dismissed the respondent’s claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principle of common law that where the principal is disclosed, the agent is not to be sued”



14. This position was reinforced in the case of *City Council of Nairobi v Wilfred Kamau Gitbua t/a Gitbua Associates and another* [2016] eKLR where the court held that:-

“In the circumstances of this case, the 2nd respondent cannot be sued as agent where there is a disclosed principal [the appellant]. There is therefore no cause of action against the 2nd respondent. The principle of common law is that where the principal is disclosed, the agent is not to be sued.”

15. The proposed interested party in conclusion prayed for the preliminary objection to be upheld with costs to them.

Petitioner's Submissions

16. The petitioner submitted with regard to the application of December 15, 2021 by the proposed interested party seeking to review the orders of this court granted on the November 4, 2021, that the interested party has not demonstrated any new fact that was not presented to court before the said orders were not made, neither have they demonstrated any error apparent on record to deserve the orders sought. In support of their argument the petitioner relied on the case of *Philip Kiprotich Tuitok v Edna Jebiwott Kiplangat & 2 others* [2022] eKLR where the court held that :-

“On the second issue as to whether the application meets the threshold for review, one needs to look at Order 45 rule 1 of the *Civil Procedure Rules* which provides as follows;

- “1. (1) Any person considering himself aggrieved—
- a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”...

Firstly, there is no error on the face of the record. Secondly, there is no discovery of any new and important evidence which would not have been availed with due diligence at the time of hearing of the application whose ruling is being sought to be reviewed. Thirdly, there is no sufficient reason given for review. What the 1st defendant is complaining about is that all the previous rulings made herein are irregular, void, illegal and are shrouded in illegalities. This is not a ground for review though it may form a good ground for appeal.”

17. The petitioner therefore submitted that the application for review ought to be dismissed for failing to meet any of the conditions pre-requisite for grant of review orders.
18. With regard to the preliminary objection the petitioner cited the case of *Gladys Omato v Independent Electoral and Boundaries Commission* [2021] eKLR where the court cited the decision by Ojwang, J (as



he then was) in Oraro v Mbaja (2005) KLR 141 where after quoting the statement of Law, JA in the Mukisa Biscuits case (supra) went on to state that: -

“A 'preliminary objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point....”

19. It was submitted that preliminary objection should be raised in circumstances where the facts are not in dispute which was not the case in this matter. It further argued that the proposed interested party has alleged that the orders are made in favour of a non-party when the joinder application was allowed by this court on the November 4, 2021, which orders have not been reviewed or challenged at all. Additionally, that ground 2-6 of the preliminary objection are factual that cannot be determined by this court without first interrogating the facts and evidence therein, therefore that the preliminary objection is based on a factual issue and not points of law as contemplated under the law.
20. The petitioner urged this court to dismiss the preliminary objection dated November 12, 2021.
21. I have considered the applications before me and submissions in support or otherwise thereof. In respect of the 1st preliminary objection, it is in opposition to the proposed petitioner's application dated November 2, 2021 in which the proposed petitioner seeks to be enjoined in this suit amongst other injunctive orders against the respondents herein.
22. The applicant avers that the orders prayed for cannot be granted because they are sought by a person who is not a party to this suit.
23. It is true that the proposed interested party sought substantive orders without first seeking joinder. This in my view was irregular as he has no *locus* to seek the orders sought. It would have been imperative for the applicant to seek joinder first before seeking substantive orders. The failure on his part renders the application as framed untenable having been filed by a non-party.
24. I find the preliminary objection justified and I allow it and dismiss the application dated November 2, 2021 accordingly. As concerns the 2nd preliminary objection it is filed by the AG and is dated November 30, 2021. It is in opposition to the application for joinder by Dr John Kennedy Omanga the proposed petitioner herein.
25. The AG submits that the said Dr Omanga lacks standing to take over the matter as he was not a party at its institution.
26. As this application stands, the proposed petitioner Dr Omanga was allowed to be enjoined in this case by court order of November 17, 2021. In the circumstances, the preliminary objection on joinder of Dr Omanga has been overtaken by events and is *res judicata*.
27. I therefore find the preliminary objection has no merit and I dismiss it accordingly.

RULING DELIVERED VIRTUALLY THIS 2ND DAY OF JUNE, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-



Ochieng for Petitioners – present

Denis Karichia holding brief for Geoffrey Imedo for the proposed 1st Interested Party – present

Gachuru holding brief for Ambasu for 2nd, 3rd & 4th Interest

No appearance for Attorney General

Court Assistant - Fred

