



Parsaloi & 3 others v Ministry of Petroleum and Mining & another; Tata Chemicals Magadi Limited & another (Interested Parties); Oldonyo-Nyokie Group Ranch & 3 others (Proposed Third Parties) (Petition 385 of 2019) [2024] KEHC 13155 (KLR) (Constitutional and Human Rights) (31 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13155 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 385 OF 2019

LN MUGAMBI, J

OCTOBER 31, 2024

BETWEEN

**PETER REMPEYIAN PARSALOI 1ST PETITIONER
OIBOO OLE KESHEKO 2ND PETITIONER
JOEL KARSHOI TIPIS 3RD PETITIONER
BRIAN KION ROTIKEN 4TH PETITIONER**

AND

**MINISTRY OF PETROLEUM AND MINING 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT**

AND

**TATA CHEMICALS MAGADI LIMITED INTERESTED PARTY
COOUNTY GOVERNMENT OF KAJIADO INTERESTED PARTY**

AND

**OLDONYO-NYOKIE GROUP RANCH PROPOSED THIRD PARTY
OLKIRAMATIAN GROUP RANCH PROPOSED THIRD PARTY
SHOMPOLE GROUP RANCH PROPOSED THIRD PARTY
OLKERI GROUP RANCH (JOINTLY AND SEVERALLY "THE
COMMUNITY" PROPOSED THIRD PARTY**



RULING

Introduction

1. By a Notice of Motion application dated 27th January 2023 the Applicant (the proposed 3rd Interested Party herein) sought orders that:
 - i. Spent.
 - ii. This Court be pleased to grant leave to the Proposed 3rd Interested Party to participate in these proceedings as an interested party, and to present its case and any objection to the Petition, and other facts relevant to the determination of issues in dispute.
 - iii. Costs of the Application be provided for.

The Applicant/Proposed 3rd Interested Party's Case

2. The Application is supported by the affidavit of the Chairman, Oldonyo-Nyokie Group Ranch, Daniel Nchui's sworn on even date on behalf of the Group Ranch and the grounds set out on the face of the Application.
3. He deposes that the Applicant entered into a Community Development Agreement (CDA) in August 2019 with the 1st Interested Party concerning the exploitation of the resources in Lake Magadi. Thereafter, the CDA Committee members were elected at a public function attended by the 1st Respondent's Permanent Secretary.
4. He deposes that the Applicant hoped that following the election of the CDA Committee, the 1st Respondent would issue a Gazette Notice to this effect affirming its functions on the implementation thereof. However, 4 years later nothing has been done thereby stifling development in the community. He stated that efforts to follow up on this matter has yielded nothing so far.
5. He deposed that he later learnt from the 1st Interested Party's officials that the delay had been caused by the people who had filed this Petition on account that they are represented in the CDA Committee. The Applicant exhibited a copy of the Consent Order entered into on behalf of the Petitioners to the effect that the implementation of the CDA be stayed and that the 1st Respondent should facilitate the election of the Petitioners in the CDA Committee.
6. He asserts that the Consent Order was issued against the interest of the community represented by the Applicant. Further, that the instant suit has proceeded without any input from the key stakeholders hence is prejudicial to the Applicant.
7. For this reason, he argues that the prosecution of this case has been done in bad faith by excluding a necessary party to the impugned CDA. Further, takes the position that the Petitioners are not officials of any known group ranches within the affected concession referred to as 'Musenke Community'. He informs that the entire concession and surrounding land only falls within the Applicant's ranches which are duly registered and recognized in law.
8. He informs that Musenke is a geographical location occupied by various persons in an overlap between the Olkiramatian Group Ranch and Oldonyo-nyokie Group Ranch, which group ranches are duly represented by two representatives at the CDA committee.



9. Furthermore, that what constitutes ‘a minority’ is already defined in the *Mining Act*, that is those forming part of a legitimate group of ranches. He thus accuses the Petitioners of seeking to represent an interest outside the community. He as a consequence contends that it is in public interest and interest of justice that the Applicant be granted an opportunity to be heard and present its objection to this Petition.

The Petitioners’ Case

10. In response, the Petitioners filed their Replying Affidavit sworn by the 1st Petitioner on 25th April 2023.
11. He depones that the Musenke Community occupies the Musenke area. He avers that this community which falls between the boundaries of the Olkiramatian and Oldonyo-Onyoike group ranches was left out during the adjudication process thus making them squatters.
12. Referring to the Petitioner’s allegation on the CDA Committee election, he depones that the Petitioners prior to the election had requested to be represented therein. It is contended that the CDA Committee election 2019 nonetheless proceeded without considering their request.
13. He informs that the Musenke community is made of the Purko sub-tribe which is the smallest sub-tribe of the Maa community and thus a minority and marginalized group. He adds that the Musenke community through its representative has previously been included by companies in their consultative meetings over their mining operations in the Magadi area.
14. The Petitioners in light of this argue that the application for joinder is misguided as the Applicant does not represent any minority or marginalized groups. Consequently, the issues purported to be raised are deemed irrelevant to the Petition. For this reason, he urges the Court to dismiss the application.

The Respondents’ and Interested Parties’ Case

15. The Respondents and Interested parties did not file responses and submissions to the instant application.

Parties Submissions

Applicant’s Submissions

16. In support of its application, the Applicant through ALP Kenya Advocates filed submissions dated 2nd May 2023.
17. The Applicant made reference to Rule 5 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and also relied on *Trusted Society of Human Rights Alliance v. Mumo Matemu & 5* [2014] eKLR where the Supreme Court held as follows in regard to who qualifies as an Interested Party:

“An interested party is one who has a stake/interest in the proceedings, though he or she was not party to the cause ab initio. He or she is 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...”
18. Reliance was also placed on *EG v Attorney General; David Kuria Mbote & 10 others (Interested Parties)* [2021] eKLR.



