



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU**  
**CAUSE NO. 145 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**JULIUS ANYANGA.....CLAIMANT**

**-Versus-**

**THE HON. MEMBER OF PARLIAMENT**

**FOR RANGWE CONSTITUTENCY.....1ST RESPONDENT**

**PARLIAMENTARY SERVICE COMMISSION.....2ND RESPONDENT**

**RULING**

Before me for determination is a Chamber Summons application by the Parliamentary Service Commission, the 2<sup>nd</sup> Respondent dated 13th April 2012. The applicant seeks the following orders:

1. **THAT** the **PARLIAMENTARY SERVICE COMMISSION** has been improperly joined by the 2<sup>nd</sup> Respondent in this Petition.
2. **THAT** the name of the **PARLIAMENTARY SERVICE COMMISSION** the 2<sup>nd</sup> Respondent, be struck out from the Petition.
3. **THAT** the Petitioner pay the 1<sup>st</sup> Respondent's costs of the petition.

The Application is supported by the affidavit of AGNES KAMONI and the grounds on the face thereof.

The application is made under Order 1 Rule 2,3,10(2) and 14, Order 2 Rules 15(1)(a),(b),(c) and (d) and 15(3) of the Civil Procedure Rules and sections 1A,1B and 3A of the Civil Procedure act and all other enabling provisions of the law.

The Petitioner and 1st Respondent did not file any replying affidavit in opposition to the application. The Petitioner however filed written submissions opposing the application.

**Background**

The background to this application is articulately captured in the applicant's submissions filed on 3rd March 2017 as follows:

3. By a Contract of engagement dated 1<sup>st</sup> February 2011, the Petitioner/Claimant was employed by

the then Member of Parliament for Rangwe Constituency, Hon. Otieno Ogindo, as the Rangwe Constituency Office Manager for a monthly salary Kshs.35,000/-. The Contract was for 22 months with effect from 1<sup>st</sup> March, 2011.

4. By a letter dated 1<sup>st</sup> August 2011, Hon. Otieno Ogindo, the then Member of Parliament for Rangwe Constituency, terminated the contract of engagement of the Claimant/Petitioner, with immediate effect under Clause 6(1) of the contract of Agreement executed between the Petitioner/Claimant and the then Member of Parliament for Rangwe Constituency, Hon. Otieno Ogindo, which provides as follows:

Clause 6(1) *“The employer may at any time determine the engagement of the person engaged by giving him/her three months’ notice in writing, or paying him/her one month salary in lieu of Notice.”*

5. On 13<sup>th</sup> September 2011, the Plaintiff/Petitioner herein filed a constitutional Petition No.64 of 2011 dated 13<sup>th</sup> September 2011 at the High Court at Kisii seeking the following-

- a. A declaration that the Parliamentary Service Commission (2<sup>nd</sup>) is duty bound to advise the Member of Parliament for Rangwe Constituency (1<sup>st</sup>) that the 1<sup>st</sup> Respondent is bound by the Constitution at all times and regarding all matters of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
- b. An order of declaration that the determination of engagement between the Petitioner and the 1<sup>st</sup> Respondent is unconstitutional and is therefore unlawful, null and void as at now.
- c. An order of specific performance compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents jointly and severally to compensate the petitioner in general damages for violation of constitutional rights of the petitioner.
- d. Costs of the Petition.

6. The 2<sup>nd</sup> Defendant/Respondent who was listed in the Petition as the 2<sup>nd</sup> Respondent filed a Chamber Summons application dated 13<sup>th</sup> April 2012 seeking to have **its name struck out from the claim**, since it was improperly enjoined.

7. The Claimant/Petitioner **has not opposed the application** by the 2<sup>nd</sup> Respondent/Defendant to date although the Advocate on record filed submissions in opposition to the Application.

8. There is also no Response by the 1<sup>st</sup> Respondent/Defendant in opposition to the application and the 2<sup>nd</sup> Respondent/Defendant’s Application is unopposed.

### **THE ISSUE FOR DETERMINATION**

9. Whether there is any nexus or contractual relationship between the Claimant/Petitioner, and the 2<sup>nd</sup> Respondent/Defendant that would give rise to a claim against the 2<sup>nd</sup> Respondent based on unfair dismissal and/or termination of employment under the operations of Kenya’s labour laws and relevant contractual and other regulation, of a contract executed between the Claimant/Petitioner and the 1<sup>st</sup> Respondent?

