



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 30 OF 2019

IN THE MATTER OF AN APPLICATION UNDER ARTICLES 162(2) (a); 165(3) (d) (ii) AND 258 OF THE CONSTITUTION

IN THE MATTER OF ARTICLES 1(1); 1(3); 2(2); 94(5) AND 159(1) OF THE CONSTITUTION

**IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES
2006**

IN THE MATTER OF SECTION 87(1) OF THE EMPLOYMENT ACT NO. 11 OF 2007

IN THE MATTER OF THE JUDICATURE ACT CAP. 8 OF THE LAWS OF KENYA PART VII

**IN THE MATTER OF PROVISIONS OF FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT) ACT, CHAPTER 43 OF
THE LAWS OF KENYA**

IN THE MATTER OF THE KENYA CITIZENSHIP AND IMMIGRATION ACT NO. 12 OF 2011

IN THE MATTER OF ORDER 3 RULE 9 OF THE CIVIL PROCEDURE RULES – LEGAL NOTICE NO. 151 OF 2010

IN THE MATTER OF AN APPLICATION FOR DECLARATORY ORDERS

BETWEEN

JAMES FINLAY (KENYA) LIMITED.....PETITIONER

v

ELLY OKONGO INGANGA.....1st RESPONDENT

LUCAS ONDUSO OMOKE.....2nd RESPONDENT

VITALIS OTIENO MUGA.....3rd RESPONDENT

REBECCA OKENYURI NYAKONDO.....4th RESPONDENT

JOICE MONGERE OCHOI.....5th RESPONDENT

CHRISTOPHER OMWAMBIA CHUMA.....6th RESPONDENT

GETUNGA MASELA INDINGA.....7th RESPONDENT

RULING

1. The 7 Respondents individually commenced Court action against James Finlay (Kenya) Ltd (the employer) before the Sheriffdom of Lothian and Borders at Edinburgh in the All-Scotland Sheriff Personal Injury Court.
2. Within a short time of lodging the Statement of Claims, the Respondents moved the Scottish Court through motions seeking orders

allowing for *locus inspection(s)* by 5 expert witnesses to enable the preparation of expert reports to assist the Court.

3. The expert witnesses were to be accompanied by a legal team of 4 including one Ronald Onyango, solicitor, and an advocate of the High Court of Kenya.
4. The Sheriff Personal Injury Court granted the motion(s) on 22 November 2018 and directed that the *locus inspections* be carried out not later than end of February 2019. The order was amended on 18 December 2018 but remained the same in substance.
5. The parties' legal advisors engaged in communications on the logistics of the *locus inspection* visits but unfortunately no consensus was reached.
6. On 25 January 2019, the employer instituted legal proceedings (amended Originating Notice of Motion was filed on 31 January 2019) against the Respondents in this Court seeking declaratory orders

1. **THAT** the orders issued by the **ALL SCOTLAND SHERIFF PERSONAL INJURY COURT** (hereinafter referred to as the Scottish Court''') dated 22nd November 2018 as amended on 18th December 2018 and more particularly listed below have to be adopted and recognised as orders of this Court before being executed as required by **Article 159(1)** of the Constitution:

(a) The **ORDER** for Inspection Reference No. PIC PG 10 – 18 dated 22nd November 2018 as amended by a subsequent **ORDER** dated 18th December 2018 issued by the Scottish Court in the case of **ELLY OKONGO INGANGA** against **JAMES FINLAY (KENYA) LIMITED** filed at Edinburgh in the Scottish Court under Court Ref. No. PIC – PN 1055 – 17 dated NINTH day of May 2017.

(b) The **ORDER** for Inspection Reference No. PIC PG 16 – 18 dated 22nd November 2018 as amended by a subsequent **ORDER** dated 18th December 2018 issued by the Scottish Court in the case of **LUCAS ONDUSO OMOKE** against **JAMES FINLAY (KENYA) LIMITED** filed at Edinburgh in the Scottish Court under Court Ref. No. PIC – PN 1056 - 17 dated NINTH day of May 2017.

