



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. E466 OF 2020**

**FREDRICK WANYONYI SIMIYU.....CLAIMANT**

**VERSUS**

**THE ACTING CHIEF EXECUTIVE OFFICER,**

**KENYA MEDICAL SUPPLIES AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**THE BOARD OF DIRECTORS,**

**KENYA MEDICAL SUPPLIES AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**AND**

**ABDUL LUSINGA AGONGA.....INTENDED INTERESTED PARTY/APPLICANT**

**RULING**

The suit herein has been filed by the Claimant, an employee of the 2<sup>nd</sup> Respondent engaged as Director, Legal Services. The 2<sup>nd</sup> Respondent is a state corporation established under the Kenya Medical Supplies Authority with the responsibility of procurement, warehousing and distribution of drugs and medical supplies to prescribed public health institutions. By letter dated 25<sup>th</sup> August 2020, the claimant was interdicted on grounds that he failed to properly advise the management and Board in regard to award of contracts and that he divulged information to unauthorised persons through leakage of the 2<sup>nd</sup> Respondent's reports, documents and communication. In the suit he seeks a declaration that the interdiction was unfair, unconstitutional, illegal and null and void. He further seeks reinstatement back to work, a permanent injunction to restrain the Respondents from continuing with the disciplinary proceedings against him, general damages and costs.

The application before me for determination is filed by one ABDUL LUSINGA AGONGA who describes himself in the application dated 28<sup>th</sup> September 2020 and filed under certificate of urgency, as a law abiding citizen of the Republic of Kenya and defender of the Rule of Law. He states in the affidavit in support of the application that he became interested in this matter after reading an Article titled "KEMSA LEGAL AFFAIRS DIRECTOR WANYONYI TO REMAIN IN OFFICE" in the People Daily Newspaper on 2<sup>nd</sup> September 2020.

In the application, ABDUL LUSINGA AGONGA seeks the following orders –

*1. Spent*

*2. That the Intended Interested Party be admitted forthwith as a party to the proceedings herein.*

*3. That the Order dated 31<sup>st</sup> August 2020 granted by this court be vacated, set aside and/or discharged forthwith.*

*4. That the Chief Accounting Officer (CEO) and/or any other relevant Officer of KEMSA (the 2<sup>nd</sup> Respondent) be summoned to produce before this court official documents bearing the claimant's official signature.*

*5. That the Supporting Affidavit, Verifying Affidavit and Witness Statement all dated 30<sup>th</sup> August 2020 in support of the Claim, the Claimant's Application, and/or all the Pleadings filed herein as well as all the pleadings filed by the claimant in these proceedings be struck off from the court records in the first instance.*

*6. That the costs of this application be borne by the Claimant.*

Among the many grounds in support of the application are that the claimant's application and pleadings were never signed and/or executed and are therefore incurably defective, that the suit was thus never filed by the claimant and he is therefore not entitled to the orders granted in favour of the claimant by this court on 31<sup>st</sup> August 2020 and that the claimant does not have a prima facie case.

In the supporting affidavit the Applicant narrates how he instructed his Counsel to peruse the court file herein and **Nairobi HCCC No. 365 of 2018** upon which he noted the difference in the signatures of the claimant in pleadings and documents filed in the two suits, instructed a document examiner to scrutinise the signatures and prepare a report which he has annexed to the pleadings. That the findings by the document examiner are that the signatures attributed to the claimant in this suit and in **Nairobi HCCC No. 365 of 2018** are for different persons and are therefore forged signatures.

He states that he is entitled to be enjoined to these proceedings by virtue of Article 258(1) and (2) of the Constitution and the fact that the 2<sup>nd</sup> Respondent is a state corporation thus it is a matter of public interest. In his opinion the public as a whole will be prejudiced if the orders granted by this court in favour of the claimant are not vacated.

The claimant opposed the application by way of a Replying Affidavit deposed by himself, sworn on 11<sup>th</sup> October, 2020 in which he deposes that the Applicant has not demonstrated a personal identifiable stake in the manner different from that of the Claimant and neither has he demonstrated that the remedies sought cannot be granted without him.

Further, that the Applicant has not demonstrated how his admission as an interested party would serve the purpose of contributing towards effective case management and that the grounds on the face of the Application and the supporting Affidavit are baseless, false and untrue and only aimed at abusing the process of this Court, delaying and/or convoluting the process of justice with the ultimate goal being to defeat the ends of justice.

It was the Claimant's case that it is clear that the Applicant is working in cahoots with other faceless persons to besmirch his character and abuse these proceedings with the sole mission of getting him out of the employment of the 2<sup>nd</sup> Respondent.