### **Applicant's Submissions**

In the Applicant's written submissions is argued that the Parliamentary Service (Constituency Offices) Regulations, 2005 were enacted to guide Members of Parliament on running of their constituency offices and cover general basic principles on prudent management of a public office and provides for the position

of an officer manager at the constituency level to manage the office and at regulations 22 and 23 relied upon by the Claimants, Provide as follows;

**Under Regulation 22**, which deals with recruitment of staff, provide that members shall *initiate recruitment of all constituency office staff and determine their terms of employment and salary scales, that the said staff must not hold any political offices and that they ought not be paid house, overtime allowances or any honorarium meaning they are expected to be local staff based at the constituency level, a provision meant to cut costs and save funds at that constituency level.*

**Regulation 23** provides that the terms of service for any constituency officer shall be for a maximum of five years and upon termination thereafter, a member of staff shall be eligible for payment of contract gratuity at the rate of 21% of his basic salary or otherwise, on earlier termination, to determine the contract gratuity on a pro rate basis.

The Applicant submits that the rationale behind this is twofold; first, that the Parliamentary Service Commission facilitates Members of Parliament in their payments for salaries and allowances, one such allowance being the constituency allowance and therefore has a role in guiding the prudent use of the said funds by issuing guidelines especially in light of the fact that there are new members of parliament every 5 years, particularly because the funds involved are public funds and secondly, Kenyan elections are held every five years upon which time a new member comes into office with his team and since the allowance is part of his/her pay, he/she is allowed to employ his/her individual staff of choice for the said five (5) years. The Parliamentary Service Commission has however, no role whatsoever, on the recruitment and dismissal of the Member of Parliament's recruited staff because the **Constituency Offices** have their own funds and **vote heads**.

The Applicant submits that there is no privity of contract between the Claimant and 2nd Respondent and relies on the case of **Price v Easton**. The Applicant further relies on the case of **Kenya Kazi Ltd v Nahid Moosa Umar & Another**[HCCC NO. 4 OF 2006] and **Mombasa Civil Appeal No. 59 of 2014, Parliamentary Service Commission v George Okoth Owuor & 2 Others**. The Applicant further relies on **Kisumu ELRC No. 320 of 2014 Andrew Tubei Mulati v Hon. Enock Kibunguchy and Parliamentary Service Commission**. In all these cases the thread of the decision is that a party who is not privy to a contract cannot be bound by the same.

The Applicant further argues that the contract which is the subject of this suit does not either expressly or impliedly refer to the Applicant as the employer of the Claimant and that it is clear from the agreement dated 1st February 2011 that the intention of the parties was that the Claimant was an employee of the 1st Respondent. It is further argued that section 2 of the Constituency Offices Regulations 2005 clearly define "staff" to mean employee(s) of a member working in the constituency office and not an employee of the Parliamentary Service Commission, the Applicant. The Applicant argues that the general rule is that the intention of the parties to an agreement should be ascertained from the document as it is deemed that what the parties intended is what was stated in the agreement.

In **Ford vs Beech (1848) 11 QB 852 at 866**, as quoted in page 3 of **Savings and Loans Kenya Ltd vs. Mayfair holdings Limited (CA No.152 of 2006)** it was held thus:

*“The common and universal principle ought to be applied: namely that (a contract) ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties to be collected from the whole agreement, and that greater regard is to be had to the clear intention of parties than to any particular words which they may have used in the expression of their intent.”*

**In the National Bank of Kenya Limited vs Pipeplastic Samkolit (K) Ltd & Another (2001) KLR 112** the Court of appeal at page 118 held: *..... A Court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”*

The Applicant further submitted that the real question in dispute before this court is whether or not there was unfair dismissal and/or termination of the Claimant's employment contrary to the Contract dated 1<sup>st</sup> February 2011, the Employment Act 2007 and all labour regulations relevant to the engagement of the Claimant by the 1<sup>st</sup> Respondent during the course of the Claimant's employment.

Regulation 13 of the Parliamentary Service (Constituency Offices) Regulations, 2005 provides for allocation of funds to the 1<sup>st</sup> Respondent by the 2<sup>nd</sup> Respondent for among other things, payment of emoluments of staff at the constituency level.

This is because under Article 127 of the Constitution, the 2<sup>nd</sup> Respondent has a duty to ensure that the welfare of the 1<sup>st</sup> Respondent is taken care of; and to facilitate effective and efficient discharge of duties of elected and nominated representatives to the people of Kenya. Parliament enables the 1<sup>st</sup> Respondent to employ staff at the Constituency level through a constituency office allocation. This is the extent of the involvement of the 2<sup>nd</sup> Respondent in matters relating to constituency office staff and such involvement does not then superintend on who and how the 1<sup>st</sup> Respondent (and by extension Members of the National Assembly and the Senators) shall appoint their staff, but it is well understood that they too must remain within the confines of Kenyan Laws as far as employment goes.

The Applicant prays that the application be allowed and its name be struck off the suit filed by the Claimant.