(c) The **ORDER** for Inspection Reference No. PIC PG 7 – 18 dated 22nd November 2018 as amended by a subsequent **ORDER** dated 18th December 2018 issued by the Scottish Court in the case of **VITALIS MUGA** against **JAMES FINLAY (KENYA) LIMITED** filed at Edinburgh in the Scottish Court under Court Ref. No. PIC – PN 1057 - 17 dated NINTH day of May 2017.

(d) The **ORDER** for Inspection Reference No. PIC PG 8 – 18 dated 22nd November 2018 as amended by a subsequent **ORDER** dated 18th December 2018 issued by the Scottish Court in the case of **REBECCA OKENYURI NYAKONDI** against **JAMES FINLAY (KENYA) LIMITED** filed at Edinburgh in the Scottish Court under Court Ref. No. PIC – PN 1058 - 17 dated NINTH day of May 2017.

(e) The **ORDER** for Inspection Reference No. PIC PG 5 – 18 dated 22nd November 2018 as amended by a subsequent **ORDER** dated 18th December 2018 issued by the Scottish Court in the case of **JOICE MONGARE OCHOI** against **JAMES FINLAY (KENYA) LIMITED** filed at Edinburgh in the Scottish Court under Court Ref. No. PIC – PN 1052 - 17 dated NINTH day of May 2017.

(f) The **ORDER** for Inspection Reference No. PIC PG 11 – 18 dated 22nd November 2018 as amended by a subsequent **ORDER** dated 18th December 2018 issued by the Scottish Court in the case of **CHRISTOPHER OMWAMBIA CHUMA** against **JAMES FINLAY (KENYA) LIMITED** filed at Edinburgh in the Scottish Court under Court Ref. No. PIC – PN 1053 - 17 dated NINTH day of May 2017.

(g) The **ORDER** for Inspection Reference No. PIC PG9 – 18 dated 22nd November 2018 as amended by a subsequent **ORDER** dated 18th December 2018 issued by the Scottish Court in the case of **GETUNA MASELA IDINGA** against **JAMES FINLAY (KENYA) LIMITED** filed at Edinburgh in the Scottish Court under Court Ref. No. PIC – PN 1051 - 17 dated NINTH day of May 2017.

1A. **THAT** the Respondents their agents and or servants must abide by and observe the provisions of the **High Court (Practice and Procedure) Rules PART VII** being part of the written laws of England applicable to Kenya by virtue of **Section 3(1)(b)** of the **Judicature Act Cap. 8** of the Laws of Kenya before conducting any *locus inspection* as ordered by the Scottish Court such *locus inspection* having the sole purpose of collecting evidence to be used in the Scottish Court.

1B. **THAT** failure by the Respondents, their agents and or servants to observe the provisions set out at **PART VII** of the **High Court (Practice and Procedure) Rules** will be in breach of the sovereignty of Kenya and an abuse of protocol as between the two sovereign states of United Kingdom and Kenya.

1C. **THAT** any execution of the Scottish Court orders before being adopted by this Honourable Court will be contrary to the legal spirit set out in the provisions of **Foreign Judgments (Reciprocal Enforcement) Act Chapter 43** of the Laws of Kenya.

2. **THAT** the Respondents have not sought judicial authority within Kenya for the inspection visit described in the Scottish Court orders dated 22nd November 2018 as amended on 18th December 2018 and more particularly listed at paragraphs No. 1(a),(b),(c),

(d), (e), (f) and (g) herein above.

3. **THAT** judicial authority is required under Kenyan laws for the Respondents to be able to execute orders issued by the Scottish Court.

4. **THAT** the Applicant will be in breach of Kenyan Constitution and the country's legislative enactments were it to allow an inspection visit based on the Scottish Court orders to take place within its estates if such visits is not sanctioned by Kenyan judicial authority.

