



**REPUBLIC OF KENYA**

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

**PETITION NO. CAUSE NO. 186 OF 2019**

(Before Hon. Lady Justice Hellen S. Wasilwa on 6<sup>th</sup> December, 2019)

**DR. FRED SIYOL.....PETITIONER**

**VERSUS**

**THE PHARMACY AND POISONS**

**BOARD OF KENYA.....RESPONDENT**

**RULING**

1. Pending before me for determination is the Notice of Motion Application dated 17<sup>th</sup> October, 2019. The Application is filed under Sections 66, 1A, 1B, 3A and 7 of the Civil Procedure Act, Order 1 Rule 10 (2), Order 2 Rule 15 (1) (b) and (d), Order 40 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all enabling provisions of law.

2. The Application seeks the following Orders:-

1. **THAT** the Court be pleased to certify this Application as extremely urgent.
2. **THAT** the Court be pleased to enjoin the Applicant, Wambua Maithya, as the 2<sup>nd</sup> Respondent.
3. **THAT** pending the hearing and determination of the instant Application, the Court be pleased to stay the Temporary Conservatory Orders issued on 9<sup>th</sup> October, 2019 to the extent that the same has defeated or stayed execution of the Judgment of the High Court in the Constitutional Petition No. 2 of 2019.
4. **THAT** the Court be pleased to set aside the Temporary Conservatory Orders issued on 9<sup>th</sup> October, 2019.
5. **THAT** the Application/Petition herein dated and filed on 9<sup>th</sup> October, 2019 be struck out with costs.
6. **THAT** the costs of and incidental of this Application be provided for.

3. This Application is premised on the grounds that:

- a) There is a judgment in the High Court of Machakos in the Constitutional Petition No. 2 of 2019- Wambua Maithya (the proposed 2<sup>nd</sup> Respondent herein) vs Pharmacy and Poisons Board (the Respondent herein) & 3 Others Interested Parties in which the Court directed that the Respondent commences the process of recruitment of the Registrar/CEO of the Pharmacy and Poisons Board afresh.
- b) Subsequent to this decision, the Petitioner herein declined service of the said court orders and that it forced the Chairman of the Board of the Respondent to issue the Petitioner with a Notice of Intention to Terminate Employment, in compliance with the Court order.
- c) The Proposed 2<sup>nd</sup> Respondent avers that the concealment of the existence of the above matter by both the Petitioner and Respondent herein is meant to deceive this Honourable Court to issue conservatory Orders against the impugned Notice/Letter but in actual sense staying the execution of the Judgment and Orders of the High Court of Machakos.
- d) It is on this basis that the proposed 2<sup>nd</sup> Respondent urges this Honourable Court to allow his Application to be enjoined in this

*proceedings so as to respond to issues raised in the petition/Application thus safeguarding the dignity of this Honourable Court by disclosing material information that the Petitioner and Respondent have colluded to conceal.*

*e) The proposed 2<sup>nd</sup> Respondent contends that the Petition/Application is frivolous, scandalous and vexatious as is without foundation and that the same is an abuse to the Court process. He urges this Honourable Court to dismiss the same with costs.*

*f) He further contends that the Application does disclose any reasonable cause of action against the Respondents as it merely challenges the Judgment of the High Court of Machakos. He further contends that the matter is in a wrong forum and ought to be an Appeal.*

*g) It is further contended that the particulars and issues raised in the instant Petition/Application are res- judicata as they have already been determined in the Judgment of the Constitutional Petition No. 2 of 2019.*

*h) He urged this Honourable Court to set aside the Conservatory Orders issued on 9<sup>th</sup> October, 2019 and further proceed to strike out the Application/Petition with costs.*

*i) He further urged this Honourable Court in the interest of Justice to allow his application dated 17<sup>th</sup> October, 2019 as prayed.*

4. The Application is further supported by the Affidavit of **WAMBUA MAITHYA** sworn on 17th October, 2019, in which he reiterates the averments made in the Notice of Motion Application.

5. The Petitioner in response to and in opposition to the Application dated 17<sup>th</sup> October filed a Replying Affidavit deposed by **DR. FRED MOIN SIYOI** sworn on 29<sup>th</sup> October, 2019, in which he avers that the instant Petition is one dealing with his employment with the Respondent and that he has no right to relief arising out of his employment with the Respondent as against the Proposed 2<sup>nd</sup> Respondent.

6. He further contends that the proposed 2<sup>nd</sup> Respondent will not enable the Court to determine and completely adjudicate upon and settle the issues raised in the instant Petition.