### **Petitioner's Submissions**

The Petitioner filed submissions dated 10th February 2017. In the submissions it is argued that this court has no jurisdiction to grant orders sought in the 2<sup>nd</sup> Respondent's application dated 15th July 2016. It would appear that the Petitioner's Counsel was making arguments on a wrong application that had already been resolved by consent of the parties on 19th January 2017 when consent was recorded as follows:

#### ***By consent***

***Application dated 15th July 2016 is allowed by consent. Parties will proceed by way of written submissions to argue application dated 13th April 2012. Applicant to file within 14 days and Respondent within 14 days from date of service. Mention on 22nd February 2017 to confirm compliance and take date for ruling."***

This effectively means that the Claimant did not file any submissions on the application before me for determination as agreed and the application is therefore technically not defended. However, this application had been argued before Sitati J. in Kisii and I will therefore adopt and consider the submissions made by the Claimant then as follows:

"Counsel for the petitioner submits that in the petitioner's appointment letter, the petitioner's duty was to be in line with the duties outlined in the Parliamentary Service Act and that it was for that reason that the Clerk of the Kenya National Assembly was notified of the petitioner's appointment and the petitioner was mandated to take over all parliamentary service commission assets and records in accordance with the law.

Further that while working as an employee of the 1<sup>st</sup> Defendant, it was the 2<sup>nd</sup> defendant who paid the petitioner his salary and the responsibilities of the 1<sup>st</sup> and 2<sup>nd</sup> defendants are dependants on each other; that the letter for termination of employment was also copied to the Clerk of the National Assembly who is the chair of the parliamentary service commission and the person who authorizes payment from the fund. **Section 37(i)** of the **Parliamentary Service Commission Finance Act** refers.

He further submits that **section 10(2)** of the **Parliamentary Service Constituency Offices Regulations 2005** provides that upon receipt of any complaint pursuant to sub regulation (1) the commission shall

investigate the complaint and take action as it deems fit.

That in the circumstance, the 2<sup>nd</sup> defendant cannot purport to distance itself from the matters raised in the petition. That it is the 2<sup>nd</sup> defendant that runs the finances and budget of the constituency as evidenced by part III of the Parliamentary Service Commission Financial Act.

The petitioner concludes by saying that if damages and costs were to be awarded by this court, the 2<sup>nd</sup> defendant who controls the constituency fund and who is responsible for the finances would have to pay or receive such costs, and thus the court should hold in favour of the petitioner and award him damages.

### **1st Respondent's submissions**

The 1st Respondent did not file any response or submissions to the application by the Applicant.

### **Determination**

I have considered the application dated 13th April 2012, the grounds and affidavit in support thereof as well as the submissions by both the Applicant and the Claimant. The issue for determination is whether there is a misjoinder of the Applicant as 2nd Respondent to this suit.

The Claimant's contract on record is so faint that it is barely legible but from what I can make of it, is between the Member of Parliament for Rangwe Constituency and the Claimant JULIUS ANYANGA as Constituency Office Manager. The contract is dated 1st February 2011 and is signed by the Claimant and MARTIN OGINDO, the Member of Parliament for Rangwe. It is witnessed by SHADRACK ALIWA NYIGILA, the Office Assistant. The commencement date for the contract is 1st March 2011. The letter of termination is dated 1st August 2011 and is signed by Hon. Otieno Ogindo, MP Rangwe Constituency and copied to The Clerk, Kenya National Assembly and 2 others. The Applicant is not party to the said contract and the letter of termination is not copied to the Applicant.

The pleadings filed by the Claimant do not state in what capacity the Applicant

has been joined in the suit. The prayers sought by the Claimant in the Petition are the following-

### **Prayers**

1. A declaration that the 2<sup>nd</sup> respondent is duty bound to advise the 1<sup>st</sup> respondent that the 1<sup>st</sup> respondent is bound by the constitution at all times and regarding all matters of the 1<sup>st</sup> and 2<sup>nd</sup> respondent.
2. An order of declaration that the determination of engagement between the petitioner/applicant and the 1<sup>st</sup> respondent is unconstitutional and is therefore unlawful, null and void as at now.
3. Order of specific performance compelling the 1<sup>st</sup> and 2<sup>nd</sup> respondents jointly and severally to compensate the petitioner/applicant in general damages for violation of constitutional rights of the petitioner.
4. Costs of the petition be borne by the respondents.

The grounds stated in support of the Petition are the following:-

- I. Your humble petitioner was employed by the 1<sup>st</sup> respondent to execute duties of the 1<sup>st</sup> and 2<sup>nd</sup> respondent 1<sup>st</sup> day of March, 2011.
- II. Your humble petitioner/applicant had his contract of employment determined on the 1<sup>st</sup> August

2011 without any explanation at all.

III. Your humble petitioner contends that whereas the respondents have the right to determine the engagement between himself and the respondents, the petitioner is constitutionally entitled to be given reasons for the determination of the said engagement.

