



**REPUBLIC OF KENYA**

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

**AT NAIROBI**

**MISCELLANEOUS APPLICATION (JR) NO. 20 OF 2019**

**IRENE MUREITHI.....EX PARTE APPLICANT**

**-VERSUS-**

**THE BOARD OF DIRECTORS,**

**CHILD WELFARE SOCIETY OF KENYA.....1ST RESPONDENT**

**SHAKILLA ABDALLA.....2ND RESPONDENT**

(Before Hon. Justice Byram Ongaya on Thursday 19th December, 2019)

**RULING**

The proposed interested party is Boyi Mickey Otolo. He has filed an application on 26.11.2019 through Odumbe Okello & Associates Advocates. The application is by the notice of motion under rule 7 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and the inherent powers of the Court. The application is for orders:

- 1) The application be certified urgent and be heard ex-parte in the first instance.
- 2) Pending the hearing and determination of the application for joinder of the applicant as an interested party there be stay of further proceedings in this matter.
- 3) Leave be granted to Boyi Mickey Otolo, the applicant herein to be joined as an interested party in these proceedings.
- 4) Pending the hearing and determination of the substantive judicial review herein the Court be pleased to stay further proceedings in this matter until the hearing and determination of the suit filed in **Kisumu ELC Petition Number 16 of 2019 Boyi Mickey Otolo – Versus- Cabinet Secretary Ministry of Labour and Social Protection and 2 Others.**
- 5) The costs of the application be provided for.

The application is based on the annexed supporting affidavit of the proposed interested party and upon the following grounds:

- a) The proposed interested party is a life member of the Child Welfare Society and has filed **Kisumu ELC Petition Number 16 of 2019 Boyi Mickey Otolo –Versus- Cabinet Secretary Ministry of Labour and Social Protection and 2 Others** where he has challenged the legality and constitutionality of Legal Notice number 58 of 2014.
- b) The Court has issued an order in **Kisumu ELC Petition Number 16 of 2019 Boyi Mickey Otolo –Versus- Cabinet Secretary Ministry of Labour and Social Protection and 2 Others** staying the operation of Legal Notice Number 58 of 2014, which is also the subject of the present proceedings, pending the hearing and determination of the petition.
- c) The purported appointment and constitution of the 1st respondent herein anchors on the Legal Notice Number 58 of 2014, which has been stayed therefore making it also the subject of the present proceedings.
- d) It is just, fair and important that the proposed interested party be joined so that he can assist the Court in administering justice to the parties.

The said petition No. 16 of 2019 seeks orders:

- a) A declaration that Child Welfare Society Order, 2014, being Legal Notice No. 58 of 2014 violates the Child Welfare Society of Kenya's right to acquire and own property of any description in any part of Kenya under Article 40 of the Constitution.
- b) A declaration that the Child Welfare Society Order, 2014, Legal Notice No. 58 of 2014 ceased to have effect immediately on 30.05.2014 which was the last day it was supposed to be transmitted to the Clerk of the National Assembly pursuant to sections 11(1) and (2) of the Statutory Instruments Act, 2013.
- c) A declaration that the Child Welfare Society Order, 2014, Legal Notice No. 58 of 2014 is null and void in its entirety having failed to comply with the applicable provisions of the Statutory Instruments Act, 2013 including but not limited to sections 5, 7 and 8 of this Act and Article 10 of the Constitution.
- d) An order for the judicial review order by way of certiorari to remove into the Environment and Land Court and quash the Child Welfare Society of Kenya Order, 2014 as published vide Legal Notice No. 58 of 2014 in its entirety.
- e) Costs of the petition.

The Court in the said petition No. 16 of 2019 at Kisumu gave conservatory orders on 24.10.2019 and extended the same on 24.10.2019 until delivery of judgment which was fixed for 31.01.2020.

