



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**PETITION NO. 86 OF 2017**

**IN THE MATTER OF: ARTICLES 19, 20, 22(1) & (2)(c), 23, 162(2)(a), 165(5)(b), AND 258(1) & (2)(c) OF THE CONSTITUTION**

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION AND VIOLATION OF THE NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE IN ARTICLES 1, 2, 3(1), 10(1) & (2)(a) & (c), 73, 75(1) AND 232(1)(a),(d),(e), (f) & (2)(b) AND 259(1) OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION AND VIOLATION OF THE RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 27, 41(1) AND 47 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF: THE ALLEGED FAILURE TO TAKE DISCIPLINARY ACTION AGAINST DR. HEZEKIAH CHEPKWONY AND DR. PIUS WANJALA**

**BETWEEN**

**OKIYA OMTATAH OKOITI.....PETITIONER**

**v**

**MINISTRY OF HEALTH.....1<sup>st</sup> RESPONDENT**

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

**HON. ATTORNEY GENERAL.....3<sup>rd</sup> RESPONDENT**

**DR. HEZEKIAH CHEPKWONY.....4<sup>th</sup> RESPONDENT**

**DR. PIUS WANJALA.....5<sup>th</sup> RESPONDENT**

**BOARD OF MANAGEMENT FOR THE**

**NATIONAL QUALITY CONTROL**

**LABORATORY.....6<sup>th</sup> RESPONDENT**

**AND**

**PHARMACY & POISONS BOARD.....INTERESTED PARTY**

**RULING NO. 4**

1. Before Court is a motion dated 20 July 2018 by the Petitioner seeking orders

1. ...

2. **THAT** the 6<sup>th</sup> Respondent’s replying affidavit dated 8<sup>th</sup> May 2018, sworn on its behalf by Dr. George Wang’ang’a be struck out from these proceedings.

3. **THAT** the 5<sup>th</sup> Respondent be compelled to demonstrate the authority to swear affidavits on behalf of the 4<sup>th</sup> Respondent.

4. **THAT** the costs of this application be provided for.

2. When the application came up directions on 31 July 2018, the Court directed the Respondents to file their replies thereto on or before 17 August 2018 and scheduled mention for 25 October 2018 to confirm compliance and give further directions. The Court at the same sitting issued directions in respect of an application dated 25 July 2018 which had been filed on the same day.

3. The Court did not sit on 25 October 2018 and when the parties appeared on 17 December 2018, the 1<sup>st</sup> to 3<sup>rd</sup> Respondents indicated that they would not participate in the application because it was directed at the 6<sup>th</sup> Respondent.

4. The Petitioner was absent and the Court sent the file back to the registry.

5. On 1 February 2019, the Petitioner moved the Court under certificate of urgency and when the parties appeared on 14 February 2019, the parties informed the Court that submissions had been exchanged. The Court reserved ruling to today.

6. The Petitioner had filed submissions in support of the application on 24 October 2018 and a 3<sup>rd</sup> supplementary affidavit on the same day.

7. The Court has not been able to locate the Respondents grounds of opposition/replying affidavit and/or submissions on file.

8. The grounds advanced in support of the application were that the 6<sup>th</sup> Respondent is a *juristic* person with the power to recruit staff and a secretariat headed by a Director who acts as the Chief Executive Officer and that because the powers of the Director are circumscribed by section 351 of the Pharmacy and Poisons Act, the Deputy Director could not purport to swear and file an affidavit on its (6<sup>th</sup> Respondent's) behalf and that there was no board resolution authorising Dr. Wang'ang'a to swear any affidavits in respect of the proceedings.

9. The Petitioner drew the attention of the Court to the case of *East African Portland Cement Ltd v the Capital Markets Authority & 5 Ors* citing the Ugandan case of *Bugerere Coffee Growers Ltd v Seraduka & Ar* (1970) EA 147 where the legal principle that a board resolution is a prerequisite authorising institution of legal proceedings.

10. The Petitioner contended that since Dr. Wang'ang'a was not a member of the 6<sup>th</sup> Respondent and was a junior to the 4<sup>th</sup> and 5<sup>th</sup> Respondents, he did not have the competence to swear the affidavit filed in Court.

11. According to the Petitioner, Dr. Wang'ang'a was incapacitated by conflict of interest as he had sworn an affidavit in support of the 4<sup>th</sup> and 5<sup>th</sup> Respondents case.

12. The Court has given due consideration to the application, the grounds, the affidavits thereto and the submissions.

13. It is correct that a long chain of authorities require that a company board issue a resolution allowing the commencement of legal proceedings in the name of the company. There are legal and pragmatic reasons why that is so.

14. In the present case, the *juristic* person did not commence litigation. It was sued by the Petitioner who at the same time included the *juristic* persons' Director and Deputy Directors, not as Interested Parties, but as Respondents.

15. The Director and Deputy Director have been sued in their names by the Petitioner who is seeking a Court order to compel the *juristic* person to take disciplinary against the Directors.

16. In such a scenario, the law and common sense must of necessity walk hand in hand. It would be illogical to expect the persons the *juristic* person is being asked to take disciplinary action against to swear affidavits on behalf on the *juristic* person.

17. In the view of the Court, that would be an exhibition of conflict of interest more serious than having the Deputy Director, Dr. Wang'ang'a swearing the affidavit.

18. The affidavit under challenge has expressly deposed that the deponent was duly authorised by the 6<sup>th</sup> Respondent to swear the affidavit. The deponent has also attached to the affidavit a letter signed by the Chairperson of the 6<sup>th</sup> Respondent and the substantive Director indicating that authority had been given.

19. It would not be sufficient therefore for the Petitioner to merely assert in a rival affidavit that the deponent lacks the capacity, or attempt to *coerce* the deponent to produce a board resolution when there is a letter whose validity has not been disproved.

20. The Court finds that the application dated 20 July 2018 lacks merit and orders it dismissed with costs.

21. The Court is concerned that after it gave directions towards the hearing of the Petition on 5 April 2018 and on 18 May 2018, the parties have been minded to file applications after application. Had the parties adhered to the directions, the hearing of the Petition could have been concluded on 24 July 2018.

**Delivered, dated and signed in Nairobi on this 22<sup>nd</sup> day of March 2019.**

**Radido Stephen**

**Judge**

**Appearances**

Petitioner in person

1<sup>st</sup> to 3<sup>rd</sup> Respondents Ms. Odhiambo, State Counsel, Office of the Attorney General

For 4<sup>th</sup> to 6<sup>th</sup> Respondents Ms. Kiarie/Mr. Muturi instructed by Kinyanjui Njuguna & Co. Advocates

For Interested Party did not participate

Court Assistant Lindsey