IV. Your humble petitioner aver that the determination of the engagement between himself and the respondents has been done without regard to the constitutional rights of the petitioner and the same amounts to promotion of impunity by those in power or perceived to be in power.

V. Your humble petitioner avers that he has been treated unfairly by the respondents.

VI. The humble petitioner recognizes that the constitution has been breached, contravened and/or is being threatened with further breach or contravention thus this action.

The grounds do not set out the reasons why the Applicant is joined to the suit and only states that the 1st Respondent executed the Claimant's contract on behalf of the 2nd Respondent, a fact that is not supported either by the pleadings or the contract. In prayer 2 the Claimant specifically seeks a declaration against the 1st Respondent for termination of his contract. The only order specifically sought against the Applicant is that it was **duty bound to advise the 1st respondent**, an issue that would not raise any liability against the Applicant for the termination of the Claimant's contract. The affidavit sworn by the Claimant in support of his petition on 13th September 2011 also does not assign any fault for termination of Claimant's contract on the Applicant. Paragraph 7 thereof states as follows:

*7. That I have considered the circumstances under which the said letter of determination was written and I find that the 1st Respondent has given no reasons completely as to the said determination.*

The Parliamentary Service (Constituency Offices) Regulations, 2005, provides for staffing of Constituency offices at Regulation 21 to 24 as follows:-

#### **STAFFING OF CONSTITUENCY OFFICES**

*21. A constituency office shall have the following staff -*

*(a) a constituency office Manager;*

*(b) a Secretary;*

*(c) a constituency office Assistant;*

*(d) a driver; and*

*(e) two guards*

*22. (1) Members shall, with the concurrence of the Commission, initiate recruitment of all the constituency office staff whose terms of employment and salary scales shall be determined by the Commission.*

*(2)The staff recruited pursuant to this regulation shall not hold any post in a political party;*

*(3) Notwithstanding the provisions of paragraph (1), the staff recruitment shall not be paid house allowance, overtime allowance or any honorarium.*

*23. (1) Subject to regulation 22(3), the terms of service for constituency staff employees shall be a maximum of five years contract and upon termination of such contract a member of staff shall be*

*eligible for payment of contract gratuity at the rate of 25% of his or her basic salary.*

*(2) On earlier termination of any contract for the constituency staff, the contract gratuity shall be determined on a pro rata basis.*

*24. Each staff shall sign a contract in three counterparts with the member retaining one, the staff the other and the last one being submitted to the clerk.*

The regulations further define staff as “**an employee or employees of a member working for the member in the constituency office**”.

As submitted by the Applicant, the mandate of the Commission under Article 127 of the Constitution does not include staffing of Constituency Offices of Members of Parliament.

The contract was not prepared by the Parliamentary Service Commission. The Commission's role is only to provide a format for the contract. The only relationship between the Commission and the constituency office is that it provides the funds for running the constituency office and the constituency office must submit copies of all employment contracts of staff as proof of the existence of such contracts for purposes of disbursement of funds to the constituency office for payment of salaries as well as all other qualifying expenditure of the constituency office.

In **Mombasa Civil Appeal No. 59 of 2014: Parliamentary Service Commission V. George Okoth Owuor & 2 Others**, the Court of Appeal held that there was no privity of contract between the Parliamentary Service Commission and the 1st Respondent who was an employee of the Changanwe Parliamentary Constituency Office.

In that case George Okoth Owuor was employed by the Hon. Ramashan Seif Kajembe, the member of Parliament for Changanwe constituency as a security guard in the Changanwe Parliamentary Constituency Office, while the 2nd Respondent was the Constituency Office Manager. The trial Court found that the Appellant, the Parliamentary Service Commission was liable as employer on grounds that it provided the funds to the Constituency Office for payment of the staff including Owuor. On appeal the Court of Appeal held that there was no privity of contract between the Commission and Owuor and further that the Commission had discharged its mandate by releasing funds to the Constituency Office for payment to Owuor.

As I held in the case of **Kisumu ELRC No. 320 of 2014 Andrew Tubei Mulati v Hon. Enock Kibunguchy and Parliamentary Service Commission** where the issue for determination was similar, the Court of Appeal decision conclusively determined the issue of whether or not the Commission was the employer of Parliamentary Constituency Office staff, which is also the issue in this case.

From the foregoing it is clear that there is no privity of contract between the

Claimant and the Applicant. It is further clear that the Claimant has no cause of action against the Applicant.

For these reasons the application herein succeeds. Consequently I make the following orders:

1. That the Parliamentary Service Commission has been improperly joined as the 2nd Respondent in this suit.
2. That the Parliamentary Service Commission be and is hereby struck off this suit.
3. There shall be no orders for costs.

**Dated, signed and delivered this 27th day of July, 2017**

**MAUREEN ONYANGO**

**JUDGE**