5. **THAT** in addition to the requirement of a Kenyan judicial authority to execute the Scottish Court orders dated 22nd November 2018 as amended on 18th December 2018 and more particularly listed at paragraphs No. 1(a),(b),(c),(d),(e), (g) and (f) herein any non-citizen visiting Kenya for the purposes of execution of the enlisted orders is required pursuant to **Section 40** of the **Kenya Citizenship Act of 2011** to be in possession of a valid work permit or be in possession of a special pass issued under the **Kenya Citizenship and Immigration Regulations 2012**.

6. **THAT** should the Applicant allow any non-citizen to visit its premises for the purposes of conducting inspections envisaged in the Scottish Court orders without such non citizen being in possession of a valid work permit or a valid special pass referred to under No. 5 above the Applicant would be committing an offence under section **45(4), (5) and (6)** and **Section 53(1)** of the **Kenya Citizenship and Immigration Act** and could be liable to criminal prosecution.

7. **THAT** the costs of these proceedings be provided for.

7. When the application was placed before the Duty Court 25 January 2019, it directed that the application be served for directions/ *inter partes* hearing on 29 January 2019.

8. On 29 January 2019, the parties informed the Court that they had reached a consent. The Court directed that a written consent be filed before 30 January 2019.

9. However, when the file was called on 30 January 2019 the parties indicated that they had failed to perfect the consent. Despite the Court allowing the parties more time, no compromise was reached.

10. At the same sitting, an Intended Interested Party made an oral indication to the Court that it wished to be joined to the proceedings. The Court directed that a formal application be filed and served within set timelines. The timelines were not met.

11. On 1 February 2019, the *Central Organisation of Trade Unions* and its affiliate the *Kenya Plantation & Agricultural Workers Union* (wrongly referred to in the application as Kenya Agricultural Planters Union (KAPAWU) filed a the joinder application seeking orders

1. ...

2. **THAT** this Honourable Court be pleased to admit the Intended Interested Party (the Union) to these proceedings.

3 **THAT** this Honourable Court be pleased to direct the Applicant and the Respondent to serve the Intended Interested Party with all documents relevant to these proceedings in order to allow the Union to substantially respond to the instant Application and any related current and future matters upon admission to these proceedings.

4 **THAT** this Honourable Court be pleased to grant stay of proceedings of the Petition and the accompanying Applications pending hearing and determination thereof.

5. **THAT** costs of this Application be provided for.

12. The principal grounds advanced in support of the joinder application were that the Intended Interested Party and some 9 unionisable employees had instructed a firm of solicitors in the United Kingdom to sign up and institute legal proceedings (test case) in Scotland seeking compensation for injuries sustained in the employer's workplace and therefore the outcome of the *locus inspections* would directly implicate the anticipated suits; that the challenge by the employer to the *locus inspections* herein would derail the anticipated suits; that the employer's instant application was meant to stifle the substantive suit upon which the *locus inspection* orders were granted; that it was necessary to delay the *locus inspections* in order to preserve evidence; that the Intended Interested Party had a contractual relationship with the employer as set out in (a) *collective bargaining agreement* setting out terms and conditions of service for employees, and that it was in the interest of justice to allow the joinder application.

13. Both the employer and the Respondents opposed the joinder application. The employer filed grounds of opposition and submissions while the Respondents filed a replying affidavit and submissions.

14. The employer contended in opposing the application that the Intended Interested Party had not clearly identified its interest in the proceedings; had not demonstrated any prejudice it would suffer were the Court to proceed without its participation; that the Intended Interested Party had not shown that the case it was going to agitate could not be made by the primary parties; that the joinder application was disjointed and at variance with the case before Court and that the Intended Interested Party and its counsel had exhibited unethical behaviour.

15. The Respondents on the other hand contended that the Scottish legal framework did not provide for group action or anticipated

proceedings; that injury cases are determined on a unitary basis and that the Intended Interested Party had not demonstrated its legal interest in the present proceedings.

