



**Haki Africa Trust v Kenya Ports Authority & 5 others; Japan International Cooperation Agency & 4 others (Interested Party); Muslims For Human Rights & another (Intended Interested Party) (Constitutional Petition E282 of 2022) [2023] KEHC 2619 (KLR) (Constitutional and Human Rights) (31 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2619 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E282 OF 2022**

**AC MRIMA, J  
MARCH 31, 2023**

**BETWEEN**

**HAKI AFRICA TRUST ..... PETITIONER**

**AND**

**THE KENYA PORTS AUTHORITY & 5 OTHERS ..... RESPONDENT**

**AND**

**JAPAN INTERNATIONAL COOPERATION AGENCY & 4  
OTHERS ..... INTERESTED PARTY**

**AND**

**MUSLIMS FOR HUMAN RIGHTS ..... INTENDED INTERESTED PARTY**

**KHELEF KHALIF ..... INTENDED INTERESTED PARTY**

**RULING**

**Introduction:**

1. The amended petition in this matter principally challenges the memorandum of understanding dated August 16, 2018 entered into between the 3<sup>rd</sup> respondent herein, Mediterranean Shipping Company SA and the 4<sup>th</sup> respondent herein, the Cabinet Secretary, Ministry of Transport, Infrastructure, Housing & Urban Development as being illegal, null and void for infringing various provisions of the Constitution and the law.



2. On June 9, 2022, this Court granted some conservatory towards the implementation of the said memorandum of understanding. The orders were hotly contested by the respondents by the filing of various applications seeking review and setting aside thereof.
3. In the midst of the fight in respect of the interim conservatory orders, two parties applied to be enjoined in the proceedings as interested parties. The parties are Muslims for Human Rights and Mr. Khelef Khalifa, the intended interested parties herein.
4. Given the urgency of the matter, the joinder applications, both evenly dated June 14, 2022 were argued orally.
5. The Petitioner supported the applications whereas the respondents strenuously opposed the applications. They filed grounds of opposition.
6. This ruling, therefore, relates to the two joinder applications.

### **Analysis:**

7. I have carefully perused the applications and the extensive submissions by the parties.
8. Given the nature of this matter, this court will not, at this point, necessarily reproduce verbatim the respective parties' dispositions and submissions. However, the Court shall take the contents thereof into account in the course of this discussion.
9. The starting point is a look at the law on joinder of interested parties.
10. In this ruling, I will reiterate what I stated in Nairobi High Court Constitutional Petition No E371 of 2021 *Esther Awuor Adero Ang'awa v Cabinet Secretary responsible for matters relating to Basic Education & others* (unreported) on the subject. This is what I rendered: -
  12. The starting point is the *Constitution*. Rule 2 of The *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (hereinafter referred to as 'the Mutunga Rules') define an 'interested party' to mean: -
 

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;
  13. The Supreme Court in *Trusted Society of Human Rights v Mumo Matemu & 5 others* [2014] eKLR observed as follows: -
 

... 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.
  14. Later, the Supreme Court further delimited the legal principles applicable in joinder applications. That was in Petition No. 1 of 2017 *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others & Michael Wainaina Mwaura (as Amicus Curiae)* [2017] eKLR and in Petition No. 15 as consolidated with Petition No. 16 of 2013 *Francis Kariuki Muruatetu & another v Republic & 5 others* [2016] eKLR.



