



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2212 OF 2014

MATHIAS NYOKA NGALA1ST CLAIMANT

**WYCLIFFE KAKAI KUTEA.....2ND
CLAIMANT**

DOMINIC NYAMAENO..... 3RD CLAIMANT

PAUL WAFULA WANYAMA..... 4TH CLAIMANT

(Suing through the Chairman, Secretary and Treasurer of KK Security Services at Nairobi County Shop Stewards on behalf of the entire Workers’ Union)

VERSUS

**KENYA NATIONAL PRIVATE SECURITY WORKERS’ UNION1ST
RESPONDENT**

KK SECURITY 2ND RESPONDENT

AND

**HANNINGTON OTIENO NYANGOR, NATIONAL TRUSTEES...INTENDED INTERESTED
PARTY**

RULING

1. By applications dated 29th January 2015, Hannington Otieno Nyangor filed the same on 30th January 2015, on the first application, seeking for orders that he be enjoined into this suit as an Interested Party on the grounds that the 1st Respondent is suffering and will continue to suffer irreparable damages; the second application is seeking for orders the setting aside and or stay of the orders issued by the court pending inter parties hearing on the grounds that the 1st Respondent has suffered irreparable damage as a result of the orders and unless the orders are set aside or stayed, the employees of the 1st Respondent will go without salaries/allowances, remaining out of locked out offices and no remittance of the statutory deductions to NSSF and NHIF.

2. Both applications are supported by the annexed affidavit of Hannington Otieno Nyangor on the basis that he is a National Trustee of the 1st respondent. He depones that the Claimants erred in law by claiming that they are bona fide shop stewards of the 2nd Respondent and obtained orders on fraudulent allegations and deception and as a result, the 1st Respondent has stalled its operations countrywide and

failed to pay the offices hence paralysing the entire operations of the union. The 1st Respondent has failed to pay its workers' salaries/allowances/rent and other services and obligations for the months of December 2014 and no statutory dues have been remitted. All the annual returns have been filed by the 1st Respondent with the Registrar of Trade Union. Thus the orders made on 17th December 2014 should be set aside and stayed pending hearing of the cause.

3. In reply only the Claimants opposed the applications by the Intended Interested Party. The Claimants submitted that there is no justification to the applications filed by the Intended Interested Party noting the Replying Affidavit filed by the 1st Respondent sworn on 19th December 2014. The court should proceed and hear the 1st Respondent application which deals with the substantive issues herein. The Intended Interested Party base their application on the grounds that there will be irreparable damage suffered, which is a principle only applicable in injunctive orders and not in an application for joinder of a party. The Chief Justice Rules with regard to the enforcement of fundamental freedoms describe who an Interested Party is and the application by the Intended Interested Party is not one such case. There must be an identifiable legal interest that must be exhibited by an applicant. The Intended Interested Party is just one of the trustees of the 1st Respondent and the attachment to this effect is dated 12th August 2012 and it is possible that there is a new list of officials since 2012.

Determination

4. The basis of the applications filed by the intended Interested Party is that as a trustee of the 1st Respondent he should be enjoined in the suit herein as an Interested Party and that the orders made on 17th December 2014 be set aside or stayed. On the one hand, a Party seeking to be enjoined in a suit cannot seek for orders that would otherwise be granted to a Party already part of the suit as a Claimant, Respondent Intended or an admitted Interested Party. For the applicant to therefore seek for the setting aside or stay of orders granted on 17th December 2014 to any Party already part of the suit is a premature process to undertake. In that regard, I will only deal with the issue of joinder of the applicant as an Interested Party to the suit.

5. An 'Interested party' has now been defined under **The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedures Rules, 2013** thus;

'Interested Party' means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a Party to the proceedings or may not be directly involved in the litigation;

6. Thus defined, these practice directions even though applicable to the enforcement of fundamental freedoms as under article 22 of the Constitution, it is imperative to apply in this regard, noting the application of the Intended Interested Party has been vehemently opposed by the Claimants. The Industrial Court Act and the Rules thereto do not directly address the issue to joinder and non-joinder of parties or the case of an interested party, but Rule 18 (1) of the Industrial Court (Procedure) Rules provides;

18. Case management.

(1) The Court may, on its own motion and where it considers fit; serve a pleading on any other Party whom it is satisfied may be Interested in the matter being considered.

7. As a case management issue, the Court may on its own motion cause to be served any pleadings to any Party whom upon being satisfied may be an Interested party. This Rule does not however outline all the various situations and circumstances where a Party on its own motion may wish to be enjoined so as to state their side of the case as an Interested Party. When the Industrial Court Act and the Rules thereto do not address a particular scenario, the court is to be guided by any other written law. In this regard I note there is the Civil Procedure Act and the Rules thereto.

