



**REPUBLIC OF KENYA**

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

**INDUSTRIAL CAUSE NO. 2108 OF 2014**

**JACOB NGWELE MUVENGEI ..... CLAIMANT**

**VERSUS**

**SPEAKER NAIROBI CITY COUNCIL ASSEMBLY ..... 1<sup>ST</sup> RESPONDENT**

**NAIROBI CITY COUNTY ASSEMBLY SERVICE BOARD..... 2<sup>ND</sup> RESPONDENT**

**COUNTY ASSEMBLY OF NAIROBI ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**CHEGE MWANGI ..... 1<sup>ST</sup> INTENDED INTERESTED PARTY**

**ISAAC NGIGE ..... 2<sup>ND</sup> INTENDED INTERESTED PARTY**

**HASHIM KAMAU..... 3<sup>RD</sup> INTENDED INTERESTED PARTY**

**KAREN WANJIKU ..... 4<sup>TH</sup> INTENDED INTERESTED PARTY**

**DIANA KAPEE ..... 5<sup>TH</sup> INTENDED INTERESTED PARTY**

**ROSEMARY WAIRIMU ..... 6<sup>TH</sup> INTENDED INTERESTED PARTY**

**MARION GITHINJI ..... 7<sup>TH</sup> INTENDED INTERESTED PARTY**

**RULING**

1. On 16<sup>th</sup> December 2014, the intended interested parties (applicants) herein by Notice of Motion application brought under Order 1 Rule 10(2) of the Civil Procedure Rules seek for orders to be joined in the suit as interested parties. The application is based on the supporting affidavit sworn by Chege Mwangi, a Member of the County Assembly for Starehe ward in Nairobi County on behalf of the applicants and 80 other members of the Nairobi County Assembly.

2. The application is based on the grounds that the matter before court is on the legality or otherwise of the appointment of the Claimant as the clerk of the Nairobi County Assembly and based on section 13 of the County Government Act which mandates the County Assembly to approve the appointment of any such person to the position of the clerk to the County assembly. The applicants being members of the County Assembly are directly affected by the claim and their presence shall be necessary in order for the

court to effectively and completely adjudicate upon and settle all questions of law and fact involved in the claim. The ends of justice will be better served by joining in the suit the applicants as interested parties on their behalf and for more than 80 other members of the County Assembly as the outcome herein is likely to affect the mandate and functionality of the assembly.

3. Other grounds are that the applicants are desirous of filing a replying affidavit to assist the court in coming to a just determination as regards to the illegal and unconstitutional appointment of the Claimant as the clerk of the Assembly since no approval was given by the Assembly as required under section 13 of the County Government Act. The applicants are therefore necessary parties herein noting their mandate and statutory obligations or the application of article 10 of the constitution and no prejudice will be suffered by the Claimant due to the joinder as the applicants also act in the public interest.

4. In the supporting affidavit, Chege Mwangi states that as the applicants they are desirous of filing a replying affidavit herein to assist the court in coming to a just determination as regards the illegal and unconstitutional appointment of the Claimant as the clerk of the Assembly if at all, since no approval was given by the Assembly as required under section 13 of the County Government Act. The Claimant is neither a salaried and or pensionable employee of the Nairobi Cit

y County Assembly and neither is assemblies' employee database nor by enjoin the applicants, the matter will be dispensed with expeditiously and justly. The applicants are proper and necessary parties in these proceedings given their mandate and statutory obligations in the process of appointing the assemblies clerk. Unless there is such joinder, the interests of Nairobi County Assembly will not be well articulated unless they appear in the proceedings to champion their cause since the Nairobi County Assembly is not a juristic person and the position of the 1<sup>st</sup> and 2<sup>nd</sup> respondents is likely to be adverse to the applicants position in an attempt to justify the illegality.

5. The deponent also avers that no prejudice will be suffered by the Claimant due to the joinder as the applicants act on behalf of the public and the matter raises public interest. By application of section 13 of the County Government Act, the alleged appointment as interim clerk by the Transitional Authority and the Speaker of the Nairobi County Assembly was acted in contravention of the constitution and written law and thus a nullity and the Claimant cannot seek the protection of the court.

