



Omwando v Principal Secretary the Ministry of Health & 6 others; Kingwara & another (Interested Parties); Kinyanjui & another (Proposed Interested Parties) (Petition E037 of 2022) [2023] KEHC 22137 (KLR) (25 August 2023) (Ruling)

Neutral citation: [2023] KEHC 22137 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION E037 OF 2022**

OA SEWE, J

AUGUST 25, 2023

**IN THE MATTER OF ARTICLES 1,2,3,10,19, 20, 21, 22, 23, 27,43,46,47,50(1),
56, 73,159,165,258 AND 259 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF THE HIV AND AIDS PREVENTION AND CONTROL, ACT, 2006

**IN THE MATTER OF ABUSE AND ILLEGALITIES IN NATIONAL
HIV ALGORITHM REVIEW AND THE REVISION OF QUALITY
STANDARD THRESHOLD OF MALARIA DIAGNOSTIC KITS**

BETWEEN

JOSEPHAT KAZEH OMWANDO PETITIONER

AND

PRINCIPAL SECRETARY THE MINISTRY OF HEALTH 1ST RESPONDENT

CABINET SECRETARY HEALTH 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

HEAD-NATIONAL HEALTH LABORATORY SERVICES 4TH RESPONDENT

**HEAD-NATIONAL AIDS AND STI'S CONTROL PROGRAMME 5TH
RESPONDENT**

**DIRECTOR OF MEDICAL SERVICES PREVENTIVE AND PROMOTIVE
HEALTH 6TH RESPONDENT**

HEAD-MALARIA CONTROL PROGRAMME 7TH RESPONDENT

AND



LEONARD KINGWARA INTERESTED PARTY

NELSON OTWOMA INTERESTED PARTY

AND

DR EDWARD KINYANJUI PROPOSED INTERESTED PARTY

GAMMA ZENITH KENYA LTD PROPOSED INTERESTED PARTY

RULING

1. Before the Court for determination are two applications by the proposed 3rd interested party, Dr. Edward Kinyanjui, and the proposed 4th interested party, Gamma Zenith Kenya Limited. Both applications are dated 6th July 2023. The 1st application was filed on behalf of the proposed 3rd interested party by Ms. Kamende pursuant to Articles 20(3) 38 and 159(2)(d) of *the Constitution* as well as Rules 3, 4, 5, 6 and 7 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*, otherwise known as the *Mutunga Rules*.
2. The application was premised on the grounds that the proposed 3rd interested party is a registered medical doctor who has been managing HIV for over 20 years; and that he seeks to be enjoined on behalf of people living with HIV as the subject matter of the Petition directly affects them. He in particular mentioned that, upon becoming aware of this case, he perused the court file and established that the Court had issued a conservatory order restraining the Ministry of Health from altering the National HIV Testing Algorithm pending the hearing and determination of the Petition. He believes the said order is detrimental to people living with HIV and therefore wishes to challenge it on their behalf. He further contended that, since the matter before the Court is technical in nature, he is best placed, as a medical professional, to guide the Court on the same with a view of ensuring a just outcome.
3. The application was supported by the affidavit of the proposed 3rd interested party, sworn on 6th July 2023 wherein he amplified the grounds aforementioned. He explained, at paragraph 6 of his affidavit, the reasons why the conservatory order is detrimental to the public interest and added that the matter before the Court is a technical matter; and that in he is the best position to guide the Court on it, being a trained medical officer. Thus, the proposed 3rd interested party prayed that his application for joinder be allowed as prayed.
4. The 2nd application was filed by Gamma Zenith Kenya Limited seeking to be admitted to these proceedings as the 4th interested party. It was premised on the affidavit of Alois Nderi sworn on 5th July 2023. The main ground raised therein is that the applicant was substantively involved in the completed three test HIV Testing Algorithm which is the subject of this Petition. Mr. Nderi deposed that the applicant's involvement included the supply of sample test kits which were used in both the verification study and the pilot study that led to the adoption of TrinScreen Test Kit as the first test in the three test algorithm.
5. Mr. Nderi further averred that the applicant has invested extensively in the testing and registration exercise, and had obtained the greenlight from the 1st and 2nd respondents to take orders for the kits from prospective clients by the time the conservatory order was issued herein. The affiant annexed documents in proof of his averments, including an exclusive agreement with Trinity Biotech Manufacturing Limited for the distribution of the subject kits. He accordingly concluded his affidavit by stating that the proposed 4th interested party stands to suffer irreparable loss unless its application for joinder is allowed to enable it safeguard its interest.