7. The Petitioner further contends that the proposed 2<sup>nd</sup> Respondent is not a party to the employment relationship between him and the Respondent and should therefore not be enjoined as a party to this Petition.

8. He further contended that the 2<sup>nd</sup> Proposed Respondent has failed to prove that he has a direct and legal interest, as a person who is legally interested in a relief has to show that the result of the suit will affect them legally by curtailing their rights thereby making them a necessary party to the suit.

9. The Petitioner avers that enjoining of the 2<sup>nd</sup> Proposed Respondent will greatly prejudice him and that the said prejudice would not be adequately compensated by way of costs. It is further averred that there is no collusion between himself and the Respondent herein.

10. He further averred he has met the threshold for grant of the conservatory orders granted and that this matter is in the right forum as it is not an appeal and that what he is seeking to challenge is his intended unfair termination by the Respondent.

11. In conclusion, the Petitioner urged this Honourable Court to dismiss the instant Application with costs.

12. The Respondent on the other hand filed its grounds of opposition on 1<sup>st</sup> November, 2019 in which it raises the following grounds in opposition to the Application dated 17<sup>th</sup> October, 2019:-

**1. There are no sufficient reasons shown by the Applicant/Proposed 2<sup>nd</sup> Respondent to warrant the Court's discretion to enjoin the Applicant/Proposed 2<sup>nd</sup> Respondent in the proceedings since;-**

**a) The Applicant/Proposed 2<sup>nd</sup> Respondent does not have any identifiable legal stake or interest in the matter.**

**b) The Applicant/Proposed 2<sup>nd</sup> Respondent has not demonstrated that he stands to suffer any prejudice in the case of non-joinder.**

**2. The Proposed Respondent does not meet the definition of a Respondent as prescribed under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 since;-**

**a) There are no allegations raised by the Petitioner in the Petition as against the Applicant/Proposed 2<sup>nd</sup> Respondent regarding the alleged violation, infringement of the Petitioner's fundamental rights and freedoms.**

**b) There is nothing in the Petition that requires a response from the Applicant/Proposed Respondent as all the issues raised in the Petition are between the Petitioner and the Respondent.**

**c) The outcome of this matter will not directly and/or legally affect the proposed Interested Party.**

**3. The Cause of action that gives rise to the Petition before the Court relates to private rights of employment between the Petitioner and the Respondent. The Proposed 2<sup>nd</sup> Respondent is not privy to the contract which gave rise to the dispute and neither does he have a stake nor any legal interest in the matter.**

#### **Submissions by the Parties**

13. The Applicant/Proposed 2<sup>nd</sup> Respondent submitted that he has made out a case for joinder as 2<sup>nd</sup> Respondent and urged this Honourable Court to allow his application as prayed. He relied on the provisions of Order 1 Rule 10 (2) of the Civil Procedure Rules and the case of **Kensalt Limited Vs Water Resources Management Authority (2018) eKLR** for emphasis.

14. It is further submitted that the Court can at any stage of proceedings upon application by either party or suo moto order for the joinder of a party. He therefore urged this Honourable Court to exercise its discretion and allow his Application as prayed. To buttress this argument the Applicant cited and relied on the Court of Appeal decision in the case of **Attorney General Vs Kenya Bureau of Standards & Another (2018) eKLR**.

15. He further submitted that he has met the threshold for joinder as set out in the case of **Joseph Njau Kingori Vs Robert Maina Chege & 3 Others (2002) eKLR**.

16. In conclusion, the Applicant urged this Honourable Court to allow his Application dated 17<sup>th</sup> October, 2019 as prayed.

#### **Petitioner's Submissions**

17. The Petitioner on the other hand submitted that the Applicant/Proposed 2<sup>nd</sup> Respondent is a total stranger and cannot in any add value to or provide the Court with any information concerning the termination of the petitioner.

18. The Petitioner further submitted that the Applicant has no vested interest or accrued right as he is neither the employer of the Petitioner nor the employee of the Respondent.

19. The Petitioner contends that the Applicant does not meet the threshold for joinder as laid out in the High Court decision in **Misc. Application No. 535 of 2018, Talewa Road Constructors Vs Kenya National Highways Authority & Another (2019) eKLR**.

20. He further relied on the cases of **Attorney General Vs Kenya Bureau of Standards & Another (2018) eKLR**, **Heritage Insurance Co. Ltd & Another Vs Gladys Kayalo Mmbo (2019) eKLR** and **Augustine Kimenteria Nthiga Vs David Ndubi Stower (2008) eKLR**.

