



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 507 OF 2019

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 10, 19, 20, 23, 27, 28, 31, 40, 47, 157 AND 236 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010

AND

IN THE MATTER OF KIBERA CHIEF MAGISTRATE'S COURT CRIMINAL CASE 1372 OF 2019; REPUBLIC VS. MOSES WAINAINA AND 8 OTHERS

BETWEEN

JASPER NDEKE SHADRACK.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

CHIEF MAGISTRATE'S COURT AT KIBERA.....2ND RESPONDENT

AND

FLORENCE WANGARI HUNGI1ST INTENDED INTERESTED PARTY

SYLVIA MWIKALI NTHANGA2ND INTENDED INTERESTED PARTY

MICHAEL KAHUNGO GITAU.....3RD INTENDED INTERESTED PARTY

JAMES MWAURA MWANGL.....4TH INTENDED INTERESTED PARTY

SELINA LEPARIE.....5TH INTENDED INTERESTED PARTY

RULING

APPLICATION

1. The Intended Interested Parties, *Florence Wangari Hungi, Sylvia Mwikali Nthanga, Michael Kahungu Gitau, James Mwaaura Mwangi and Selina Leparie* through a Notice of Motion dated *28th September 2020* and *25th September 2020*, and oral application respectively applied to be enjoined as Interested Parties herein and be allowed to join these proceedings.
2. The Formal Applications are premised on the grounds on the face of the respective applications, whereas the oral applications was based on Counsel Submissions.
3. The Formal Applications are further supported by Intended Interested Parties Supporting Affidavits by respective Intended Interested Parties.

INTENDED INTERESTED PARTIES CASE

4. The Intended Interested Parties case is based on the grounds on the face of the applications and supported by intended Interested Parties respective affidavits in support.

5. The grounds in support are as follows:-

a) That the Intended Interested Parties/Applicants, were charged jointly together with the Petitioner herein, in Kibera CMCri. Case No.1372 of 2019; Republic vs. Moses Wainaina & 8 others.

b) That the Intended Interested Party contend that they were wrongly charged in Kibera CMCri. Case No. 1372 of 2019, since their duties were not to look after Buildings, but Quality Assurance and Standards of Education and not Buildings, and they were as follows:-

- i) “Ensuring Implementation of all Education Policies and Programmes in all Counties within your Region.”**
- ii) “Liaise with the Regional Commissioners in the Interior Ministry of Education Matters.”**
- iii) “Holding Co-ordination Meetings with County Education Officers, for efficient and submission of Monthly Reports to the Ministry Headquarters.”**
- iv) “Submissions of Monthly Reports to the Ministry headquarters.”**
- v) Ensure Effective and Efficient Administration of National Examinations in the Region.**
- vi) “Ensure Proper Co-ordination of Co-curricular Activities, in the Region.”**
- vii) “Ensure prudent utilisation of Public Resources at County, Sub-county, and School Levels.”**

c) That the charges levelled against the Applicants/Intended Interested Parties, is in Breach of Articles 10, 19, 20, 23, 27, 28, 29, 31, 40, 47 & 57 and 236 in Chapter Four Bill of Rights, and Chapter Thirteen- Public Service of the Constitution.

d) That the Prosecution of the Applicants/Intended Interested Parties, is unlawful, wrongly, illegal, and unfair, in that they were not, in capacity as the Regional Quality Assurance and Standards of Education Officer for Nairobi County, In Charge of Buildings, but their superiors, who were directly involved in Buildings were the ones to be charged in their line of duty in Buildings, including the following:

“1) The Permanent Secretary,

2) The Regional Director of Education – who was also the Director of Education

3) The Deputy Director of Education in Charge of Quality Assurance and Standards and

4) The Regional Director of Education in the whole of Nairobi County, whom are the Intended Interested Party’s /Petitioner’s Superiors” and they were not in-charge of Buildings, and their fundamental rights are likely to be contravened, since the Respondents have not complied with the law, regarding proper investigations and charging of Criminal offences, which charges, should not have bene preferred against the Applicants/Intended Interested Parties, but on their four (4) superiors, instead of the applicants who were hurriedly charged without carrying out proper investigations and charged the proper officials, who were their superiors.

e) The Intended Interested Parties having been charged jointly with the Petitioner herein and having already obtained a stay of the proceedings of CMCri. Case No. 1372 of 2019 on 18th May 2020, it is in the Interests of Justice that the Intended Interested Parties be enjoined into this Petition so that both Petitions can be heard together in the best interests of justice, by reason of the facts that they are both charged jointly and their petitions should be consolidated and heard together.

6. Application for joinder of James Mwaura Mwangi and Selina Laparie was made orally by their Counsel Mr. Odhiambo; on same grounds as those of other Intended Interested Parties herein above.

PETITIONER’S RESPONSE

7. The Petitioner herein filed grounds of opposition and Notice of Preliminary Objection. The Preliminary Objection raises the following grounds:-

a) No provision of law, whether Constitutional or Statutory permits filing of Cross-Petition or Petition by an Intended Interested Party.

b) The Petition filed by the Intended Interested Party is a plagiarized replica of the Petitioner’s Petition dated 18th December 2019.

c) *Whereas the law does not provide for Corrective Affidavit, amendment using Corrective Affidavit blatantly breaches mandatory legal principles by purporting to amend Notice of Motion dated 25th September 2020; supporting Affidavit dated 25th September and Petition dated 25th September 2020.*

d) *The suit by the Intended Interested Party is otherwise an abuse of the court process.*

8. The Petitioner's ground of opposition are as follows:-

a) *The application is bad in law and warrants dismissal in limine.*

b) *The Application is fatally defective for being premised on the Civil Procedure Act and Civil Procedure Rules in lieu of Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 notably christened Mutunga Rules.*

c) *The Intended Interested Party has outstandingly failed to establish not only the stake or interest or duty she has in the proceedings, but also how the outcome will affect her save for being a co-accused thus contravening mandatory rules set in Supreme Court Petition 15 & 16 of 2015; Francis Kariuki Muruatetu & another v. Republic & 5 others.*

d) *There is no nexus between the Intended Interested Party who is allegedly the Quality Assurance and Standards Officer in Education and the Petitioner who is the Director of Planning, Compliance and Enforcement for Nairobi City County.*

e) *An Interested Party being a non-party cannot seek substantive orders as sought.*

f) *The Application to be enjoined as Interested Party has been advertently filed very late in the day with a sole objective of delaying conclusion of the Petitioner's case.*

g) *There is otherwise no basis for the entire application and prayers therein should be dismissed with costs.*

ANALYSIS AND DETERMINATION

9. Upon carefully considering the intended Interested Parties applications and the Petitioner's grounds of opposition as well as the Preliminary Objection thereto and parties oral submissions, the following issues arise for consideration:-

a) *Whether the Intended Interested Party has met the threshold for enjoinder.*

b) *Whether the Intended Interested Parties cross petition is bad in law and warrants dismissal in limine.*

A. WHETHER THE INTENDED INTERESTED PARTY HAS MET THE THRESHOLD FOR ENJOINDER.

10. The Intended Interested Parties' Counsel contend that all Intended Interested Parties are charged with the same offence and that no prejudice would be suffered by the Petitioner if the applicants are enjoined as Interested Parties to the proceedings pending before this Court. The Petitioner on his part contend that no interest has been demonstrated to warrant granting of the application for joinder.

11. **Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** defines "**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.

12. An Applicant seeking to be enjoined as an Interested Party has therefore to demonstrate that he/she has an identifiable stake or legal interest or duty in the proceedings before the Court. The Intended Interested Party are charged jointly together with the Petitioner as his co-accused in **Criminal Case No. 1372 of 2019 at Kibera Law Courts**.