6. On behalf of the respondents, Ms. Waswa indicated that she had no objection to either application. The applications were however resisted by the petitioner. In respect of the 1st application the petitioner relied on his Grounds of Opposition dated 15th July 2023 in which he contended, inter alia, that:
 - (a) The application is frivolous, vexatious and a clear abuse of the court process and therefore ought to be dismissed *in limine*.
 - (b) The proposed interested party's alleged deep involvement as raised is a non-issue as it willfully involved itself in an illegal process in connection with the National HIV Testing Algorithm; the Court having issued conservatory orders on 8th September 2022 halting the process pending the hearing and determination of this Petition;
 - (c) The inclusion of the proposed interested party would open a floodgate for joinder of all the firms involved in contempt of the Court's orders, and therefore setting a bad precedent in addition to turning this suit into a commercial dispute.
 - (d) The relationship between the applicant and the manufacturer further taints the Algorithm process as the TrinScreen Testing Kit is produced by a manufacturer of questionable standards whose product, Uni-Gold HIV produced many non-reactive results.
 - (e) The applicant does not meet the requirements for joinder as they are looking for mercy based on their own negligence and personal interests that are non-issues in this Petition.
 - (f) The proposed interested party has not demonstrated any prejudice it will suffer in case of non-joinder other than loss based on its own negligence and ignorance.
7. The petitioner also filed a Replying Affidavit sworn on 15th July 2023 in which he reiterated the substance of his Petition and the justification for the conservatory orders given on 26th April 2023. In effect, he deposed to facts touching on the merits of his Petition in a bid to show that the proposed interested parties contentions are untenable. He accordingly opposed the joinder of the proposed 3rd and 4th interested parties as well as the setting aside of the ruling dated 26th April 2023.
8. In addition to the written submissions filed on behalf of the proposed 4th interested party, learned counsel were given an opportunity to make oral submissions on 26th July 2023. Hence, Ms. Kamende for the proposed 3rd interested party relied on the affidavit of Dr. Kinyanjui and reiterated that he is a medical practitioner of over 20 years' standing; and that he is ready to shed light in this matter pursuant to Article 22(3)(e) of *the Constitution*. She urged the Court to find that the proposed 3rd interested party has demonstrated an identifiable stake in the matter and therefore ought to be enjoined to this Petition.
9. Mr. Muniyithya for the proposed 4th interested party relied on his skeletal written submissions dated 17th July 2023 as well as the List and Bundle of Authorities filed therewith. He made reference to Order 1 Rule 10(2) of the *Civil Procedure Rules* and the cases of *Kingori v Chege & 3 others* [2002] 2 KLR 243, *Zephir Holdings Ltd v Mimosa Plantations Ltd, Jeremiah Matagaro & Ezekiel Misango Mutisya* [2014] eKLR and *Lucy Nungari Ngigi & 128 others v National Bank of Kenya Limited & another* [2015] eKLR to demonstrate that the proposed 4th interested party is a necessary party to the Petition and therefore that its application is warranted. Counsel also relied on *Francis Kariuki Muruatetu & another v Republic & 5 others* [2016] eKLR for the applicable principles.
10. On behalf of the Petitioner, Mr. Mukonyi submitted that joinder of an interested party is not an automatic right; and therefore an applicant is obliged to demonstrate an identifiable stake or legal duty. In his submission Dr. Kinyanjui had not satisfied of the conditions for joinder since his only ground was that he is a doctor serving HIV patients. He pointed out that there are many doctors who can



likewise raise the same issues Dr. Kinyanjui intends to raise; and therefore that his application ought to be dismissed.

11. At this stage, the Court is not required to examine the merits or demerits of the proposed 3rd and 4th interested parties' respective cases; and therefore the only issue for determination is whether sufficient cause has been shown for their joinder. The applications were anchored on Rule 7 of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules](#), which provides:

- “(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.”

12. Although Mr. Munyithya placed reliance on Order 1 Rule 10(2) of the [Civil Procedure Rules](#), that rule is explicit in so far as it provides for joinder of principal parties, either as a plaintiff or defendant. To that extent I find the authorities referred to by Mr. Munyithya unhelpful since they expound on Order 1 Rule 10(2) aforementioned. An interested party, to my mind, is in a different category from principal parties and is indeed defined thus in Rule 1 of the [Mutunga Rules](#):

“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. Accordingly, the procedural rule governing the joinder of interested parties to constitutional petitions is, not Order 1 Rule 10 of the [Civil Procedure Rules](#), but Rule 7 of the [Mutunga Rules](#), which states:

- “(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.”