6. The applicants also filed their written submissions on 16<sup>th</sup> February 2015. And stated that for the court to grant an application for joinder as an interested party consideration must be given as under Order 1 of the Civil Procedure Rules which covers parties to a suit where an 'interested party' must have an identifiable stake or legal interest or duty in the proceedings and has not been joined at a party. A court may order a party who ought to be enjoined in a suit as a party a party whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved be added as a party. This was as held in **Trusted Society of Human Rights Alliance versus Mumo Matemo & 5 Others [2014] eKLR** where the court defined who an 'intervener' is and the role such a party should take. On the other hand an 'interested party' was described as a party that had a stake in the proceedings, one likely be to affected by the decision of the court when it is made or one who feels that their interest will not be well articulated unless he himself or she herself appears in the proceedings and champion his/her rights.

7. In this case, the applicants hold a special responsibility to champion public interests as elected representative of the people. They play an important oversight role of ensuring public resources are utilised according to the law.

8. The applicants also submitted that they have an identifiable interest as held in **Walter Osapiri Baraza versus Cabinet Secretary Ministry of Interior and National Co-ordination and 6 others [2013] eKLR**, that the interest must be over and above normal interest any other person may have in litigation which id of a public nature. The applicants as representatives of the people feel that their interests and by extension those of the electorate are prejudiced if they are not herein enjoined. In this case the Speaker of the Assembly is not representing the interests of the Assembly but in this case the clerk and the Speaker are the main protagonists leaving the applicants with no option than to seek their

joinder.

9. In reply the Claimant filed his **Grounds of Opposition** and List of Authorities on 13<sup>th</sup> February 2015. The Claimant is poised to the application by the applicants seeking to be joined in the suit on the grounds that their interests are already effectively represented by the 1<sup>st</sup> and 3<sup>rd</sup> respondents, the Speaker of the County Assembly and the County Government of Nairobi and thus they have not demonstrated that their joinder or lack to is would affect the outcome of the case. Such joinder will not aid in the effective and just determination of the issues in the claim as applicants have no identifiable stake or legal interests in the proceedings before court and their role is limited to the collective approval of the appointment of the Claimant as under the County Government Act. Other grounds are that the applicants have no standing here to file the matter as their collective interest unit is the County Assembly and not as individual members and the application should thus be dismissed.

10. The Claimant rely on the cases of **Trusted Society of Human Rights versus Mumo Matemo and others [2014] eKLR; John Mining Temoi and Another versus Governor of Bungoma County and 17 others [2014] eKLR; Communications Commission of Kenya and 4 others versus Royal Media Services limited and 7 Others [2014] eKLR; and Judicial Service Commission versus Speaker of the National Assembly and 8 Others [2014] eKLR.**

11. The Claimant also submitted that there will be no prejudice suffered by the applicants as the questions before court relate to an employment contract of the Claimant which has statutory implications. Section 13 of the County Government Act outline how a clerk is appointed and is approved by the County Assembly and the issues before court can be addressed without the applicants as the respondents jointly cover the interests of the corporate. There are 172 County Assembly members and only a few are before court and once the list for interested parties become open, it will open the floodgates for others to come in an stall the hearing of the claimant. There is no prejudice the applicants will suffer is not enjoined by the Claimant has already suffered the delays pending the hearing of this application. The applicants have the forum to challenge any decisions made on their behalf at the floor of the Assembly and not before court. The Speaker of the County Assembly has entered appearance and is represented by counsel different from counsel for the 3<sup>rd</sup> respondent. thus whatever interest the applicants have is represented by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

12. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed their **Replying Affidavit sworn by Alex Ole Magelo** as the 1<sup>st</sup> Respondent and the chairman of the 2<sup>nd</sup> Respondent and being conversant with the issues raised by the applicants and depones that as the Speaker of the County Assembly of Nairobi he holds a constitutional officer under article 178(1) of the constitution and thus being a public officer believes in the rule of law and the application by the applicants is misguided. The court has the requisite power to resolve the issues in the claim in recognition of the separation of powers as held in **Simon Kagiri versus County Assembly of Nyeri and 2 others [2013] eKLR.** The County Government is a distinct entity, an embodiment of interests of its members of the County Assembly who can only pursue their interests through the titular head of the same, the speaker. The interests of the applicants are represented by the corporate Assembly which in this case is the 3<sup>rd</sup> respondent. There are no distinct interests attributable to members of the County Assembly other than in the corporate name of the Assembly that is capable of being pursued by the applicants.

13. Mr Magelo also depones that the County Assembly exercise legislative mandate in the corporate name of the County Assembly and thus there are no separate interests from that of the County Assembly that its membership can individually pursue. The joinder application is speculative and has not demonstrated and the basis of its support not outlined. The jurisdiction of the court is clear under article 162(2) of the constitution and section 12 of the Industrial Court Act and the employer of the Claimant being the 2<sup>nd</sup> Respondent is sufficient to represent the interests of the employer in this matter and members of the County Assembly have no locus to, in their individual capacity, raise claims or represent interests in this matter as they are not the employer of the Claimant in their individual capacity and the corporate is already represented.

