



**REPUBLIC OF KENYA**

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

**PETITION NO. 137 OF 2019**

**MR. RONOH SITIENEL.....1ST PETITIONER**

**DR. IRENE KAMANJA.....2ND PETITIONER**

**MS.HELLEN BOSIBORI.....3RD PETITIONER**

**MS. GEOGINA MUCHAI.....4TH PETITIONER**

**MR.PAUL MUNYAO.....5TH PETITIONER**

**-VERSUS-**

**PHARMACY & POISONS BOARD.....1ST RESPONDENT**

**CABINET SECRETARY MINISTRY OF HEALTH.....2ND RESPONDENT**

**-AND-**

**HON. ATTORNEY GENERAL.....1ST INTERESTED PARTY**

**NATIONAL QUALITY CONTROL LABORATORY.....2ND INTERESTED PARTY**

**DR. EDITH WAKORI.....3RD INTERESTED PARTY**

**DR.SIMON MUNGAI.....4TH INTERESTED PARTY**

**DR.LILIAN BALUSI.....5TH INTERESTED PARTY**

(Before Hon. Justice Byram Ongaya on Friday 25<sup>th</sup> October, 2019)

**RULING**

The petition was filed on 22.07.2019 through Kinyanjui Njuguna & Company Advocates. The 1st respondent Pharmacy & Poisons Board appointed Gumbo & Associates to act in the case as per notice dated 22.07.2019. The Hon. Attorney General filed a notice of appointment on 24.07.2019 to act for the 2nd respondent, the Cabinet Secretary for Health, and, 1st interested party, the Hon. Attorney General.

Dr.Pius M. Wanjala filed on 27.08.2019 the notice of appointment of advocate dated 23.07.2019 to act as Advocate for 2nd interested party. On 27.08.2019 the Hon Attorney General filed a notice of appointment of advocate dated 27.08.2019 to act for 2nd interested party as well.

On 23.09.2019 the Attorney General through learned Litigation counsel Beatrice Akuno filed an urgent application under Article 156 of the Constitution, sections 5, 6, 7 and 21 of the Office of the Attorney General Act and sections 9, 11, and 12 of the Public Officer Ethics Act and Order 51 rule 1 of the Civil Procedure Rules 2010. The prayers were for orders:

- a) The matter be certified urgent and be heard during the current Court Vacation.
- b) Dr. Pius Wanjala be removed on record as acting for the 2nd interested party in these proceedings.
- c) All pleadings, documents and representations made by Dr. Pius Wanjala on behalf of the 2nd interested party without authority or

concurrence of the Hon. Attorney General should be struck out from the proceedings.

d) Costs of this application be provided for.

The application was supported by the affidavit of Susan Mochache, Principal Secretary at the Ministry of Health and upon the following grounds:

a) The Hon. Attorney General has received instructions to act for 2nd interested party.

b) The 2nd interested party is a state corporation and is not properly represented since there is no Board of management pursuant to orders of Lady Justice Maureen Onyango issued on 14.08.2019.

c) In absence of the Board the 2nd interested party is unable to pass any valid resolutions including the instruction of a counsel to represent it in this matter.

d) Dr. Pius Wanjala who has filed a notice of appointment subsequent to the notice of appointment filed by the Hon. Attorney General has no capacity to act for the 2nd interested party because:

i. He is a public servant serving as a Deputy Director in the 2nd interested party and would be conflicted on the issue of which Board is to assume office. He cannot purport to act as a counsel for the 2nd interested party while being a public officer or on instructions of the former Board whose tenure and revocation is the subject matter of the instant proceedings.

ii. Dr. Pius Wanjala is employed in the public service in the Ministry of Health as a Pharmacist and cannot act in any other role unless properly re-designated in the public service in line with applicable procedures.

iii. The representation of the 2nd interested party by Dr. Pius Wanjala would expose the institution to risks since he is neither external counsel with a professional indemnity cover and neither is he an internal counsel or a litigating counsel from the office of the Hon. Attorney General.

