



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. 101 OF 2020

IN THE MATTER OF ARTICLES 3(1), 22, 48, 50(1), 162(2)(a), 165(5(b),

258 & 259(1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF ALLEGED THREAT TO AND CONTRAVENTION

OF ARTICLES 132(2)(f) OF THE CONSTITUTION

IN THE MATTER OF COMPELLING THE PRESIDENT TO SUBMIT TO

THE NATIONAL ASSEMBLY FOR VETTING AND APPROVAL OF THE

NAMES OF PERSONS RECOMMENDED BY THE JUDICIAL SERVICE

COMMISSION FOR APPOINTMENT AND EMPLOYMENT AS JUDGE

IN THE MATTER OF THE JURISDICTION OF THE EMPLOYMENT AND

LABOUR RELATIONS COURT OVER THE EMPLOYMENT OF STATE

OFFICERS INCLUDING JUDGES OF THE SUPERIOR COURTS

IN THE MATTER OF THE DOCTRINE OF LEGITIMATE EXPECTATIONS

BETWEEN

OKIYA OMTATAH OKOITI.....PETITIONER

- VERSUS -

THE HON. ATTORNEY GENERAL.....RESPONDENT

-AND-

ADRIAN KAMOTHO NJENGA.....INTENDED INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Friday 16th October, 2020)

RULING

The intended interested party is Adrian Kamotho Njenga Advocate. He filed an application by way of the notice of motion dated 13.07.2020 under Articles 22, 23, 27, 47, 48, 162(2) (a), 165 and 258 of the Constitution of Kenya, section 1A, 1B of the Civil Procedure Act, section 3 of the Employment and Labour Relations Court Act, 2011, rule 3 of the Employment and Labour Relations Court Act, 2011, Rules 2 and 7 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 –(Mutunga Rules), and all other enabling provisions of the law. The applicant prayed for orders:

- 1) That the application be determined before the hearing of the petition dated 24th June 2020.
- 2) That Adrian Kamotho Njenga be granted leave to be enjoined in the petition as an interested party.
- 3) That the costs of the application be provided for.

The application was based on the attached supporting affidavit of the applicant and upon the following grounds:

- 1) The petition dated 24th June 2020 has been duly filed herein.
- 2) The petition fundamentally assails the order and decree of the High Court at Nairobi in **Adrian Kamotho Njenga – Versus- Attorney General; Judicial Service Commission & 2 Others (Interested Parties) Petition 369 of 2019.**
- 3) The said petition **Adrian Kamotho Njenga – Versus- Attorney General; Judicial Service Commission & 2 Others (Interested Parties) Petition 369 of 2019** is still alive before a bench of Judges.
- 4) The applicant has a constitutional right to access justice and to be heard by the Court failing he will suffer irreversible prejudice.
- 5) The applicant has a legitimate expectation and a duty to bring to the attention of the Honourable Court pertinent issues to avert potential miscarriage of justice to the petitioner herein and the public at large.
- 6) The applicant has been steadfast in the protection and enforcement of the constitution and the rule of law in Kenya and his participation in these proceedings will aid the Court to arrive at a just determination of the petition herein.
- 7) The applicant has a discernible stake and interest as well as a duty to ensure that the veracity of matters laid before the Court is carefully ascertained.
- 8) It is in the interest of justice and public interest that the application is allowed.
- 9) At paragraph 8 of the supporting affidavit the applicant states thus, **“8. That I seek this Honourable Court’s leave to be enjoined as an interested party in order to appraise this Court on the status and developments at the High Court at Nairobi which is currently seized of the matters that the petitioner seeks to prosecute. This will enable this Honourable Court arrive at a just determination of the instant Petition.”**

The petitioner opposes the application by reliance on the submissions filed for the respondent in the petition. The respondent in the petition, the Honourable Attorney General, has opposed the application by filing the grounds of opposition dated 29.07.2020 through the learned Principal State Counsel, Schola Mbilo. The grounds of opposition are as follows:

- 1) The intended interested party has not demonstrated how his interests will not be well articulated unless he appears in the proceedings to champion his cause.
- 2) The applicant describes himself as a public spirited Kenyan citizen and defender of the Constitution which is similar to description of the petitioner. The intended interested party has not demonstrated any of his interests that would not be articulated by either the petitioner or the respondent for him to be deemed as a necessary party to the proceedings.
- 3) That the interested party has taken the exact same perspective of matters as the petitioner herein hence he does not need to be enjoined in the proceedings as an interested party.
- 4) The issues raised in the instant petition are purely public interest litigation on Constitutional interpretation while issues in the alleged petition **Adrian Kamotho Njenga – Versus- Attorney General; Judicial Service Commission & 2 Others (Interested Parties) Petition 369 of 2019** were purely seeking orders to compel the President to appoint recommended persons as Judges and has no nexus with these proceedings.
- 5) Petition **Adrian Kamotho Njenga – Versus- Attorney General; Judicial Service Commission & 2 Others (Interested Parties) Petition 369 of 2019** is already determined and the record being in public domain there is no development as the Court can easily access pleadings, proceedings or any document therein as may be necessary.
- 6) Participation by the applicant in the present proceedings is not necessary for the complete settlement of all questions involved in the proceedings as has not demonstrated any expertise on constitutional interpretation to warrant his participation in the petition.
- 7) The applicant has not met the threshold for joinder as per the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and as per decision made by Courts on the subject. The applicant has no stake in the proceedings to be enjoined as an interested party and it is in the best interest of justice the application be dismissed.
- 8) The applicant will not be adversely affected in law by non-joinder into the petition.

The applicant and the respondent filed their respective submissions. The Court has considered the parties’ respective submissions. The

petitioner and the respondent did not file affidavits to deny any of the material facts set out in the supporting affidavit. The Court has no reason to doubt the facts as per the supporting affidavit. In particular, the Court returns that the petitioner is a party in the petition at the High Court, Petition **Adrian Kamotho Njenga – Versus- Attorney General; Judicial Service Commission & 2 Others (Interested Parties) Petition 369 of 2019** and which is alive. Further the Court finds that in the instant petition, the petitioner has referred to the petition **Adrian Kamotho Njenga – Versus- Attorney General; Judicial Service Commission & 2 Others (Interested Parties) Petition 369 of 2019** as per paragraphs 6 (c) of the supporting affidavit annexed on the petition and, paragraphs 59 (1.2) and 19.3 of the petition respectively. Further, the Court finds that the present petition, for example in paragraphs 33 and 35 of the petition, refers to the 41 persons recommended by the Judicial Service Commission for appointment by the President to various offices of Judge in the Judiciary, and which issue was similarly in issue in **Adrian Kamotho Njenga – Versus- Attorney General; Judicial Service Commission & 2 Others (Interested Parties) Petition 369 of 2019** as per the judgment exhibited for the petitioner in the supporting affidavit. There is no dispute that the applicant is the petitioner in **Adrian Kamotho Njenga – Versus- Attorney General; Judicial Service Commission & 2 Others (Interested Parties) Petition 369 of 2019**. The Court finds that the petitioner has thereby established that he has stakes in the present proceedings and his presence will be necessary for efficient, effective and complete determination of the present petition. As submitted for the respondent, in **Meme –Versus- Republic [2004]eKLR**, it was held that joinder could also be necessary where the Court seeks to prevent a likely course of proliferated litigation so that if the present petition and petition in **Adrian Kamotho Njenga – Versus- Attorney General; Judicial Service Commission & 2 Others (Interested Parties) Petition 369 of 2019** raise substantially similar issues, the applicant is well placed to assist the Court to prevent such proliferated litigation.

As submitted for the applicant, the Mutunga Rules define 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, in **Francis Kariuki Muruatetu & Another –Versus- Republic & 5 others [2016]eKLR**, the Supreme Court enjoined the parties that sought enjoyment in view of the unique and public interest nature of the matter.

The Court finds that in the instant case the applicant has established that he has stakes and interest because he is the petitioner in the related petition in **Adrian Kamotho Njenga – Versus- Attorney General; Judicial Service Commission & 2 Others (Interested Parties) Petition 369 of 2019** and further the parties have not denied the public interest nature of the present petition. The Court returns that the applicant has met the criteria for joinder and his presence will be necessary towards facilitating the just, expeditious and proportionate resolution of the present petition as provided for in section 3 of the Employment and Labour Relations Court Act, 2011.

In conclusion, the application by the notice of motion dated 13.07.2020 is hereby allowed with orders:

- 1) The applicant Adrian Kamotho Njenga Advocate is hereby granted leave to be enjoined in the present petition as an interested party.
- 2) The petitioner and the respondent to serve their respective papers on record upon the applicant within 7 days.
- 3) Being a public interest litigation, each party to bear own costs of the application.

Signed, dated and delivered by the court at Nairobi by video-link this Friday 16th October, 2020.

BYRAM ONGAYA

JUDGE