13. The Petition herein was provoked by the charging of the Petitioner jointly with the Intended Interested Parties and seeks declarations that Petitioner's Constitutional rights have been violated and that all criminal proceedings before the 2nd Respondent specifically **Criminal Case No. 1372 of 2019 Republic vs. Moses Wainaina & 8 others** against them in relation to the facts therein are unconstitutional, null and void. The Intended Interested Parties are seeking same orders as the Petitioner in his Petition.

14. I find that the Intended Interested Parties herein have demonstrated that they have identifiable stake or legal interest or duty in the proceedings before the Court but are not party to the proceedings nor are they directly involved in the litigation. I find that the Intended Interested Parties have met the threshold to warrant being enjoined as Interested Parties in these proceedings. Further I find no prejudice would be suffered by the Petitioner if the Intended Interested Parties are joined as Interested Parties.

B. WHETHER THE INTENDED INTERESTED PARTY'S CROSS PETITION IS BAD IN LAW AND WARRANTS DISMISSAL IN LIMINE.

15. The Intended Interested Parties in the applications dated 28th September 2020 and 25th September 2020 respectively Syliva Mwikali Nthanga and Florence Wangari Hungi prays for leave to file a Cross-Petition upon being enjoined as Interested Parties. The applications are based on **Civil Procedure Act** and **Civil Procedure Rules and Article 159 of the Constitution**.

16. The Petitioner in the Preliminary Objection dated 13th January 2020 opposes the allowing of the Intended Interested Parties Cross-Petition as the Intended Interested Parties have not cited any provisions of law, whether Constitutional or Statutory granting the filing of Cross-Petition or Petition by an Intended Interested Party. The Intended Interested Party cannot seek to be enjoined as Interested Party in proceedings and seek to file a Cross-Petition or Petition in the same proceedings. No party can be both Interested Party and a Petitioner at the same time. It is furthered noted that the Petition filed by the Intended Interested Parties is a plagiarized replica of the Petitioner's Petition dated 18th December 2019. This cannot be condoned as it is otherwise an abuse of the Court process. The Intended Interested Parties should consider either forgoing being enjoined or proceed on filing their own Petition separately.

17. I find that the *Constitution* and the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure, 2013* has not provided for filing of Cross-Petition by an Intended Interested Party or Interested Party in the same Petition. The Intended Interested Parties were not at any time barred before seeking to be enjoined in these proceedings from filing their individual respective petitions without seeking to be enjoined and had they opted to do so they would have rightly exercised their constitutional rights to access justice. I find that it would be an abuse of Court process for intended Interested Parties to seek to be enjoined as Interested Parties and at the same time file either a Petition or cross Petition in the same proceedings. I find the intended Interested Parties cross-Petition or Petition to be bad in law and warrants dismissal in limine.

18. *In view of my findings herein above I proceed to make the following orders:-*

a) The Applications by Intended Interested Parties for their joinder in these proceedings are meritorious and are allowed as follows:-

- i. Florence Wangari Hungi is joined in these proceedings as 1st Interested Party.*
- ii. Sylvia Mwikali Nthanga is joined in these proceedings as 2nd Interested Party.*
- iii. Michael Kahungo Gitau is enjoined in these proceedings as 3rd Interested Party*
- iv. James Mwaura Mwangi is enjoined in these proceedings as 4th Interested Party*
- v. Selina Leparie is enjoined in these proceedings as the 5th Interested Party.*

b) The 1st, 2nd, 3rd, 4th and 5th Interested Parties do file and serve their responses to the Petition within 15 days from the date of this ruling.

c) The Intended Parties application to be allowed to file Petition or Cross-Petition within the Petition herein is bad in law and is accordingly dismissed.

d) Costs be in the cause.

Dated, Signed and Delivered at Nairobi on this 17th day of March, 2021.

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J. A. MAKAU

JUDGE