



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT LABOUR AND RELATIONS COURT AT MOMBASA**

**CAUSE NO. 399 OF 2015**

**(Consolidated with elrc no. 400 of 2015)**

**ALFONSO KATHEKA MUNYALI .....1<sup>ST</sup> CLAIMANT**

**JEREMIAH NYAMBERI ICHWARA .....2<sup>ND</sup> CLAIMANT**

**VERSUS**

**THE COUNCIL OF THE KENYA SCHOOL**

**OF GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR GENERAL OF THE KENYA SCHOOL**

**OF GOVERNMENT.....2<sup>ND</sup> RESPONDENT**

**A N D**

**Dr.TOM WANYAMA OUNDO .....1<sup>ST</sup> INTERESTED PARTY**

**PRISCA MARY OLUOCH .....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

**Introduction**

1. The claimants separately brought this suit on 17.6.2015 seeking the following orders:

- a) *A reinstatement of order for the Respondent to reinstate the claimants to their position as the Campus director of Kenya School of Government Mombasa and Matuga Campus*
- b) *A declaration that the appointment of the new campus director of Kenya School of Government Mombasa and Matuga campus is null and void.*
- c) *A prohibition order to the respondent to stop any further action aimed at deploying the claimants to any other position at all other than the campus director as duly appointed.*
- d) *The respondent be condemned to pay the costs of the claim.*

***e) This honourable court be pleased to make any further orders as it may deem just and fit to grant.***

2 Simultaneously with the suit, the claimants filed Notices of Motion seeking conservatory orders pending the hearing and determination of the suit. The suits were later consolidated and the court granted interlocutory injunction in time before the claimants handed over office. The suit was fixed for hearing on 7.9.2015 but before then the applicants separately brought the Notices of Motions dated 31.8.2015 seeking to be “added as persons whose presence before the court is necessary in order to enable the court to effectively and completely adjudicate upon and settle all the questions involved in the suit and as person directly affected and interested in the proceedings and the claimants’ claim”.

3 Each Notice of Motion is premised on the grounds set out in the body of the motion and the supporting affidavit sworn by the respective applicants on 31.8.2015. The applicants were appointed to serve as campus Directors for the Kenya School of Government (KSG) and deployed to Mombasa and Matuga campus respectively. According to the applicants, they are entitled to hearing in this suit under Article 48 and 50 of the Constitution and more so because they are being adversely affected by the injunction orders made in this suit on 17.6.2015 and on 31.7.2015 which barred the respondents from installing them as Campus Directors for Mombasa and Matuga

respectively. The gist of the motion is that the applicants seek to be added as parties to the suit in order for them to protect their interest and rights in the suit including the right to challenge the suit which may bar them from assuming office as campus Directors.

4 The claimants have opposed the applicants’ Motions by their replying affidavit sworn on 11.9.2015. According to claimant’s the applicants have not demonstrated any identifiable legal interest or stake in the suit before the court because they were never appointed Directors for any specific campus but KSG generally. According to the claimants they are permanent and pensionable campus Directors for KSG Mombasa and Matuga. That the motions are brought in bad faith and as an attempt by the respondents to delay the final determination of the suit. That the applicants should only be called as defence witnesses or in the alternative they should file their own separate suit as employees against their employer. The motions were heard when Mr Mwenesi learned counsel led his colleague Mr Ndegwa in prosecuting the applicant’s motion while Ms Kipsang learned counsel opposed the motion on behalf of the claimants. Miss Luta learned state counsel never participated in the motions.

### **Analysis**

5 The issue for determination is whether the applicants should be added as necessary parties to respond to the claimant’s suit. Mr Mwenesi submitted that the applicants are likely to be adversely affected by the outcome of the suit herein and as such they are necessary parties who should be accorded a hearing before a judgment is pronounced to their detriment. According to the counsel, the applicants are already being adversely affected by the injunction order dated 17.6.2015 that barred the installation of the applicants as campus Directors yet they were appointed to such office. That the final relief being sought in the suit is to declare null and void, the applicant’s appointments to the office of campus Directors. According to the learned counsel the applicants are entitled under Article 50 of the Constitution to a hearing before being condemned. That Article 159 of the Constitution requires that judicial time should be fairly used and justice should not be delayed. In that regard he submitted that if the applicants were to file separate suits, justice will be delayed and there will be risk of the court making conflicting decision. The counsel relied on Tanzania court of appeal Decision in **C.A No. 68 of 2011 Tang Gas Distributors Ltd –vs – Said and others ( 2014) BEA** where the court held that

***“a court has the power to add a person who was originally not a party to the suit as a defendant against the will of the plaintiff, either on its own motion or at the instance of the defendant or a nonparty to the suit. That such will always be done if it is***

***necessary to do so in order to effectually and completely adjudicate and settle the questions in the suit. That such power can be exercised at any stage of the proceedings”.***

6 Mrs. Kipsang advocate submitted that the applicants did not demonstrate any identifiable interest to warrant the joinder being sought. That the applicants and the claimants have separate contracts of employment and as such each should file separate suits against the employer as they have no claim against the claimants. That the applicants have not come to court with clean hands as they are attending the school and are using the school’s facilities. That the applicants have not been appointed specifically to serve Mombasa and Matuga campuses respectively but to serve in the office of Campus Director generally for a fixed term of 3 years. That the applicants are still permanent and pensionable lecturers at the school. She distinguished the present case from the ***Tang Gas Case*** on grounds that the Tanzania case dealt with the joinder of a defendant as opposed to joinder of interested parties. She cited several Kenyan judicial precedents most of which dealt with the issue of joinder of parties as ***Amicus curiae***.

7 After carefully considering the motions, affidavits and the submissions placed before court, the court finds that the final decision in this suit may indirectly affect the applicants adversely should the claimants be allowed to retain their offices as campus Directors for KSG Mombasa and Matuga respectively. Even though such a decision may not in any way nullify the applicant’s appointments as campus Directors for KSG they will have lost their deployment to the said campuses at least for the time being. This court is persuaded to follow the Tanzania court of Appeal decision in the ***Tang Gas case***, supra, to find and hold that the applicants are necessary parties in this suit for purposes of effectual and complete determination of all the questions raised in this suit. The claimants may have no direct claim for any relief against the applicants but it is obvious that the outcome of this suit may affect the latter adversely. The applicants are therefore entitled to respond to and be heard in the suit herein before judgment.

#### **Disposition**

8 For the reason stated above the two Motions by the applicants dated 31.8.2015 are allowed as prayed. For avoidance of any doubt the applicants are thenceforth added as respondents to the suit herein and are now at liberty to file and serve response to the claimants suits within 14 days from the date hereof

Dated and Delivered at Mombasa this 9<sup>th</sup> day of October 2015.

**ONESMUS MAKAU**

**JUDGE**

9.10.2015

Coram

Before Justice Onesmus Makau

C/Assistant -

For the Claimant:

For the Respondent:

Court

Judgment delivered in their presence/absence in open court.

**ONESMUS MAKAU**

**JUDGE**