iv. The representations by Dr. Pius Wanjala are inimical to the position of the parent Ministry.

e) The orders sought should be granted in the interest of justice.

f) The 1st respondent revoked appointment of petitioners as 2nd interested party's Board members by gazette notice no. 6599 of 01.07.2019 and made other appointments accordingly. The petitioners filed the present petition to challenge their removal. By orders of Court ( Onyango P.J) given on 14.08.2019 both Boards have been barred from sitting. In absence of a board, the 2nd respondent cannot make a decision to appoint counsel in the present petition.

g) The Attorney General filed a notice to act for 2nd interested party on 27.08.2019 and Dr. Pius Wanjala filed on 27.08.2019 a notice to act for the 2nd interested party as well.

h) Dr. Pius Wanjala has a pending suit **ELRC Cause No. 124 of 2019 Dr. Hezekiah Chepkwony & Others – Versus- Cabinet Secretary Ministry of Health** and wants to use the present petition to advance his private interests disguised as public interests.

i) Under Article 156 of the Constitution the Hon. Attorney General has power and authority to represent the Government, any Government Ministry or Department especially in matters of public interest. By section 6(2) (d) of the Office of the Attorney General Act 2012, the Hon. Attorney General can issue directions to any officer performing legal functions in Government.

The 2nd interested party filed on 03.10.2019 the replying affidavit of Hezekiah Chepkwony, the Director of the 2nd interested party, to oppose the application upon the following grounds:

a) The 2nd interested party is a body corporate as a state corporation under the Pharmacy and Poisons Board Act, Cap. 244 Laws of Kenya. Section 35E thereof states it can sue and be sued in its corporate name. The 2nd interested party is the principal respondent to the current application.

b) Sections 35H (1), 35(1) (c) and 35 F (5) of the Pharmacy and Poisons Board Act provides thus the Board of Management shall appoint a Director who shall be the chief executive of the Laboratory responsible to the Board of Management for the day to day management of the Laboratory; the Director shall have power to advise and obtain advice from the Board of Management in regard to any matter within his purview under this Act; and the Director shall be the secretary of the Board of Management. Thus as Director he is the accounting officer of the 2nd interested party in terms of the provisions of the Public Procurement and Disposal of Assets Act.

c) In **Republic –Versus- Attorney General and Another Ex-parte Francis Andrew Moriasi, Judicial Review Application No. 364 of 2018**, Nyamweya J. held that the Public Procurement and Asset Disposal Act, pursuant to Article 227 of the Constitution, provides that the power to make contracts in public procurement is exclusively given to the accounting officer of a procuring entity. Further the role of the Attorney General does not extend to procurement of legal and other related services in state corporations and constitutional commissions or offices. That procurement of legal services is the responsibility of the accounting officers of those respective entities who are required to follow the law. Further, the learned judge held that functional independence is bestowed upon

state corporations by section 3 of the State Corporations Act which provides that a state corporation shall have perpetual succession, in its corporate name be capable of being sued, and be capable of holding and alienating movable and immovable property.

d) On 19.12.2018 the 2nd interested party's Board resolved that when funds become available it shall employ legal personnel but in the meantime the Senior Deputy Director (Dr. Pius Wanjala) may handle legal matters that are within his ability on behalf of the Laboratory as part of his duties.

e) On 23.05.2019 the 2nd interested party's Board resolved that Dr. Pius Wanjala is mandated to conduct proceedings on behalf of National Quality Control Laboratory. Accordingly Dr. Wanjala's job description was revised to include assisting the Laboratory as an in-house lawyer on legal matters within his ability, including court matters, for the time being until the Laboratory is able to appoint substantive legal officer.

f) The Board's decisions as referred to remain binding and have not been set aside and the 2nd respondent cannot vary them at all.

g) Even in absence of a Board of Directors the 2nd respondent continues to operate as a body corporate.

