



**Kioko & 2 others v Kenya Medical Practitioners & Dentists Council & 5 others;  
Kenya Film Classification Board (Interested Party); Centre for Reproductive  
Rights (Intended Interested Party) (Constitutional Petition E008 of 2020)  
[2022] KEHC 17101 (KLR) (Constitutional and Human Rights) (16 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 17101 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E008 OF 2020**

**AC MRIMA, J**

**DECEMBER 16, 2022**

**BETWEEN**

**ANN KIOKO ..... 1<sup>ST</sup> PETITIONER  
PEARLS & TREASURES TRUST ..... 2<sup>ND</sup> PETITIONER  
KENYA CHRISTIAN PROFESSIONAL FORUM ..... 3<sup>RD</sup> PETITIONER**

**AND**

**KENYA MEDICAL PRACTITIONERS & DENTISTS COUNCIL .... 1<sup>ST</sup>  
RESPONDENT  
THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT  
DIRECTOR GENERAL OF HEALTH ..... 3<sup>RD</sup> RESPONDENT  
THE CABINET SECRETARY, MINISTRY OF HEALTH ..... 4<sup>TH</sup> RESPONDENT  
MARIE STOPES KENYA ..... 5<sup>TH</sup> RESPONDENT  
KENYA PHARMACY AND POISONS BOARD ..... 6<sup>TH</sup> RESPONDENT**

**AND**

**KENYA FILM CLASSIFICATION BOARD ..... INTERESTED PARTY**

**AND**

**THE CENTRE FOR REPRODUCTIVE RIGHTS .... INTENDED INTERESTED  
PARTY**



## RULING

### Introduction:

1. This ruling is in respect to the application by way of a Notice of Motion dated October 27, 2021. The application was taken out and supported by the Affidavit of Evelyne Opondi deposed to on a similar date on behalf of The Centre for Reproductive Rights (hereinafter referred to as ‘the Applicant’).
2. The application was vehemently opposed by the Petitioners, but supported by the 5<sup>th</sup> Respondent herein, Marie Stopes Kenya.

### The Application:

3. The application sought the joinder to the Petition herein in the following terms: -
  - a. Spent
  - b. That the Honourable Court be pleased to grant leave to the Centre for Reproductive Rights to be admitted as an interested party in the above Petition filed in this Honourable Court.
  - c. That the Interested party be granted leave to file a Reply to the Petition and submit written and Oral arguments in the above Petition.
  - d. That the 2<sup>nd</sup> Interested Party be allowed to submit with leave of Court any other information it may deem important and relevant to allow for the just disposition of this matter.
  - e. Each party to bear their costs of this Application.
4. It was the Applicant’s argument that it is a global legal advocacy organization that uses the power of the law to advance reproductive rights as fundamental human rights around the world and address root causes and systemic violations of sexual reproductive rights of women and girls globally.
5. It urged its case further stating that it has intervened as *amicus curiae* or interested party in cases that attack or threaten women and girls’ access to sexual and reproductive health before the Courts in Kenya, African Commission on Human and People’s rights, the African Committee of Experts on Rights and Welfare of the Child, among others.
6. Locally, it was its case that it appeared as *amicus curiae* in The High Court and the Court of Appeal in *Teachers Service Commission vs WJ & 5 Others* (2020) eKLR and represented the Petitioner in Petition No 266 of 2015 *FIDA Kenya & 3 Others vs Attorney General & Others*.
7. The Applicant made its case stating that the Petition raises questions that threaten women and girls’ access to comprehensive sexual and reproductive health and services including access to medical abortion.
8. It urged further that the Petition raises questions of pre-birth personhood under the *Constitution* and the rights of foetuses independent of pregnant women.
9. The Applicant stated that it has the mandate and expertise that will assist Court to interpret and apply the *Constitution* and Human Rights on the right to the highest attainable standard of health of women and girls of reproductive age, the right to life and the permissible areas of limitation.