It was the Claimant's case that the Applicant has not demonstrated prejudice which he stands to suffer if the application is not allowed or that his interest will not be well articulated unless he appears in these proceedings to champion his own cause.

The Claimant further contends that the Applicant supported his Application dated 28<sup>th</sup> September, 2020 through an undated Supplementary Affidavit.

The Applicant filed a supplementary affidavit sworn on a date not stated on the face of the affidavit in which he reiterates that the signatures of the claimant are not genuine and that the orders of this court granted in favour of the claimant on 31<sup>st</sup> August 2020 were induced by fraud, illegality and misrepresentation and/or falsehoods. He further avers that the Claimant has misunderstood the gist of his application and that should the application succeed the entire suit will be compromised. He avers that none of the parties to this suit has raised the issues pleaded in his application hence the necessity to grant his prayers for joinder and setting aside of the interim orders.

## **Submissions**

The application was disposed of by way of written submissions.

## **Applicant's Submissions**

The Applicant submits that he has a stake in the suit as the 2<sup>nd</sup> Respondent is a state corporation funded by public funds and the claimant's case is therefore a public interest case.

The Applicant submitted that members of the public and/or tax payers including him (the Intended Interested party herein) have a legitimate expectation that persons occupying public offices at the 2<sup>nd</sup> Respondent do so rightly, legally and/or lawfully as they earn salaries and allowances paid by the members of the public and/or tax payers. Consequently, if any person, in this case, the claimant occupies an office at the 2<sup>nd</sup> Respondents illegally and/or unlawfully, public funds and/or taxes will be illegally and unlawfully lost whenever paying the salary and/or allowances of such a person as he is not supposed to be in the office and/or entailed to such emoluments in the first place.

The Applicant submitted that in as much as the proceedings herein are in the nature of employer-employee relations, they fall within the ambit of public interest and concern. That the Intended Interested party being a Kenyan and/or taxpayer, he is directly affected by the proceedings herein for he has a legitimate expectation that in discharging its mandate, the 2<sup>nd</sup> Respondent will have in its offices employees and/or staff that are there legally and /or lawfully. Accordingly, it is trite fact that the Intended Interested Party has a stake in the proceedings herein, and it would only be fair that he be enjoined as sought.

The Applicant avers that he pays taxes to the Government of Kenya and which are in turn allocated to State Corporations including the 2<sup>nd</sup> Respondent to pay salaries, wages and/or allowances to its staff and/or employees including the claimant which will be lost if used in paying the Claimant's salaries and/or allowances, especially if it turns out that the claimant was reinstated in office because of his non-disclosure, deceit and/or misrepresentation.

The Applicant averred that his submissions will assist the court to consider all the factors relevant to the case, thereby arriving at a well-informed, reasoned and/or balanced decision and/or verdict. He submitted that once established by the court that his averments are true and correct, the claimant's claim will be dismissed at once, thereby saving the court judicial time and resources. Further, that the Intended Interested Party's submissions if considered will enable the court correct an inadvertent error committed due to the non-disclosure and/or misrepresentation by the claimant.

The Applicant contended that it is imperative to ascertain whether his submissions were a mere replication of what the other parties will be making in court. He averred that none of the Respondents has disputed the signature of the claimant on the said supporting affidavit, verifying affidavit and/or witness statement. That none of the parties to the proceedings will progress submissions disputing the claimant's disputed signature. That in the circumstances, it is only him that is in position to progress submissions relating to the claimant's disputed signatures. Accordingly, if he is not enjoined as an interested party in the proceedings herein, the court will never know whether indeed the

disputed signatures never belonged to the claimant.

### **Claimant's Submissions**

For the claimant it is submitted that the Applicant's Application and submissions raise new issues which are not proximate but peripheral to the gist of the main cause as between the principal parties herein and as such, he clearly does not have any stake in the matter before this Court. That his intention is to abuse these proceedings. The Claimant relied on the Supreme Court's decision in the case of **Francis Kariuki Muruatetu & Another v Republic & 5 others [2016] eKLR** (supra) where the Court expressed itself that:

*"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. One of the principles for the admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether new issue to be introduced before the Court..."*

The Court went further and stated that any interested party or amicus curiae who signals that he or she intends to steer the Court towards a consideration of those 'new issues' cannot, therefore, be allowed.

The claimant submits that the applicant has not demonstrated the prejudice he is likely to suffer should he not be enjoined in these proceedings.