19. Applying these principles to this matter, the Applicant submitted that it has demonstrated an identifiable interest given that its representatives were duly elected to the CDA Committee in 2019 in which the Petitioners seek to be included yet the CDA which was signed between the 1st Interested Party and the Applicant. The Applicant contends that it has been prejudiced as it has enjoyed the fruits of the said CDA agreement due to this suit. The Applicant maintained that its members are a properly recognized minority group under the law while the Petitioners are not.
20. The Applicant argued that its joinder into this matter will enable the Court to determine whether the Petitioners are a minority in the resource area in question as alleged or not. This can only be done by the Court considering representations from the communities in the resource location area by way of evidence to reach a fair determination of the issue.
21. The Applicant contended that it will be prejudiced if it is not included in this Petition as it is assigned the minority seat in the CDA Committee which position that the Petitioners want in the instant suit when it has not been determined whether they even qualify to be a minority group. For reasons, the Applicant believes that its application has merit and thus urged the Court to allow it.

Petitioners' Submissions

22. In rebuttal, the Petitioners' filed submissions dated 5th May 2023 through their Counsel Letangule and Company Advocates.
23. The Petitioners submitted that the Supreme Court in Francis Kariuki Muruatetu & another v Republic & 5 others Petition No. 15 as consolidated with No 16 of 2013 [2016] eKLR issued the guiding principles on joinder of Interested party by stating as follows:

“Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

 - i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
 - ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
 - iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”
24. Similar reliance was placed in Skov Estate Limited & 5 others v Agricultural Development Corporation & another (2015) eKLR.
25. The Petitioners submitted that the Applicant has not met the set threshold to be enjoined in this suit. They asserted that since the Application was premised on the Consent Order the same was a non-issue as the 1st Interested Party had already registered its opposition to the same. As such they argued that this makes the Applicant's interest in the matter non-existent.



26. Furthermore, they argued that the Applicant would not be prejudiced if not enjoined in this suit as this harm was not proved. The Petitioners took the view that joinder of the Applicant would not also expedite the operationalization of the CDA Committee but only delay the finalization of this suit.
27. The Petitioners countered that the Applicant's case can be well articulated by the 1st Interested Party who is already a party in this matter. This is because the subject CDA was entered into between the 1st Interested Party and the Applicant. The Petitioners thus urged that this Application should be dismissed.

Analysis and Determination

28. Following a perusal of the pleadings and submissions of the parties, it is my view that the single issue raised for determination is:

Whether or not this Court should allow the Applicant's application for joinder.

29. The law on joinder of interested parties in constitutional petitions is set forth in *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

30. Rule 2 defines an 'interested party' as follows:

'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'

31. Rule 5 (d) (ii) specifies as follows:

The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—

- (ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.

32. The Supreme Court in *Communications Commission of Kenya & 3 others vs Royal Media Services Limited & 7 others* (2014) eKLR discussed joinder of an interested party and as follows:

“(22) In determining whether the applicant should be admitted into these proceedings as an Interested Party we are guided by this Court's Ruling in the *Mumo Matemo* case where the Court (at paragraphs 14 and 18) 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 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...”

(23) Similarly, in the case of *Meme v. Republic*, [2004] 1 EA 124, the High Court observed that 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 provide protection for the rights of a party who would otherwise be adversely affected in law;
 - (iii) joinder to prevent a likely course of proliferated litigation.”
- (24) We ask ourselves the following questions: (a) what is the intended interested party’s stake and relevance in the proceedings? and (b) will the intended interested party suffer any prejudice if denied joinder?”
18. Consequently, 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 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...”
33. Equally, the applicable principles in an application for joinder of an interested party were set by the Supreme Court in Francis Kariuki Muruatetu (supra) where it was underscored as follows:
- a. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
 - b. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
 - c. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.
34. Furthermore, in the Superior Court went on to note as follows:
- “(41) Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties’ before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.”
35. Two key principles emerge from the above authorities, first is that joinder as an interested party is not an absolute right. It discretionary and each case must be considered depending on the circumstances.
36. In the instant case, it was submitted that communities within Magadi area are usually involved in mining activities through Community Development Agreements which establish CDA Committees and representative of the communities are then elected into these CDA Committees to oversee the implementation of those CDA agreements. The Applicant insists that its members who elected in the 2019 elections that were presided over by the Permanent Secretary to sit in the CDA Committee. On



the other hand, the Petitioners argue that that their request to have their representation in the CDA Committee as a minority group was ignored when these elections were conducted.

37. The Applicant exhibited documentation that shows they are duly registered group ranch in the resource location area which entered into the impugned CDA with the 1st Interested Party.
38. From the facts, it is evident beyond peradventure that the Applicant's has established that it has an identifiable stake in this matter. A determination by this Court would not be complete without examining the impugned CDA. Clearly, as a party in the CDA agreement, it will suffer the prejudice if a determination is made without affording it hearing when that agreement is a major feature in these proceedings. Moreover, it is a stakeholder within the Magadi concession area.
39. I am persuaded that joinder of the Applicant will enable the Court to conclusively and fully determine the contentious issue in this matter. Indeed, the Petitioners have not satisfied this Court that they stand to suffer any prejudice should this joinder be allowed by the Court.
40. It is thus my considered view that the Applicant has met the threshold for a joinder as an interested Party in these proceedings.
41. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF OCTOBER, 2024.

L N MUGAMBI

JUDGE