### **The Applicant's Submissions:**

10. The Applicant further urged its case through written submissions dated March 14, 2022. It urged the Court to determine the Application on the basis that it has an identifiable stake in the Petition and that its non-joinder would occasion it prejudice.
11. On the first issue, it was its case that its stake is identifiable on the basis of its expertise and the claim that it is the only global legal advocacy organization that uses the power of the law to advance reproductive rights as fundamental human rights around the world.
12. It submitted that it does not raise different issues from the Petition but only seeks to assist the Court to interpret and apply the Constitutional and international human rights standards on the right to the highest attainable standard of health of women and girls of reproductive age in Kenya.
13. It further was its case that despite being based in the United States of America, it is registered in Kenya as a Company and has amassed wealth of experience and expertise to contribute to the development of jurisprudence in reproductive legal protection in Kenya.
14. It submitted that its participation in the case will benefit the Court on application of relevant principles, comparative law and international human rights standards in relation to the fundamental rights to reproductive health case.
15. The Applicant stated that it has satisfied the requirements expected of an interested party as established by the Supreme Court in Petition No 15 & 16 of 2015 *Francis Karioko Muruatetu & Another vs Republic & 5 Others*.
16. It was its case that the application was in consonance with the findings in *Kenya Medical Laboratories Technicians and Technologists Board & 6 Others vs Attorney General & 4 Others* (2017) eKLR where it was observed inter-alia that the true test of having a legal interest lies in what would be the results on the subject matter if those rights could be established.
17. The Applicant further urged that it had only identified several issues for determination but not introduced or framed its own fresh issues for determination Court.
18. It was its case that the Petitioners have interchangeably used terminologies such as 'unborn child', 'unborn children' and 'Kenyans before birth' to refer to the alleged representation of foetuses without establishing the recognition of pre-birth personhood in Kenya.
19. It was submitted that the Petition has misclassified foetuses as 'unborn children who accrue rights independent of pregnant women.
20. It urged that the existence of the entity known as unborn children and Kenyans before birth is doubtful under the laws of Kenya.
21. It was further its case that under the *Constitution*, life begins at birth and independent fundamental rights and freedoms accrue birth meaning that a foetus does not have independent rights at conception.
22. The applicant submitted further that the Petition relies on the wrong framing of international human rights law to advocate for the existence of foetal rights.
23. It submitted that it is impossible to institute a suit on behalf of a non-existent entity know as 'Kenyans before birth'.



24. In conclusion, it urged the Court to allow the application submitting that the Petition was a bid to increase restrictions on access to abortion care and was retrogressive on abortion related service contrary to the Constitution and The Health Act.

**The Petitioners' Objection:**

25. The Petitioners opposed the Application through the Replying Affidavit of Ann Kioko, deposed to on February 15, 2022.
26. From the outset, it was its case that the Application did not meet the threshold requirements for joinder as established in the case Petition No 15 & 16 of 2015 Francis Karioko Muruatetu & Another vs Republic & 5 Others case (supra).
27. It was her case that the Applicant failed to identify its stake in the case, identify the prejudice it will suffer for failure to be joined and explain its relevance to the proceedings.
28. She deposed that the Applicant had not demonstrated exceptional circumstances that would warrant its joinder and the mere fact that it participated in other cases did not give it the automatic right to be joined in this case.
29. In reference to the definition of an interested party in Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, it was her deposition that the Applicant had not set out any legitimate stake and sufficient grounds for its joinder in the proceedings and had no proximate interest to warrant joinder.
30. It was further her case that there is no common question of fact or law existing between the parties and the Intended Interested Parties.
31. She urged that Application for joinder will be declined where the cause of action being proposed or relief sought is incompatible to or totally different from the existing cause of action or the relief.
32. It was her case that an application will not be admitted to the proceedings simply because of an averment of an interest in the matter.
33. She stated that an applicant must demonstrate a clear connection between it and the case. To that end, the decision in Okiya Omtatah Okoiti vs Kenya Airways PLC & 3 Others and Kenya Civil Aviation Authority (KCAA) & Another (KCAA) was relied on.
34. Further to the foregoing, it was deposed that the issues raised by the Applicant are identical to the ones raised by the Marie Stopes Kenya, the 5<sup>th</sup> Respondent herein.

**The Petitioners' Submissions:**

35. In its written Submissions dated March 27, 2022, the Applicant largely reiterated its case as urged in the Replying Affidavit of Ann Kioko.
36. While relying on the case of Trusted Society of Human Rights Alliance vs Mumo Matemu & 5 Others (2014) eKLR it was submitted that the Applicant had not attained the threshold of an Interested Party.
37. It was submitted that the Applicant had not shown an identifiable stake and had left everything to conjecture and the Court.
38. The Petitioners submitted further that joinder was not a matter of right but one that is looked into on its own merits and circumstances.



