



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW NO. 9 OF 2016

(Formerly J.R. No. 183 of 2016)

**IN THE MATTER OF AN APPLICATION BY PROF. SOLOMON S.R. MPOKE FOR LEAVE
TO APPLY FOR AN ORDER OF PROHIBITION AND CERTIORARI**

AND

IN THE MATTER OF KENYA MEDICAL RESEARCH INSTITUTE

AND

**IN THE MATTER OF UNLAWFUL AND ULTRA VIRES DECISION TO TERMINATE
CONTRACT**

AND

**IN THE MATTER OF UNLAWFUL AND ULTRA VIRES DECISION TO TERMINATE
CONTRACT**

AND IN THE MATTER OF ISSUANCE OF TERMINATION NOTICE

REPUBLIC APPLICANT

VERSUS

1. KENYA MEDICAL RESEARCH INSTITUTE,

2. CHAIRPERSON, BOARD OF MANAGEMENT,

KANYA MEDICAL RESEARCH

INSTITUTE RESPONDENTS RESPONDENTS

AND

DAVID KISANG PROPOSED INTERESTED PARTY

AND

PROF. SOLOMON S.R. MPOKE EX-PARTE APPLICANT

Mr. Karanja for applicant/proposed interested party

Mr. Mahinda for exparte applicant

Mr. Masese for respondent

RULING

1. The applicant, David T. Kisang seeks to be enjoined in this matter as an interested party. The application is based on the grounds set out on the face of the notice of motion filed on 20th July 2016 to wit;

a) The proposed interested party is a citizen of Kenya, previously in the employment of the 1st respondent and a founder member of the UNION OF NATIONAL RESEARCH AND ALLIED INSTITUTES STAFF OF KENYA (UNRISK) which he served as the chief shop steward, KEMRI. He is conversant with the issues raised by the ex-parte applicant and is therefore a proper person who should be heard by the court in this matter.

b) Neither the ex-parte applicant nor the respondents should be heard in this matter since the interviews and appointment of the ex-parte applicant as 1st respondent's director on 6th August, 2010 was conducted in violation of a court order issued by this Honourable court in **Ind. Cause No. 142 of 2010 Dr. Rashid Aman & Anor Vs The Minister, Ministry of Public Health & Sanitation & 2 others**. The renewal of the said appointment on 4th July, 2013 was also done both un-procedurally and unlawfully.

c) The 1st respondent presently does not exist in law and cannot therefore be sued since the legislation that established it viz **Science and Technology Act** (Cap 250) was with effect from 24th June, 2013, repealed by the **Science, Technology and Innovation Act, 2013**, and in the circumstances, the **State Corporations Act** (Cap 446) did not and does not apply to the ex-parte applicant's letter of appointment dated 4th July, 2013.

d) The Cabinet Secretary for Health who the ex-parte applicant alleges to be his employer should be enjoined in this matter in order to respond to the said allegation.

Response

2. The application is opposed by the exparte applicant on the grounds that the proposed interested party has no interest in this matter nor is he a proper person to be heard by the court in terms of order 53 Rule 6 of the Civil Procedure Rules. Order 53 Rule 6 reads;

“Any person who desires to be heard in opposition to the motion and appears to the High court to be a proper person to be heard shall be heard, notwithstanding that he has not been served with the notice or summons and shall be liable to costs in the discretion of the court if the order should be made.”

A proper person in court's view is a person who is likely to be adversely affected by the decision of the court in determining the matter at hand. A proper person is not a friend of the court in the sense of having special knowledge or expartee with regard to the issues for determination. A friend of the court is a neutral person whereas a proper person in terms of Order 53 Rule 6 is one who desires to be heard in opposition to the motion for reasons the court deems proper.

3. In the present judicial review application, the proposed interested party is in his own words a previous employee of the 1st respondent, KEMRI and is no longer an official of UNRISK.

4. The 2nd respondent being the Board of Management of the 1st respondent is the employer of the exparte applicant and is in a position to respond to all the issues raised by the exparte applicant in this matter.

5. The jurisdiction of this court is to determine disputes between employees and employers and matters related thereto without unduly bringing in extraneous issues that may be prejudicial to either party.

6. The proposed interested party appears to oppose both the exparte applicant and the respondents. The role the proposed interested party wishes to play is not in opposition to the application therefore, in the manner contemplated under order 53 Rule 6 which is to oppose the application *strictu sensu*

7. Accordingly, the court does not deem the proposed applicant, a proper person to be heard in this matter and the court declines to exercise its discretion in favour of allowing the applicant to be heard in this matter.

8. The court makes no order as to costs.

Dated and delivered at Nairobi this 27th day of January 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE