



Council of County Governors v Salaries and Remuneration Commission; Kenya Human Rights Commission & another (Proposed Interested Parties) (Petition E272 of 2022) [2023] KEHC 20163 (KLR) (Constitutional and Human Rights) (30 June 2023) (Ruling)

Neutral citation: [2023] KEHC 20163 (KLR)

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

PETITION E272 OF 2022

M THANDE, J

JUNE 30, 2023

BETWEEN

COUNCIL OF COUNTY GOVERNORS PETITIONER

AND

SALARIES AND REMUNERATION COMMISSION RESPONDENT

AND

KENYA HUMAN RIGHTS COMMISSION ... PROPOSED INTERESTED PARTY

NATIONAL TAXPAYERS ASSOCIATION PROPOSED INTERESTED PARTY

RULING

1. By an Application dated 5.7.22, the proposed interested parties seek to be admitted in these proceedings as interested parties. They further seek that upon being so admitted, they be allowed to file any such pleadings or affidavits that they may desire to propagate their cause herein, to enable the Court reach a fair and just determination.
2. The proceedings herein were initiated by the Petitioner vide a Petition dated 3.6.22 seeking the following prayers:
 1. A declaration do issue that the Respondent's action in failure to provide for County Governors with a defined benefit pension scheme similar to the one enjoyed by State officers at the National Government is discriminatory, unfair, unjustifiably selective and in contravention of Article 27 of the Constitution of Kenya, 2010.



2. An order of mandamus do issue to the respondent compelling it to make provisions for pension benefits for retiring County Governors and to provide for a pension to the office holders of County Governors.
3. Such further and other reliefs be granted to the petitioner as this Court deems fit.
4. Costs of the petition.
3. The 1st proposed interested party, states that it is a non-governmental organization, is devoted to the promotion of human rights in the country. Its objects include promoting social, cultural and economic rights, good governance and democracy and focuses on public finance management as one of its thematic areas. The 2nd proposed interested party's mandate is to work in partnership with both National and County Governments on public accountability in the collection and utilization of taxes. It also works with taxpayers to monitor the management of public resources and advocates for accountability in the delivery of public services.
4. The position of the proposed interested parties is that the Petition herein touches on their role of among other things ensuring prudent use of public funds, good governance, utilization of public resources and accountability of public funds. They have considerable expertise in constitutional matters and have an interest in this matter. The proposed interested parties further contend that they have at all times been working hand in hand and held various fruitful meetings with the Respondent touching on similar issues. They seek to assist in ventilating the weighty constitutional issues before this Court which have an imminent domino effect on the other groups enumerated under Article 260 of the Constitution. Their joinder is thus necessary for determining the real issues in dispute in the suit herein. Additionally, that any decision of the Court touching on the Respondent will have a tremendous effect on the proposed interested parties. They therefore seek to be admitted herein as interested parties.
5. The Application is opposed by the Petitioner vide grounds of opposition dated 23.1.23. The grounds are that the proposed interested parties have not demonstrated any identifiable stake in the proceedings and will not in way be directly affected by the decision of the Court in the matter. Further that they have failed to meet the criteria for admission into proceedings established by the Supreme Court in the case of Communications Commission of Kenya & 3 others v Royal Media Services Limited & 7 others [2014] eKLR. The Petitioner asserts that the proposed interested parties have no role in regards to setting recommendations for the provision of pension benefits for retiring state officers, which falls within the mandate of the Respondent. The proposed interested parties have also not demonstrated the value they will add to the proceedings. Their averments are based on speculations and apprehension of misuse of taxpayers' money and violation of socio-economic rights set out in the Constitution. The prayers sought by the proposed interested parties will have the effect of derailing the speedy determination of the Petition. This is owing to the fact that the proposed interested parties failed to file their application within the 7 days as directed by the Court on 22.6.22 which they filed and served on 23.11.23 when the other parties had filed their responses and supplementary responses to the Petition. There is therefore no justifiable reason for the grant of the orders sought.
6. The Respondent did not oppose the Application.
7. The proposed interested parties' case is that they have a legitimate and identifiable stake or a legal interest or duty in the proceedings herein which are of general public interest. The Petition touches on matters of public funds and usage; including allocation and disbursement thus a need for inclusivity of the public or representation in the case as its determination will affect the public in general. Further that the Petitioner, though comprised of officials elected by the citizens to govern for the benefit of the



- people, has failed to consider the implications and consequences likely to arise should there be a sudden and unilateral definition of benefits and provision of pensions by the Respondent, on the citizenry who will be particularly affected by the same.
8. It was submitted that the Petition touches on the role of the 1st proposed interested party in the promotion of human rights, inter alia, social, cultural and economic rights, good governance and democracy, being that public finance management is a thematic area on which the 1st proposed interested party focuses as per its strategic plan. The aforesaid rights of citizens will thus be immensely affected if the Petition is allowed. The 1st proposed interested party even published a book in April 2013 titled “Functions of elected state officers” which analyses the remuneration structure of elected state officers. The 1st proposed interested party has also sustained conversations in different counties with citizens and state actors on accountability of public resources, public debt and its bearing on tax, leadership and integrity. They have also done simplification of auditor general reports for the public to easily grasp and criticize, and engaged in capacity building of citizens to understand how to engage, plan and provide oversight in the usage of budgets at the county level and demand accountability from the duty bearers. In light of the foregoing, the 1st proposed interested party’s address before the Court will be on the topics of accountability of public resources, public debt and its bearing on tax, leadership and integrity and will prove how the payment of pension benefits for governors and their deputies from taxpayers’ money will be a direct violation of the citizen’s right to basic social amenities among other concerns touching the public.
 9. As regards the 2nd proposed interested party, it was submitted that as an association tasked working with taxpayers to monitor the management of public resources and advocating for accountability in the delivery of public services, it has actively made numerous submissions before the Finance and National Planning Committee against the taxation of essential services, which is fuelled by the escalating pensions and wage bill. As such, the 2nd proposed interested party has a legitimate and identifiable interest in the matter in issue by virtue of the fact that their mandate is to fight against the taxation of essential services. The petition before this court is to push for pension for the members of the Petitioner and if allowed, will heavily bruise the taxpayer since the same will cause a huge wage bill which will push the government to tax essential goods and services, thus denying the citizens their right to be economically able and to sustain their lives in a manner that promotes their dignity and fundamental rights espoused in the *Constitution* of Kenya. In a publication of a report titled “Financial Implication of the Court Ruling on SRC guidelines” on their website in May 2019, the 2nd proposed interested party helped to raise awareness on the issues of members of parliament housing allowance, equity and taxes. Therefore, the issues in controversy fall squarely within the mandate of the 2nd proposed interested party.
 10. For the Petitioner, it was submitted that the proposed interested parties have not demonstrated any identifiable stake in the proceedings and will not be prejudiced if not admitted nor will they be adversely affected by the decision of the Court in the Petition. The Petitioner further submitted that the role of setting recommendations for provision of pension benefits to state officers falls within the mandate of the Respondent. The proposed interested parties have neither responsible for regulating salaries nor making recommendations for pension benefits for State officers. They have also failed to submit any evidence to substantiate their claim of sufficient in the matter. The Petitioner thus contended that the proposed interested parties have not demonstrated any stake in the matter and have no role to warrant their admission to the proceedings herein.
 11. The Petitioner further submitted that the proposed interested parties have not based their case on clear and specific grounds. The claim that paying pension benefits will reduce amounts allocated to social amenities thereby violating taxpayers’ socio-economic rights is merely speculative. The Petitioner urged



the Court to be guided by the cases of *Ainsbury vs Millington* [1987] 1 ALL ER 929 (HL) and *Anarita Karimi Njeru v Republic* [1979] eKLR and find that the proposed interested parties' case is based on speculation and lacks clarity and precision. The Petitioner urged the Court to dismiss the Application with costs.

12. Rule 2 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* defines an interested party as follows:

“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;

13. An interested party is not a party to proceedings and may not be directly involved in the matter before Court. An interested party must however have an identifiable stake, legal interest or duty in the matter before the Court.

14. In the case of *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* [2014] eKLR, the Supreme Court considered an application by the Law Society of Kenya for admission in the matter as an interested party and defined an interested party as follows:

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.

15. Rule 7 provides for joinder of a person as an interested party as follows:

1. A person, with leave of the Court, may make an oral or written application to be joined as an interested party.
2. A court may on its own motion join any interested party to the proceedings before it.

16. A person wishing to be joined as an interested party in any proceedings may apply orally or in writing to be so joined. The Court may also join any interested party suo moto.

17. And in the case of *Francis Kariuki Muruatetu & another v Republic & 5 others* [2016] eKLR the Supreme Court set out the guiding principles in an application for joinder of a party as an interested party as follows:

- (37) From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party:

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.

18. In the case of *Julius Meme v Republic & another* [2004] eKLR, this Court stated:

We have seen clear merit in this proposition that in public law matters such as those falling under judicial review or constitutional reference, the High Court ought to satisfy itself that all persons who should be served with the trial papers and any supporting evidence, have been duly served. Counsel submitted, and we agree, that in public law applications of the type exemplified herein, it is desirable that the widest possible participation should be allowed. Dr Muigai proposed that all situations, in such proceedings, where the interests of a party are likely to be affected, and consequently such a party has a genuine interest in joining in, the Court should permit joinder where it is sought. This proposition was supported by the Supreme Court of Uganda case, *Departed Asians Property Custodian Board v Jaffer Brothers Ltd* [1999] 1 EA 55 (SCU), in which the following pertinent remarks were made by Mulenga, JSC;

“In order for a person to be joined on the ground that his presence was necessary for the effective and complete settlement of all questions involved in the suit, it was necessary to show either that the orders sought would legally affect the interests of that person and that it was desirable to have that person joined to avoid a multiplicity of suits, or that the defendant could not effectually set up a desired defence unless that person was joined or an order made that would bind that other person.....”

The foregoing passage spawns certain principles which are opposite to the joinder of parties in a constitutional reference such as the present one:

- (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 preempt a likely course of proliferated litigation

19. The proposed interested parties’ case is that if admitted, the Court will benefit from their expertise and experience in promotion of human rights, *inter alia*, social, cultural and economic rights, good governance and democracy, being that public finance management on accountability of public resources, public debt and its bearing on tax, leadership and integrity. They will be able to address the Court on the topics of accountability of public resources, public debt and its bearing on tax, leadership and integrity and will prove how the payment of pension benefits for governors and their deputies from taxpayers’ money will be a direct violation of the citizen’s right to basic social amenities among other concerns touching the public.



20. I am of the considered view that in public interest matters such as the one before Court, it is desirable that the widest possible participation should be allowed so that the Court arrives at a just and fair determination. Given the stated proposed interested parties' mandate and experience in matters relating to human rights, specifically socio-economic rights and accountability with regard to public resources, I am persuaded that they have an identifiable stake and interest in the Petition before Court. Further, their joinder will assist in the complete settlement of all the questions arising in the Petition and provide protection for the rights of taxpayers and other parties who would otherwise be adversely affected in law. Additionally, joinder of the proposed interested parties will serve to pre-empt a multiplicity of litigation.
21. I am accordingly satisfied that the participation of the proposed interested parties in the proceedings herein will be useful and will enrich the proceedings. In any event, no prejudice will be occasioned to any of the parties by the admission of the proposed interested parties.
22. On the contention by the Petitioner that the proposed interested parties' claim lacks clarity and specificity, this is a matter that can only be determined at the hearing of the Petition and after they have filed their response thereto.
23. Before I conclude, I must state that the proposed interested parties have not assisted this court in the expeditious disposal of the matter herein. When they sought to be admitted as interested parties on 22.6.22, the Court directed that they file a formal application within 7 days. They served the Application on the Petitioner on 23.11.23, 4 months later. Directions on disposal of the Application by written submissions were given on 24.1.23, with a mention date of 28.2.23 for compliance. On that date, the proposed interested parties did not attend Court and had not filed submissions as directed. The matter was fixed for mention on 25.4.23. On that date, the proposed interested parties had still not filed submissions and sought more time. This is was in spite of this being their Application. The Court nevertheless extended grace to them to file submissions by 28.4.23 and fixed a date for ruling. The proposed interested parties have by their conduct delayed the hearing of this matter.
24. In the end and the conduct of the proposed interested parties notwithstanding, I find merit in the Application dated 5.7.22 and the same is hereby allowed on the following terms:
 - a. Kenya Human Rights Commission and National Taxpayers Association are hereby admitted as interested parties herein.
 - b. Leave is hereby granted to Kenya Human Rights Commission and National Taxpayers Association to file and serve their pleadings and/or affidavits by 30.7.23. In default, the leave so granted shall lapse.
 - c. Leave is granted to the Petitioner and Respondent to file and serve supplementary affidavits by 14.8.23.
 - d. No orders as to costs.
 - e. Mention on 25.9.23 to confirm compliance.

DATED AND DELIVERED IN NAIROBI THIS 30TH DAY OF JUNE 2023

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M. THANDE
JUDGE

In the presence of: -



..... for the Petitioner
..... for the Respondents
.....for the Interested Parties
..... Court Assistant