39. Further to the foregoing, it was its case that the Interested Party had no *locus standi* since the issues presented by the Petitioner- are based on Kenyan Law yet the Applicant was an entity based in the United States.
40. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Respondents and the 1<sup>st</sup> Interested Party did not participate in the Application.
41. The 5<sup>th</sup> Respondent was not opposed to the Application.

**Analysis:**

42. Having laid out what pits the Petitioners and the Applicant at opposite ends, the following areas emerge for discussion.
  - i. The guiding principles for joinder of an Interested Party.
  - ii. Whether the application meets the threshold for joinder.
43. I will hence deal with the issues sequentially.
  - a. The principles for joinder of an Interested Party:
44. The Court will reiterate what it stated in Nairobi High Court Constitutional Petition No E371 of 2021 *Esther Awuor Adero Ang'awa vs Cabinet Secretary responsible for matters relating to Basic Education & Others* on the subject.
45. This is what the Court 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.

16. 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.

46. In sum, 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.

47. I will now apply the foregoing considerations to the application at hand.

b. Whether the application meets the threshold for joinder:

48. The Court has carefully considered the application.



49. An identifiable, proximate interest is the claim that an intended interested party, of all the myriad of issues raised in a dispute, can clearly recognise, distinguish and isolate as falling accurately within their area of practice, expertise or having close or immediate relationship in the subject of dispute.
50. The Applicant described itself as a global legal advocacy organization that advocates the reproductive rights through the law. Its objective is to advance reproductive rights as fundamental human rights around the world and address root causes and systemic violations of sexual reproductive rights of women and girls.
51. The Applicant's basis for joinder is anchored on the position that the Petition raises issues that threaten women's or girl's access to sexual and reproductive health services including access to medical abortion.
52. In addition to the foregoing, the Applicant stated that since the Petition raised issues of pre-birth personhood and the right of foetus, separate from pregnant women, it was well placed on its expertise to help this Court apply the relevant principles and navigate comparative jurisprudence and international human rights standards in reproductive health care.
53. What forms the substratum of the Petition as can be discerned from the Amended Petition and the prayers therein is the lift on the ban that had been imposed on Marie Stopes Kenya, by Kenya Medical Practitioners & Dentists Council from offering abortion related services.
54. Abortion services, the right to life and the right to reproductive health care is at the heart of the dispute. The applicant herein presents expertise on the law revolving around women and girls' reproductive healthcare.
55. The just and fair determination of the Petition is more likely to be accomplished and fostered by the participation of the Applicant as opposed to its being locked out. The relevance of the information and knowledge within its powerhouse cannot be gainsaid.
56. It is, therefore, this Court's humble view that the Applicant has satisfied the Court of the need to participate in these proceedings. However, its participation ought to be as an Amicus Curiae and not as interested party. This Court says so because the Applicant wishes to render its expertise and experience it has gained world over in the instant dispute for purposes of aiding the Court to reach its decision.
57. Having said so, it is the Court's finding that whereas the Applicant will not participate as an interested party, it will do so an Amicus curiae pursuant to Rule 6(c) of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules](#) 2013.

### **Disposition.**

58. In the end, the following orders do hereby issue: -
  - a. The Notice of Motion dated October 27, 2022 is hereby dismissed.
  - b. The Centre For Reproductive Rights is hereby enjoined in the Petition as an Amicus Curiae.
  - c. The *Amicus Curiae* will within 30 days file and serve its amicus brief.
  - d. The *Amicus Curiae* will only file its brief and written submissions on the main Petition and will not participate in any interlocutory matters.
  - e. Each party to bear its own costs.
59. It is so ordered.

**DELIVERED, DATED and SIGNED at KITALE this 16<sup>th</sup> day of December, 2022.**



**A. C. MRIMA**

**JUDGE**

**Ruling No. 2 virtually delivered in the presence of: -**

**Miss Prudence Mutiso and Mr. Martin Onyango**, Learned Counsel for the Applicant.

**Miss Wamboi**, Learned Counsel for the Petitioners.

....., Learned Counsel for the 5<sup>th</sup> Respondent.

**Kirong/Regina** – Court Assistants.