16. The Court has considered all the material placed before it including the written and oral submissions.

The law on joinder of Interested Party

17. The test for joinder of an Interested Party in this jurisdiction has been the subject of various decisions and ultimately the highest Court in the land, the Supreme Court gave its imprimatur to the legal principles in *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Ors* (2015) eKLR.

18. In the words of the Supreme Court, 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.

19. The Supreme Court also adverted to the legal principles in *Francis Kariuki Muruatetu & Ar v Republic & 5 Ors* (2016) eKLR.

Intended Interested Party's stake

20. These proceedings, which the Intended Interested Party wishes to join are not substantive proceedings as far as the gravamen of the Respondents legal grouses are concerned.

21. The substantive proceedings are pending before the Scottish Courts. The said proceedings are yet to be determined on the merits.

22. The said proceedings are personal in nature though the facts and legal issues therein may be similar or may arise in other anticipated proceedings which may or may not be presented before the Scottish Courts by the Intended Interested Party.

23. The Intended Interested Party is not a primary party to the substantive proceedings. It did not make known its intention to join those substantive proceedings, most likely because it was well advised of the unitary nature of such claims.

24. It is however fighting vociferously to join these *ancillary proceedings* in respect of interlocutory orders made to enable the determination of the substantive proceedings.

25. In the view of this Court, the Intended Interested Party cannot have a stake or identifiable interest in these *ancillary proceedings* when it has not instituted any substantive proceedings on behalf of its members or made an attempt to join the running substantive proceedings pending before the Scottish Courts.

26. It is clear to the Court that what is being advanced by the Intended Interested Party is no more than (an) *inchoate interests or rights*. The Intended Interested Party is attempting to enter the house through the window when it has made no attempt to gain ingress through the door. The door may eventually turn out not locked.

27. The application is premature at the very most.

Prejudice

28. Prejudice may be factual or legal.

29. The Intended Interested Party indicated that it is in the *boiler room*, so to speak with a likelihood of instituting appropriate proceedings on behalf of its membership not part of the substantive proceedings currently before the Scottish Courts.

30. If and/or when those proceedings are commenced by the Intended Interested Party, it has not demonstrated that any orders made by this Court in these *ancillary proceedings* would prejudice it.

31. The orders sought by the employer in the instant proceedings are more in the nature of *positive orders*, to compel the Respondents to comply with statutory processes for enforcement of judgments and/or orders made by foreign Courts in this jurisdiction.

32. Any such orders, if granted by this Court will not stop the Scottish Courts from making further *locus inspection* visits orders were the Intended Interested Party satisfy the test for such orders before the Scottish Courts.

33. It is therefore not likely to be prejudiced, factually or legally.

Failure to file submissions

34. The employer also urged the Court to reject the joinder application on the ground that the Intended Interested Party had failed to file submissions it intended to make during the hearing of the Originating Motion and refuge was sought in the *Muruatetu* decision.

35. In the view of this Court, the requirement as to submissions is anchored in section 23(2)(d) of the Supreme Court Act and being a particular provision, should not be decisive at this level of the judicial hierarchy.

Conclusion and Orders

36. From the foregoing, the Court concludes that the Intended Interested Party has failed to meet the test for joinder to these proceedings.

37. The Court therefore declines to exercise its discretion in favour of the Intended Interested Party.

38. The application dated 31 January 2019 is dismissed with no order as to costs.

Delivered, dated and signed in Nairobi on this 6th day of February 2019.

Radido Stephen

Judge

Appearances

For Employer Mr. Obura instructed by Obura Mbeche & Co. Advocates

For Respondents Mr. Okero instructed by Behan & Okero Advocates

For Intended Interested Party Mr. Onyango/Mr. Amunga instructed by McKEVRON LAW CHAMBER LLP

Court Assistant Lindsey