21. In conclusion, the Petitioner urged this Honourable Court to dismiss the Application.

#### **Respondent's Submissions**

22. It is submitted on behalf of the Respondent herein that the Applicant has not met the definition of a Respondent as prescribed under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and can therefore not be enjoined as 2<sup>nd</sup> Respondent in this matter.

23. It is further submitted that the Proposed 2<sup>nd</sup> Respondent/Applicant does not have a stake in the Petition before this Court and that his submissions are of no relevance to the proceedings in this matter. To buttress this argument the Respondent relied on the Authority of **Kensalt Limited Vs Water Resources Management Authority (2018) eKLR**.

24. In conclusion, the Respondent submitted that the Applicant does not meet the prescribed threshold for joinder as such this Honourable Court ought to dismiss the Application with costs.

#### **Determination**

25. The main contention by the Applicant is that he has a stake in this case because the issues raised herein were arbitrated upon by the High Court sitting in Machakos in Petition No. 2 of 2019.

26. I have looked at Petitioner No. 2 of 2019. In this Petition whose judgement the Applicant has not provided, the Hon. J. Odunga rendered a judgment on 26/9/2019 issuing an order of Certiorari removing into this Court and quashing the Respondent's decision contained in the daily Nation newspaper of 25/1/2019 advertising for the vacant position of Registrar/Chief Executive Officer of the Pharmacy and Poisons Board and any other consequent attendance process or decision including final appointment of Registrar/Chief Executive of the Pharmacy and Poisons Board afresh in compliance with the law.

27. The Parties in this case were **Wambua Maithya (proposed 2<sup>nd</sup> Respondent herein ) vs Pharmacy & Poisons Board (Respondent herein) and 3 other Interested Parties**.

28. That judgement was delivered and though an appeal has been preferred, there are no orders staying the High Court's decision.

29. In the current case, the Petitioner is seeking orders to stay the Respondent's decision contained in the letter of 4/10/2019 purporting to terminate his employment. It is his contention that he is the Chief Executive Officer of the Pharmacy and Poisons Board and his position has

no bearing on orders issued in another case in which he was not a Party.

30. In view of the orders issued by J Odunga, the nexus between the Applicant and his interest in the current Petition which concerns an individual employee should be established.

31. The proposed Respondent states that he needs to be enjoined in this case in order to inform Court of issues the Petitioner has failed to disclose to this Court emanating from the Petition in Machakos.

32. Indeed, the proposed Respondent may wish to disclose certain issues in the Petition stated but that Petition is spent and the judgement then is in the public domain and so that may not be valid reasons for joinder.

33. In **High Court case Joseph Njau Kinrori vs Robert Maina Chege and 3 Others (2002) eKLR**, the Court laid down guiding principles for a party intending to be joined as follows:-

1) *“He must be a necessary party.*

2) *He must be a proper party.*

3) *In the case of a defendant there must be a relief flowing from that defendant to the plaintiff.*

4) *The ultimate order or decree cannot be enforced without his presence in the matter.*

5) *His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit “.*

34. These principles were also enumerated in **Francis Kariuki Muruatetu & Another versus Republic & 4 Others, Supreme Court Petition No. 15 of 2015 (2018) eKLR** where the Hon. SC Judges rendered themselves as follows:-

a) *“The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.*

b) *The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.*

c) *Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court”.*

35. Considering the above authorities, which in case of the SC are bidding on this Court, the Intended Party must demonstrate to this Court what remedies are being sought from him by the Petitioner. In this case, there are none.

36. The Applicant must also demonstrate that there are such issues he will raise which no other party cannot.

37. In this case, the Respondent was a party to the Petition in Machakos. The Respondent is still opposing this Petition which is still what the Intended Respondent will be doing.

38. From the application as it stands, I have not seen anything distinct, which the Proposed 2<sup>nd</sup> Respondent will add on to this case which is clearly outlined. Other than wanting to disclose to this Court what are pertinent issues that arose in the Machakos Petition. The Petition in Machakos having been rendered is in the public domain and the Respondent will not be barred from disclosing the same issue.

39. In view of my above finding, I find the applicant is not a necessary party in this Petition being between the Petitioner as an employee as against his employer the Respondent and for which the Applicant will not add any value. The application is found without merit and is therefore denied.

**Dated and delivered in open Court this 6<sup>th</sup> day of December, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Masika for 2<sup>nd</sup> proposed Respondent – Present

Kubai holding brief Gumbo for Respondent – Present