In the present judicial review application, the ex-parte applicant has applied for an order of certiorari to remove to this Court and quash the decision of the respondents contained in the letter dated 07.10.2019 and received on 09.10.2019 directing the applicant to proceed on compulsory leave from 08.10.2019; and costs of the application be provided for.

The ex-parte applicant does not oppose the application filed for the proposed interested party. The respondents have opposed the application by filing grounds of opposition on 03.12.2019 through learned Senior State Counsel Beatrice Akuno. It is urged as follows:

- a) The applicant has failed to invoke the rules of the Court in making the application.
- b) The applicant has not demonstrated any identifiable or sufficient interest in the present judicial review proceedings.
- c) The present dispute is employment dispute in which the applicant has failed to establish sufficient interest for joinder as prayed for.
- d) The applicant has not established that he is a necessary party for proper, complete and effectual determination of the present dispute.
- e) Under section 20 (4) of the Employment and Labour Relations Court Act the Court has power, inter alia, to require any person to furnish in writing or otherwise, such particulars in relation to such matters as it may require and produce any relevant documents.
- f) The proceedings are for judicial review orders which are concerned with the process and not merits of the case. The applicant has no standing to challenge the process complained of by the ex-parte applicant because the process did not affect the applicant, the proposed interested party.
- g) The applicant has not demonstrated prejudice to be suffered in event of non-joinder. Enjoining the applicant will only serve to blur and confuse the real issues for determination.
- h) The applicant has not established a case to justify stay of proceedings herein. Only the interested party is affected by the present proceedings and there are already stay orders on the decision to send the ex-parte applicant on compulsory leave and that should be sufficient.
- i) The applicant has failed to meet a threshold for stay of proceedings herein and the application is meant to unfairly delay the hearing and determination of the present judicial review application and the applicant will suffer no prejudice if the present suit is heard and determined on its merits.

The Court has considered the pleadings in the said petition No. 16 of 2019 at Kisumu and the present judicial review proceedings. It is clear that the cause of action in the two proceedings is different and the prayers sought are equally different. The proceedings are as well between parties who are not claiming in the same right. The subject matter in the suits is different. The Court finds that even if the said petition No. 16 of 2019 at Kisumu is determined in the judgment fixed for 31.01.2020, the matters in dispute in the present judicial review proceedings will remain unresolved and the ex-parte applicant's cause of action will remain active. Accordingly and as submitted for the respondents, the applicant has failed to establish the necessary threshold for grant of stay of proceedings orders as prayed for.

In **Communications Authority of Kenya & 4 Others –Versus- Royal Media Services Limited and 7 Others [2014]eKLR**, the Supreme Court upheld the holding in **Meme –Versus- Republic [2004] 1EA 124** where the High Court observed that a party could be enjoined in a matter for reasons thus: **“(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings; (ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law; (iii) joinder to prevent a likely course of proliferated litigation.”** In the present case, the only reason advanced for the applicant in praying for

joinder is that he has filed the said petition No. 16 of 2019 at Kisumu. The Court has revisited the application for joinder and the supporting affidavit and returns that the applicant has not demonstrated existence of any of the three ground in **Meme –Versus- Republic [2004] 1EA 124** to justify grant of the prayer for joinder. The applicant’s case appears to be that because he has filed the said petition No. 16 of 2019 at Kisumu and which is fixed for judgment on 31.01.2020, he should be enjoined in the present proceedings for purposes of staying the present proceedings. The applicant has not given an established good reason for the Court to make such orders as are prayed for. As submitted for the respondents the applicant has failed to show that he is a necessary party for the complete and effectual determination of the present judicial review proceedings.

The Court finds that the applicant has failed to justify the grant of the orders as prayed for and the application must therefore fail.

In conclusion, the application for joinder and stay of proceedings dated 26.11.2019 and filed the same date is hereby dismissed with costs in favour of the respondents.

**Signed, dated and delivered** in court at **Nairobi** this **Thursday, 19th December, 2019**.

**BYRAM ONGAYA**

**JUDGE**