That Claimant submitted that the Applicant has not demonstrated how the case which he intends to make before Court disputing the Claimant's signatures in the supporting Affidavit, verifying Affidavit and witness statement, is of any relevance to the Courts dispensation of the main issue as between the principal parties. That the Applicant cannot rely on entirely new issues to demonstrate the relevance of his case to the main cause, which, is but aimed to defeat the ends of justice.

The Claimant submitted that joinder of a party to proceedings as an interested part is at the discretion of the Court and in the instant case, the Applicant has not met the threshold to be enjoined as an interested party. That it would be more appropriate for the Applicant not to participate in these proceedings at all, considering that he does not stand to be prejudiced in any way in the event of non-joinder. That the Applicant adds no value to the proceedings for not having a stake in the matter before this Court, but is only likely to divert the natural course of the proceedings.

### **Analysis and Determination**

Having considered the pleadings and the submissions, the only issue that arises for determination is whether the Applicant has sufficiently demonstrated that he has met the requirements for joinder as an Interested Party to the suit herein.

The general rule for joinder of parties is set out in **Order 1 Rule 10(2)** of the **Civil Procedure Rules** which provides as follows –

**(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.**

[Emphasis added]

Section 23 of the Supreme Court Rules cited by the Applicant herein are only applicable to proceedings in the Supreme Court and not to proceedings in this court.

An Interested party was defined by the Supreme Court in **Trusted Society of Human Rights Alliance v Mumo Matemo and 5 Others (2014) eKLR** as follows –

*"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. Consequently, Rule*

2 of the constitution of Kenya (Protection of rights and fundamental freedoms) practice and procedure rules, 2013 has defined an interested party to mean:

*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;”*

Further **Rule 2 of the Constitution of Kenya (Protection of rights and fundamental Freedoms) Practice and Procedure Rules, 2013** has defined an interested party to mean:

*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;*

Article 258 of the Constitution which the Applicant also relied upon provides as follows –

## **258. Enforcement of this Constitution.**

**(1)Every person has the right to institute court proceedings, claiming**

**that this Constitution has been contravened, or is threatened with contravention.**

**(2)In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—**

**(a) a person acting on behalf of another person who cannot act in their own name;**

**(b) a person acting as a member of, or in the interest of, a group or class of persons;**

**(c) a person acting in the public interest; or**

**(d) an association acting in the interest of one or more of its members.**

In the case of **Francis Kariuki Muruatetu & Another v Republic & 5 Others [2016] eKLR**, the Supreme Court after analyzing legal provisions and case laws in an application for joinder of an interested party, outlined various elements which emerged as applicable where a party seeks to be enjoined in proceedings as an interested party 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 nonjoinder, 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.”*

The court further observed that –

*“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. One of the principles for the admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court... The Court went further and stated that any interested party or amicus curiae who signals that he or she intends to steer the Court towards a consideration of those ‘new issues’ cannot, therefore, be allowed.”*

As has been submitted by the claimant, the issues raised in the application for joinder are different from those raised in the claim. The Applicant’s main contention is that the signatures attributed to the claimant in pleadings filed herein are substantially different from those in previous proceedings attributed to the claimant.

The claim herein relates to a disciplinary matter in a private employment contract and therefore the provisions of the Constitution are not applicable as the Employment Act adequately provides for resolution of the same.

In addition, the averments of the Applicant if proved, would amount to criminal acts against the claimant which would not be capable of being adjudicated in the instant suit. Section 44(4) of the Employment Act provides for circumstances when an employer may terminate the employment of an employee while Section 41 and 43 thereof provide for the procedure for termination so that even if the grounds raised by the Applicant were to be proved, they would be irrelevant in the disciplinary process by the Respondent against the claimant.

As was stated in Mumatetu case cited above and as provided **Order 1 Rule 10(2)** of the Civil Procedure Rules, the joinder of an Interested Party would only be allowed by the court where the joinder would assist the court in arriving at a just determination of the dispute. In this case, the Applicant is not a necessary party and has no evidence relating to the issue in dispute in the suit herein that would add value to the suit. The information contained in the affidavits and documents filed by the Applicant are irrelevant and extraneous to the determination of the issues in dispute herein. The joinder of the Applicant would further unnecessarily convolute the issues herein and are prejudicial to the claimant as the Applicant appears to want the claimant to be removed from office, a power or privilege that is reserved only to the claimant's employer.

**For the foregoing reasons, I find the application for joinder as an Interested Party by the Applicant to be without merit and accordingly dismiss the same with costs to the claimant.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15<sup>TH</sup> DAY OF JANUARY 2021**

**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**