15. In *Francis Kariuki Muruatetu & another v Republic & 5 others* Petition 15 as consolidated with 16 of 2013 [2016] eKLR the Supreme Court identified the following applicable conditions, and, stated as follows: -
- One must move the Court by way of a formal application. 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 also 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.
11. Apart from the three principles developed by the Supreme Court, rule 2 of the *Mutunga Rules* clarifies that a party seeking to be enjoined as an interested party ought to demonstrate that he/she/it has an identifiable stake or legal interest or duty in the proceedings before the Court.
12. Deriving from the foregoing, the following conditions are relevant in the consideration of joinder applications: -
- i. The party intending to be enjoined has an identifiable stake which is proximate enough and not merely peripheral.
  - (ii) The party has a clear legal interest in the matter.
  - (iii) The party has a defined duty in the proceedings.
  - (iv) The party is not directly involved in the litigation. In other words, the party is not one of the main parties in the proceedings that is either as a Petitioner or a respondent.
  - (v) The party will be affected by the decision of the Court when it is made, either way.
  - (vi) The party demonstrates that his or her or its interest will not be well articulated unless he himself or she herself or itself appears in the proceedings, and champions the cause. Differently put, the party must demonstrate that it stands to be prejudiced if it does not take part in the proceedings.
  - (vii) The party should not expand the prevailing cause of action or introduce a new cause of action.
13. I will now apply the foregoing considerations to the applications at hand.
14. The genesis of the amended petitions is the impugned memorandum of understanding. A cursory look at the memorandum depicts a case where its implementation is likely to have some far-reaching effects on the operations of the Kenya Ports Authority, which is a national entity, which may lead to the privatization of the entity. To that end, the dictates of the *Constitution* and the law regarding that aspect must be appropriately adhered to, hence the grant of the conservatory orders so as to accord an opportunity to this Court to interrogate the matter further.



15. Given the manner in which this matter was hotly contested before me, there is no doubt that it elicited serious public interest and it is at the heart of, not only Kenyans, but the world over in view of the role played by the Kenya Ports Authority.
16. The joinder has been opposed on the grounds that the interested parties have not demonstrated any stake in the matter which will not be well articulated by the main parties in the instant proceedings unless the parties themselves appear in the proceedings.
17. The interested parties have described their identity and argued how they think they ought to be part of these proceedings. The Muslims for Human Rights (MUHURI) is a Non-Governmental Organization majorly fighting for realization and protection of human rights and the Constitution in Kenya. It has since taken part in many litigations in Kenya. It stated that its urge to be enjoined is to advance and promote the rights and fundamental freedoms of the coastal people who stand to be adversely affected by the proceedings.
18. Khelef Khalif on his part needs no much introduction in the struggle for human rights and fundamental freedoms in Kenya. He has, as well, taken part in many like litigations in furtherance of his ambition. He is also a member of an organization known as Okoa Mombasa based in Mombasa where the Kenya Ports Authority has its headquarters and Mr. Khelef hails from.
19. As the matter has elicited enormous public interest, and the intended interested parties are not intending to expand the scope of the Petition, but rather to be the voice of the coastal people who, as alleged, stand to be greatly affected by the intended implementation of the Memorandum of Understanding, this Court finds no prejudice that is likely to be suffered by the respondents in the matter on account of the joinder. If anything, the intended interested parties will accord the Court a wide latitude within which to look at the constitutional challenges brought against the memorandum of understanding.
20. In fact, from the arguments made before Court, there seems to be no party which is championing the interests of the coastal locals, who allege to stand to be greatly prejudiced by the implementation of the memorandum of understanding. Therefore, an order that their voice be also heard, however, insignificant it may be alleged to be, does not prejudice any of the parties in these proceedings in any way whatsoever.
21. Having said so, it is this court finding and holding that the applications for joinder are merited.

**Disposition:**

22. In the end, the following final orders do hereby issue: -
  - a. The notices of motion dated June 14, 2022 by the intended interested parties are hereby allowed.
  - b. The Muslims For Human Rights shall henceforth appear as the 6th Interested Party and Mr. Khelef Khalifa as the 7th Interested Party.
  - c. Costs of the applications shall be in the Petition.
  - d. This matter shall be placed before the Presiding Judge for further directions.

**Orders accordingly.**

**DELIVERED, DATED AND SIGNED AT KITALE THIS 31ST DAY OF MARCH, 2023**

**A. C. MRIMA**



## **JUDGE**

### **Ruling delivered virtually in presence of:**

**Mr. Oluga**, Counsel for the Petitioner.

**Mr Ouito for Dr. Arwa**, Counsel for the 1<sup>st</sup> respondent.

**N/A** for the 2<sup>nd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Respondents.

**N/A** for the 3<sup>rd</sup> Respondent.

**Mr. Mbaluto**, Counsel for the 2<sup>nd</sup> Interested Party

**N/A** for 3<sup>rd</sup> Interested Party.

**N/A** for the Applicants.

**Regina/Chemutai** – Court Assistants

