



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) (A), 23, 162(2) (A),
165(5) (B) AND 258(1) & (2) OF THE CONSTITUTION OF KENYA, 2010**

**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 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 OKOITL.....PETITIONER

V

MINISTRY OF HEALTH1ST RESPONDENT

PUBLIC SERVICE COMMISSIO.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

DR. HEZEKIAH CHEPKWONY.....4TH RESPONDENT

DR. PIUS WANJALA.....5TH RESPONDENT

AND

NATIONAL QUALITY CONTROL

LABORATORY.....INTENDED INTERESTED PARTY

RULING NO. 3

1. Mr. Okiya Omtatah Okoiti (Petitioner) moved Court on 11 October 2017 alleging that the Ministry of Health (1st Respondent) and the Public Service Commission (2nd Respondent) had violated the Constitution, 2010 by failing to take disciplinary action against Dr. Hezekiah Chepkwony (4th Respondent) and Dr. Pius Wanjala (5th Respondent) and further that the 4th and 5th Respondents had created a hostile work environment for employees of the *National Quality Control Laboratory* (there were other allegations).

2. On 26 January 2018, an application was filed on behalf of the National Quality Control Laboratory (Intended Interested Party) seeking orders

1. **THAT** this Honourable Court be pleased to enjoin the Intended 6th Respondent as a party to the suit;

2. **THAT** costs of this application be provided for.

3. When the parties appeared in Court on the same day, the Petitioner indicated that he would not oppose the joinder of the Intended Interested Party (but not as a Respondent) while the 1st to 3rd Respondents sought for more time to take instructions.

4. The Court directed the Petitioner and Respondents to file responses to the application on or before 2 February 2018 and scheduled it for hearing on 7 February 2018.

5. Because the 1st to 3rd Respondents had not filed any response to the application in time, the Court allowed them up to 16 February 2018 and rescheduled hearing to 22 February 2018.

6. Because other applications had been filed in the intervening period, the Court could not hear the application until 13 March 2018.

Grounds for the joinder application

7. The grounds/reasons advanced for the application were mainly that the Petition had raised issue with the conduct of the 4th and 5th Respondents in the course of their official duties with the Intended Interested Party where they served as Director and Deputy Director respectively and therefore the joinder of the employer was necessary for the expeditious determination of the real matters in dispute and that the Intended Interested Party had information which would be relevant and material.

8. It was also asserted that the 1st to 3rd Respondents had not contacted the Intended Interested Party to give appropriate instructions in respect to the dispute presented to Court.

9. The supporting affidavit to the application was sworn by one Dr. George Wang'anga who described himself as the Deputy Director of the Intended Interested Party.

Opposition to the joinder application

10. The 1st to 3rd Respondents replying affidavit to the application was expunged by the Court from the record in a Ruling No. 2 but the Court nevertheless allowed them to address it on the law.

11. On behalf of these Respondents, it was contended that joinder of the Intended Interested Party was not in the interest of justice because the dispute was disciplinary in nature and that discipline over the 4th and 5th Respondents was within the province of the Public Service Commission of Kenya (the 2nd Respondent).

12. It was also submitted that the Intended Interested Party would add no value/relevance to the proceedings and that it would suffer no prejudice if it did not participate in the proceedings.

13. Further, it was added, joinder of the Intended Interested Party would only serve to derail and delay the expeditious determination of the case before Court.

14. In a brief rejoinder, it was contended that the Intended Interested Party had a gazetted Board and was distinct from the 4th and 5th Respondents and therefore it would be in the public interest to join it into the proceedings.

Evaluation

15. The Intended Interested Party (*National Drug Quality Control Laboratory*) is established under sections 35D and 35E of the Pharmacy and Poisons Act, Cap 244 Laws of Kenya as a juristic person with the power to sue and be sued.

16. Section 35F of the Act creates a *Board of Management* for the Intended Interested Party and its functions, pursuant to section 35G include to make regulations governing the appointment, conduct and discipline of employees of the Laboratory; *in consultation with the Minister, to draw up a scheme of service for employees of the Laboratory; to administer the approved terms and conditions of service, including appointments, dismissals, remuneration and retiring benefits of employees of the Laboratory; and to appoint such employees*

upon terms and conditions to be laid down by the Board of Management, after consultation with the Minister, as it considers necessary for the proper and efficient administration of the Laboratory.

17. The statutory status of the Intended Interested Party and the functions given to its *Board of Management* leave the Court with no doubt as to its disciplinary control over the 4th and 5th Respondents. It is not only a putative employer of the 4th and 5th Respondents, but legally so, in terms of section 2 of the Employment Act, 2007.

18. It has a direct responsibility over the allegations raised in the Petition and therefore a necessary party to the present dispute.

19. However, because it is the *Board of Management* which has the disciplinary mandate, it is the organ which ought to make a decision as to the joinder into these proceedings.

20. In consideration of the foregoing, the Court will allow the application under consideration in the following terms

- i. The Intended Interested Party is joined into these proceedings as the 6th Respondent.
- ii. The Intended Interested Party to file and serve all relevant papers consequent upon the Petition within 14 days from today.
- iii. The Director in his capacity as the Secretary of the *Board of Management* to file with the Court papers in (ii) above, a copy of the Board resolution to join the proceedings.
- iv. In default of compliance with (iii) above, Petition to proceed without participation of the Intended Interested Party.
- v. A date be fixed for further directions.

21. Costs in the Cause.

Delivered, dated and signed in Nairobi on this 5th day of April 2018.

Radido Stephen

Judge

Appearances

Petitioner Okiya Omtatah Okoiti (in person)

For 1st to 3rd Respondents Ms. Odhiambo, State Counsel

For 4th and 5th Respondents Ms. Kiarie instructed by Kinyanjui Njuguna & Co. Advocates

Court Assistant Lindsey