8. The provisions of order 1 rule 15 of the Civil Procedure Rules relate to third Party proceedings. These cover situations in which a defendant seeks to claim against another person who is not a Party to the proceedings. Order 1 rule 3 relate to joinder of persons as defendants. The provisions of rule 3 are an instruction to persons who wish to file suits and pass the information so that the claimant/plaintiff is at liberty to join several persons as defendants/Respondents so as to avoid a multiplicity of suits. In such a case then the court has discretion to order the name of a person who ought to be enjoined whether as plaintiff or defendant, or whose presence before the court is necessary, to enable the court effectually and completely adjudicate upon the matter and settle all questions involved in the said suits.

9. Order 1 rule 10(2) of the Civil Procedure Rules provide clear wording for a person to be enjoined as plaintiff or defendant, but there is no clear wording for a person to be enjoined as an Interested party. However, the words "***whose presence before the court may be necessary to enable the court effectually and completely to adjudicate upon...***" could be deemed to cover persons Interested in the subject matter of the suit. There is therefore no bar to the joinder of an Interested Party to a suit although the rules are not very explicit. In the case of **Supermarine Handling Services Ltd vs Commissioner General, Kenya Revenue Authority (2002) 2 KLR 758**, the court held;

... it is probably time, that the procedure for applying to be joined as an Interested Party to proceedings be given more consideration. An Interested Party is not a litigant per-se as he is neither a plaintiff nor defendant.

10. Courts need to exercise caution before making an order for a person to be joined as a respondent/defendant where the application for that joinder does not emanate from the claimant. The choice of whom to sue is that of the Claimant and there could be cogent reasons as to why a litigant has opted not to sue some other persons. Even, in the absence of any reason, the choice to sue has to be left to the litigant, and it is not to be disturbed without the presence of compelling reasons. Where there is an application for a person to be joined as defendant, and the Claimant object to such joinder, the court has to be cautious before making an order for such joinder. It has to be clear that the remedy sought by the Claimant in the proceedings, is to be directed against the Party sought to be enjoined, or that the remedy the Claimant is seeking cannot be granted, or the proceedings cannot be properly conducted without the person sought to be enjoined being a party.

11. In this case, the Claimants have filed a claim against the Respondents and outlined the cause of action as being that of employer and employee being shop stewards in the employ of the 2nd Respondent and the 1st Respondent being their union. the Claimants are therefore members of the 1st Claimant due to their employment with the 2nd Respondent. in this regard, the Intended Interested Party as a trustee of the 1st Respondent is therefore part and parcel of the 1st Respondent directly as an officer holding a national position as one of the trustees. However, though stated in his affidavit as much, the Intended Interested Party has attached at extract of Union official for 2012. the annual returns of each Union such as the 1st Respondent are established through an extract from the Registrar of Trade Unions with regard to current status of such a Union with regard to who the national officials are. the Registrar of Trade Unions is the repository of all records with regard to trade unions. As such even where the Intended Interested Party had a clear and cogent interest to demonstrate the need to have him enjoined herein, prudence demanded that before moving the court as he has, to ensure that the extract from the Registrar of Trade unions is obtained to allay any fears that since 2012, the officials and trustees of the 1st Respondent remain the same.

12. In this regard, noting the clarity now built by the Practice Rules as under article 22 of the Constitution with regard to enforcement of fundamental rights and freedom on who an 'Interested party' is and further extrapolation of the same vide the Industrial Court (Procedure) Rules and the Civil Procedure Act and the Rules thereto, I find no identifiable stake, legal interests or duty that the Intended Interested Party will suffer if not enjoined herein being a trustee of the 1st Respondent who is already a Party herein. I find no justification to the enjoinder without clear and cogent demonstration that indeed the Intended Interested Party will not be adequately represented by the 1st respondent.

13. caution must be made here that unionisation is the cornerstone of workers collective action, bargaining and engagement with other stakeholders. Without unionisation, workers become weak, are left to their own individual devices and at the mercy of those they engage with. It is not to be forgotten that workers unionise so as to create a solid movement with a leadership that can articulate their interests at any given moment. Such interest is best articulated by the elected officials, who include the trustees as the overall officers in control of the Union resources. For the officials to therefore omit the collective and commence individual and separate proceedings away from such entity is to weaken and fracture unionisation. In this case, the Intended Interested Party as a national official of the 1st Respondent should in actual sense support the application by the 1st Respondent instead of filing separate suits and or applications in the same suit so as to protect the interests of the 1st Respondent. in any event, the 1st Respondent has entered appearance and defended the suit. To seek to attend to the same matter separately as an Interested Party away from the 1st Respondent is a demonstration that the Intended Interested Party has failed in his duty of ensuring the resources of the 1st Respondent are protected. by getting into expenses of filing the applications as herein without either consulting with the 1st Respondent as an official or acting alone for the interest of the 1st responding which interest is already addressed is not prudent and cannot be justified by seeking to be enjoined as an Interested Party.

14. To therefore allow the application by the Intended Interested Party will not serve any useful purpose known in law or justified in the current suit.

I find no merit in the various applications of the Intended Interested Party dated 29th December 2014. These applications are dismissed. Each Party will bear their own costs.

Delivered in open court and dated this 11th February 2015.

M. MBARU

JUDGE

in the presence of:

Court Assistant: Lillian Njenga

.....

.....