



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATION COURT**

**AT NAIROBI**

**PETITION NO. E113 OF 2021**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 41 AND 236 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: SECTIONS 33 AND 34 OF THE PUBLIC SERVICE COMMISSION ACT**

**AND**

**IN THE MATTER OF: THE EMPLOYMENT ACT, 2007**

**AND**

**IN THE MATTER OF: CONTRAVENTION OF THE RULES OF NATURAL JUSTICE**

**BETWEEN**

**KEVIN OTIENO ONDO.....PETITIONER**

**VERSUS**

**ETHICS AND ANTI CORRUPTION COMMISSION.....1<sup>ST</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION.....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**AND**

**ACTING DEPUTY CHIEF EXECUTIVE OFFICER OF**

**ETHICS AND ANTI CORRUPTION COMMISSION.....1<sup>ST</sup> INTERESTED PARTY**

**SHERIA MTAANI NA SHADRACK WAMBUI.....2<sup>ND</sup> INTERESTED PARTY**

**PATRICK MAINA MWANGI.....INTENDED 3<sup>RD</sup> INTERESTED PARTY**

**RULING**

1. The application before me for determination is dated 27<sup>th</sup> July 2021 in which the Applicant seeks to be enjoined in the instant petition as a 3<sup>rd</sup> Interested Party. The grounds in support of the application are that the Applicant has a demonstrable legal stake in the proceedings in his capacity as a Kenyan patriot who aspires and is duty bound to respect, uphold and defend the Constitution of Kenya, by virtue of Article 3 and Chapter 6 of the Constitution of Kenya 2010.

2. The Applicant further states that his joinder will ensure the determination of this Court is conclusive in respect of the issues raised in the petition and that the joinder will not prejudice any of the parties, nor delay the proceedings. He reiterates the same grounds in his affidavit in support of the application.
3. The Petitioner does not oppose the application. The 2<sup>nd</sup> Interested Party is also not opposed to the application.
4. The application is however opposed by all the Respondents and the 1<sup>st</sup> Interested Party.
5. The application was disposed of by way of written submissions. The Applicant filed submissions dated 27<sup>th</sup> September 2021.
6. The 1<sup>st</sup> Respondent and 1<sup>st</sup> Interested Party filed their joint submissions also dated 27<sup>th</sup> September 2021. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not file submissions but Counsel for the said parties informed the Court that they were relying on the submissions filed by the 1<sup>st</sup> Respondent and 1<sup>st</sup> Interested Party.
7. The Petitioner and the 2<sup>nd</sup> Interested Party did not file any submissions.

### **Determination**

8. The issue for determination in my view is whether the Applicant has demonstrated that he has sufficient stake in this suit, or will suffer prejudice if not enjoined, or that his joinder will ensure a fairer and more conclusive determination of the issues in dispute in the suit.

### **Facts**

9. In order to put the application into perspective, it is important to set out the background facts of the petition.
10. The position of Deputy Chief Executive Officer of the 1<sup>st</sup> Respondent fell vacant on 1<sup>st</sup> July 2019 following the resignation of the holder thereof. The 1<sup>st</sup> Interested Party was on 5<sup>th</sup> December 2019 appointed to fill the position in acting capacity. The appointment was extended by letter dated 24<sup>th</sup> November 2020 for one year. The same is lapsing on 5<sup>th</sup> December 2021.
11. On 23<sup>rd</sup> June 2020, the Respondent internally advertised the position. The same was contested in **Okiya Omtata Okioti v Ethics and Anti-Corruption Commission & Another, Petition No. E040 of 2020** which was determined on 15<sup>th</sup> January 2021, when the Court dismissed the same.
12. The 1<sup>st</sup> Respondent thereafter again commenced the recruitment process for the position of Deputy Chief Executive Officer, this time opening up the position to qualified members of the public.
13. In the petition herein, the Petitioner seeks to stop the advertisement on grounds that the 1<sup>st</sup> Interested Party who has been acting in the position for more than two years, and members of the public, have legitimate expectation that the 1<sup>st</sup> Interested Party would be confirmed to the position. Further, that the recruitment process would be a waste of public funds.
14. The 2<sup>nd</sup> Interested Party applied for joinder and was admitted as none of the parties objected. The Intended 3<sup>rd</sup> Interested Party's application of rejoinder is the subject of this ruling.
15. The principles for joinder of parties have been expounded in several decisions of the courts, among them **Judicial Service Commission v Speaker of the National Assembly & 8 others [2014] eKLR** where the Court stated–