13. Magelo also states that section 13 of the County Government Act does not aid the interested party's application as the power given under the law is not to the members of the County Assembly but in the corporate being the 3<sup>rd</sup> respondent. a party can only be joined as an interested party in a case where there is an identifiable stake of legal interest in the proceedings. There is no direct interests in the subject matter as the 3<sup>rd</sup> respondent, where the applicants are members, as a jurist persona and willing to articulate their apprehensions unless they are guided by private interests, political motivation or unspecified considerations. The application should therefore be dismissed.

14. The 1<sup>st</sup> and 2<sup>nd</sup> respondents also submitted that the applicants have no capacity to apply herein as they have as they cannot sue in their individual capacity on matters affecting the County Assembly as held in **Simon Wachira Kagiri versus County Assembly of Nyeri and 2 others [2013] eKLR**. In this case the applicants being members of the County Assembly have their interests represented in the corporate name of the Assembly as held in **John Mining Temoi & Another versus Governor Bungoma County & 17 others [2014] eKLR**. the court has jurisdiction to hear the case under as jurisdiction is conferred by article 162(2) of the constitution and section 12 of the Industrial Court Act. There is an employment relationship between the Claimant and 2<sup>nd</sup> Respondent and members of the County Assembly such as the applicants have no locus *standi* in their individual capacity to raise claimant.

15. The basis of the application by the applicants is that they should be joined herein as interested parties as being members of the Nairobi County Assembly they are directly affected by the claim and their presence shall be necessary in order for the court to effectively and competently adjudicate upon and settle all questions of law and fact involved in the claim. The applicants come to court on their own behalf and on behalf of others who are members of the Nairobi County assembly.

16. The respondents in this case are the speaker, Nairobi County assembly, the Nairobi City County Assembly Service Board and the County Assembly of Nairobi. The respondents have entered appearance each represented by counsel where the 1<sup>st</sup> and 2<sup>nd</sup> respondents are opposed to the joinder of the applicants as interested parties herein on the grounds that their interests are taken care of by the appearance of all the respondents particularly the 1<sup>st</sup> and 3<sup>rd</sup> respondents.

The questions are therefore thus;

**Whether the applicants should be enjoined as interested parties**

**If yes, whether they have they have met the requisite criteria for such joinder;**

**And if no, whether they will suffer any prejudice**

17. The suit herein as filed by the Claimant is against the 3 respondents with regard to the claimant's contract of employment with the 2<sup>nd</sup> Respondent which employment the 1<sup>st</sup> Respondent has interfered with through the issuance of a suspension letter and now seeking that the respondents including the 3<sup>rd</sup> Respondent be restrained from interfering with his contract of employment. in this regard the 1<sup>st</sup> Respondent is the Speaker of the Nairobi County Assembly established under article 178 of the constitution; the 2<sup>nd</sup> Respondent is the County Assembly Service board established under section 12 of the County Government Act; and the 3<sup>rd</sup> Respondent is the County of Nairobi established under the constitution.

18. In this regard therefore, the respondents are sued in their corporate nature as bodies established under the constitution and the law. The court has addressed itself on this issue and agrees with the decision in **Simon Wachira Kagiri versus County Assembly of Nyeri and 2 others [2013] eKLR**; that

*... the County Assembly may be sued in its own name the court takes the view that the County Assembly as a distinct institution in the County Government carrying out public duties as mandated by the Constitution and the County Government Act, is capable of*

*suing or being sued in the absence of an express statutory provision. However such suit ought to be brought through its titular head - the Speaker.*

19. Thus the 3<sup>rd</sup> Respondent as the County Assembly a body established under the constitution can sue and be sued in its own name, however this has to be done through the 1<sup>st</sup> Respondent as the head of the County assembly. The respective committee such as the 2<sup>nd</sup> Respondent which has direct responsibility over the dispute herein may also be enjoined as the Claimant finds appropriate.