14. Hence, in [Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others](#) [2014] eKLR the Supreme Court set out the applicable principles in this regard, which were later reaffirmed in [Francis Kariuki Muruatetu & another v Republic & 5 others](#) (*supra*) thus:

- “(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...”

15. In the instant case, and starting with the application by the proposed 4th interested party, it has been demonstrated that the company was substantially involved in the development of the three-test HIV testing algorithm, which is the subject matter of the Petition herein; and that it participated in a rigorous process that involved the KMLTTB, Pharmacy and Poisons Board and the Ministry of Health, that informed the policy shift from the current two-test to the three-test algorithm. The proposed 4th interested party explained, and it was not disputed, that it expended time, resources and effort towards the success of the project. Its contention that it will suffer prejudice was supported by the fact that it has already received a demand for breach of contract by the kit manufacturer on the basis of an already existing distribution agreement, a copy of which was annexed to the application by the proposed 4th interested party. I am therefore convinced that there is considerable merit in the contention by the company that it runs the risk of suffering irreparable loss in the event of non-joinder.
16. It is notable that the petitioner, in his responses to the two applications, has not refuted the involvement of the proposed 4th interested party in the manner set out by the company. In the circumstances, the Court is satisfied that the proposed 4th interested party has demonstrated sufficient compliance with the principles set in *Francis Kariuki Muruatetu* (*supra*) by identifying their personal stake, the prejudice they will suffer and the relevance of their case to the Petition before the court.
17. As for the proposed 3rd interested party, he simply stated that he is a medical doctor who has been managing HIV cases for a period of over 20 years. It is on that single account that he seeks to be enjoined in the matter to represent the interest of persons living with HIV who he believes have a legal and identifiable interest in this matter. He relied on Rule 7(1) of the *Mutunga Rules* to buttress his assertion that the court has wide and unfettered discretion to allow any interested party to appear before it at any time.
18. Whereas under Article 22 of *the Constitution* provides, a party can appear on behalf of others claiming that a right or freedom has been denied, violated or infringed, or is threatened, the considerations for joinder as an interested party are entirely different. It is therefore not enough for the proposed 3rd interested party to rely on the fact that he has managed HIV cases for the last 20 years or that this court having wide and unfettered jurisdiction should admit him as a party to champion the public interest without compliance with the principles set by the Supreme Court as shown above. Indeed, the Supreme Court in *Francis Kariuki Muruatetu* (*supra*), was explicit thus:

“(45) Parties, particularly Katiba Institute, cited Article 22 of *the Constitution* as allowing them to join this matter so as to protect the public interest. Article 22 provides:

- “(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.



- “(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by –
- (a) a person acting on behalf of another person who cannot act in their own name;
 - (b) a person acting as a member of, or in the interest of a group or class of persons;
 - (c) a person acting in the public interest; or
 - (d) an association acting in the interest of one or more of its members”.

(46) Clearly, this Article cannot be a basis for admission of an interested party to any existing proceedings, where such a party has not shown a personal stake/interest in the matter, and only seeks to champion the public interest. The said article allows a party acting on behalf of another, or of the public, to ‘commence or institute’ a matter before a Court of law. Article 22 is not a formula for the admission of interested parties to any and all Court proceedings...”

19. In sum, I am far from convinced that the proposed 3rd interested party has shown either an identifiable stake in these proceedings or the prejudice to be suffered by him to warrant his joinder. Moreover, the court has already enjoined the 2nd interested party to these proceedings whose application dated 29th May 2023 was premised on the same grounds as the instant application by the proposed 3rd interested party, namely, to champion to interests of people living with HIV. Accordingly, the application dated 6th July 2023 by the proposed 3rd interested party, Dr. Edward Kinyanjui, being devoid of merit, is hereby dismissed with no order as to costs.
20. The result therefore is that the successful application of the two is the one dated 6th July 2023 by the proposed 4th interested party, Gamma Zenith Kenya Limited. The same is hereby allowed and orders granted as follows:
- (a) That Gamma Zennith Kenya Limited be and is hereby enjoined to these proceedings as the 3rd interested party.
 - (b) The 3rd interested party to file and serve its pleadings herein, if any, within 7 days from the date hereof.
 - (c) Cost of the application be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25TH DAY OF AUGUST 2023

OLGA SEWE

JUDGE