*“In considering whether or not to allow the participation of any party either as an interested party or as a friend of the Court, the Court is guided by the provisions of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereafter the “Mutunga Rules”). Rule 2 thereof defines “friend of court” as an independent and impartial expert on an issue which is the subject matter of proceedings but is not a party to the case and serves to benefit the Court with their expertise.*

*Suffice it to say that while an interested party has a ‘stake/interest’ directly in the case, an Amicus’ interest is its ‘fidelity’ to the law...Consequently, 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 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.”*

16. Again in **Francis Kariuki Muruatetu & another v Republic & 5 others [2016] eKLR** the Court observed

*[37] From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party:*

*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.*

17. In **Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others [2015] eKLR** the Court observed –

*We have in several cases, considered the role of amicus and outlined the difference between amici curiae and interveners. This guideline has been followed by other Courts in our jurisdiction, in cases such as **Judicial Service Commission v. Speaker of the National Assembly and Another, High Court Petition No. 518 of 2013 [2013] eKLR**; and **Justice Philip K. Tunoi & Another v. Judicial Service Commission & 2 Others, High Court Petition No. 244 of 2014 [2014] eKLR**. We elaborated the difference between interveners and amici curiae in the application to be enjoined as amicus by the Law Society of Kenya, in this matter, - **Trusted Society of Human Rights Alliance v. Mumo Matemo & 5 Others, Sup. Ct. Pet. No. 12 of 2013** - at paragraphs 17 and 18 of the ruling:*

*“..... while an interested party has a ‘stake/interest’ directly in the case, an amicus’s interest is its ‘fidelity’ to the law: that an informed decision is reached by the Court, having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Courtroom.*

*‘Consequently, 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.’”*

18. As rightly submitted by the Applicant, the Constitution of Kenya 2020 places onus on every Kenyan to participate in the promotion of the rule of law and the spirit of constitutionalism.

19. Article 3 of the Constitution specifically provides for the same follows –

### **3. Defence of this Constitution**

**(1) Every person has an obligation to respect, uphold and defend this Constitution.**

**(2) Any attempt to establish a government otherwise than in compliance with this Constitution is unlawful.**

20. The Applicant’s grounds for joinder are that he is a Kenyan patriot who aspires and is duty bound to respect, uphold and defend the Constitution.

21. Does this averment amount to “*personal interest or stake that is clearly identifiable that is proximate enough to stand apart from anything peripheral*” as was stated in **Mumatetu (supra)**?

22. Has the Applicant demonstrated the prejudice he will suffer as a consequence of non-joinder? Has he demonstrated that the submissions he intends to make before the Court are not merely a replica of what the other parties will be making before the Court?

23. In my view, the Applicant has not demonstrated any of the above to the satisfaction of the Court. He has not demonstrated that he will bring on board anything that will not be articulated by the Petitioner and the 2<sup>nd</sup> Interested Party. In my view, the joinder of the 3<sup>rd</sup> Interested Party will only convolute the proceedings in this case. The Applicant has further not demonstrated any special personal interest that is different from that of the Petitioner and 2<sup>nd</sup> Interested Party, or any Kenyan for that matter, to warrant his joinder to this suit.

**24. For the foregoing reasons, the application is declined and it is accordingly dismissed.**

**25. There shall be no orders for costs.**

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12<sup>TH</sup> DAY OF NOVEMBER 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**