h) There are no instructions even by the 2nd respondent for the Attorney General to act in the case. The exhibit SM-3 on supporting affidavit amounts to a complaint and allegation by the 2nd respondent against Dr. Pius Wanjala and not instructions to act in the case and made without any reference to the 2nd interested party's Director. Dr. Pius Wanjala has since seen a copy of that letter, denied the allegations by his letter of 17.08.2019 and sworn an affidavit that the allegations are not true.

i) Effective 23.07.2019 Dr. Pius Wanjala was expressly instructed to act for the 2nd interested party in the suit and he drew and filed relevant documents as instructed.

j) Dr. Pius Wanjala has expertise in the core business of the 2nd interested party and therefore has an added advantage to represent the 2nd interested party. He has a current advocate's practising certificate No. LSK/2019/07595 and it was issued subject to and in compliance with the Advocates (Professional Indemnity) Regulations, 2004. In any event counsel from the Attorney General's office are exempt from taking out indemnity cover and they would in that sense expose the 2nd interested party to higher risks than Dr. Pius Wanjala.

k) The 2nd respondent has no basis to ask the Attorney General to apply for the Court to order that the Attorney General acts for 2nd interested party where as the 1st respondent which is equally a state corporation has appointed its own counsel in the present petition and the same has not been challenged.

l) The application is made in bad faith.

m) It is not the position of Dr. Pius Wanjala which is inimical to that of respondents but it is the position of the 2nd interested party which is inimical to that of respondents.

n) There are court orders and opinions by the Attorney General about statutory mandate of the 2nd interested party which are upheld by the 2nd interested party but which the counsel for Attorney General has elected to defend the respondent's defiance cause to the said legal opinions of itself and court orders.

The Court has considered the parties' respective cases and submissions on record. The 1st interested party and 2nd respondent filed submissions on 11.10.2019. The 2nd interested party filed the submissions on 14.10.2019. The 1st respondent filed no submissions but supported the application. The Court makes findings as follows:

1) The applicants have not in any manner challenged the 2nd interested party's evidence that Dr. Pius Wanjala is duly appointed by the 2nd interested party to act in the case as part of his additional authority and job description as conferred upon him by his employer, the 2nd interested party. Further the 2nd interested party has confirmed that Dr. Pius Wanjala is a duly licenced advocate and entitled to appear in Court as an Advocate. The Court finds that Dr. Pius Wanjala was entitled and had full instructions to file the notice of appointment of Advocate and to appear accordingly.

2) The Court follows the cited holding by Nyamweya J in **Republic –Versus- Attorney General and Another Ex-parte Francis Andrew Moriasi, Judicial Review Application No. 364 of 2018** and that goes to further confirm that Dr. Pius Wanjala is duly instructed to act in the petition for 2nd interested party. The notice of appointment for the Hon. Attorney General to act for the 2nd interested party is therefore amenable to being expunged from record.

3) The Court finds that there was no basis for the Attorney General to file a notice of appointment to act for the 2nd interested party in this case whereby the 2nd interested party had already, as a corporate body, appointed its own counsel to act.

4) The 2nd interested party has established that its interests in the petition are inimical to the respondents' interests in the matter and the Court returns that interests of justice will not be served if the Hon. Attorney General was to be allowed to act for both the 2nd respondent and the 2nd interested party because the conflict of interest is apparent in the circumstances of the present petition.

In conclusion, the application dated 09.09.2019 is hereby determined with orders:

1) The application is dismissed with costs.

- 2) The notice of appointment by the Hon. Attorney General to act for the 2nd interested party herein is expunged from record.
- 3) The notice by Dr. Pius Wanjala to act for the 2nd interested party is upheld.
- 4) Parties to take prompt further steps for the expeditious determination of the main petition or further steps in the proceedings.

**Signed, dated and delivered in court at Nairobi this Friday, 25<sup>th</sup> October, 2019.**

**BYRAM ONGAYA**

**JUDGE**