20. To therefore bring in the applicants as parties to the proceedings herein in the capacity of 'interested party' that 'interest' must be established first as these are not parties the Claimant has found fit to add to the suit. Particularly in a matter that the Claimant has objected to the joinder of the applicants as interested party, the court must take great caution in such joinder as held by this court in **Mathia Njoka Ngala & Others versus Kenya Private Security Workers Union & Another, Cause No. 2212 of 2014.**

21. 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;*

22. Equally, 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.*

23. 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.*

24. This is further buttressed in the finding of the High Court in **Judicial Service Commission versus Speaker of the National Assembly 7 Others, Petition No. 518 of 2013**, where the court held;

***The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2012**, defines an interested party as "a person or entity that has an identifiable stake or legal interest in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation". From the foregoing it is clear that an interested party as opposed to an amicus curiae or a friend of the court may not be wholly indifferent to the outcome of the proceedings in question. He is a person with an identifiable stake or legal interest in the proceedings hence may not be said to be wholly non-partisan as he is likely to urge the Court to make a determination favourable to his stake in the proceedings.*

25. The above petition went before a 5 bench which re-emphasised the position with regard to who can

be an interested party in a suit thus;

**Rule 2 of the Mutunga Rules** defines an interested party as 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. In our view, the application by Mr. Mboko did not meet the criteria set in the **Mutunga Rules**. No identifiable stake or legal interest in the proceedings was demonstrated; nor was it shown how the outcome of these proceedings would impact on him. Further, with regard to his knowledge of Parliamentary matters and proceedings of Parliamentary committees, there was already a substantive party, the Speaker of the National Assembly, who could deal with the issues in dispute, and was the proper party to do so.

26. The issue was then more aptly addressed by the Supreme Court in **Communications Commission of Kenya and 4 others versus Royal Media Services limited and 7 Others [2014] eKLR** where the court held;

*... an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is the one who will be affected by the decision of the court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause... a party could be enjoined in a matter for the reasons that:*

- i. Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
- ii. Joinder to provided protection of the rights of a part who would otherwise be adversely affected in law;
- iii. Joinder to prevent a likely course of proliferated litigation.

27. In the instant case, the applicants are members of the County Assembly of Nairobi the 3<sup>rd</sup> Respondent who is party to the suit and the 1<sup>st</sup> Respondent the Speaker as the titular head is sued and has entered appearance. As members who are represented by the 1<sup>st</sup> and 3<sup>rd</sup> respondents, the stake the applicants may have is already covered by the appearance of the respondents as the corporate representatives in the County Assembly where the 1<sup>st</sup> Respondent takes leadership. The submission by the applicants that their interest is with relation to the public interest that they seek to represent as the representatives of the people, however I find no evidence to extricate the applicants from the corporate decisions made by the County Assembly where they are members and have a chance to participate and make approvals within that entity for the public good including issues that may relate to the claimant.

28. At paragraph 7 of Chege Mwangi affidavit he depones;

*7. THAT unless the intended interested parties are enjoined in the suit the interest of Nairobi County Assembly will not be well articulated unless they appear in the proceedings, and [as] champions of their cause since the Nairobi County Assembly is not a juristic person and the position of the 1<sup>st</sup> and 2<sup>nd</sup> respondents is likely to be adverse to the intended interested parties position in an attempt to justify the illegality*

29. As members of the County assembly, the applicants possess an accountability mechanism in their representation of the public interest at the floor of the County assembly. This cannot be denied of them by any other stakeholder be it the Claimant or the respondents herein. They have a public duty to always undertake their oversight role as members of the County Assembly. This is not a compromise of their stake, interests or championing of the public interest that they now seek to prosecute herein. That role is well undertaken elsewhere other than before the court. Section 13 of the County Government Act and Order 42 of the Nairobi County Assembly Standing orders employ the interested parties as members of the County Assembly to actively participate in the appointment of the public officers in the County and this role is not taken away even where this claim and proceeding are to go on in their absence and without

inclusion at interested parties.

30. The joinder of the applicants in the background of the law that empower the Speaker of the County Assembly to act for the County Assembly will only serve to proliferate issues herein and will serve no relevance in a matter that relate to an employee against his employer. The public interest that the applicants seek to evoke is already addressed by the appearance of the respondents in their own rights, parties who rightly ought to Respondent to the claim as filed by the claimant.

31. 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 and 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 applicants will suffer if not enjoined herein being a trustee of the 1<sup>st</sup> Respondent who is already a Party herein. I find no justification to the enjoinder without clear and cogent demonstration that indeed the applicants will not be adequately represented by the respondents.

**Application for joinder by the applicants and intended interested party filed on 16<sup>th</sup> December 2014 is declined. The application is dismissed. each party to bear their own costs.**

**Delivered in open court at Nairobi this 2<sup>nd</sup> Day of March 2015.**

**M. Mbaru**

**Judge**

In the presence of:

Lilian Njenga: Court Assistant

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