



REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CONSTITUTIONAL PETITION NO. E2 OF 2020

CORAM: R.E. ABURILL, J

GABRIEL OTIENDE.....1ST PETITIONER

EVANS ONYANGO.....2ND PETITIONER

ELIJAH ODINGO OSADHO.....3RD PETITIONER

DICKSON ORUKO WASONGA.....4TH PETITIONER

RICHARD ATITO ORONDO.....5TH PETITIONER

VERSUS

COUNT COMMISSIONER, SIAYA COUNTY.....1ST RESPONDENT

CABINET SECRETARY

MINISTRY OF INTERIOR & COORDINATION.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

JOHN NYAPOLA OKUMU.....1ST INTERESTED PARTY

JOSHUA OUMA MINYA.....2ND INTERESTED PARTY

DUSILA ATIENO TSUMA.....3RD INTERESTED PARTY

JOSEPH ODIALA MESO.....4TH INTERESTED PARTY

AND

THE APPLICANTS

LORDVICUS CHIEDOAMARA.....1ST PROPOSED INTERESTED PARTY

DAVID OCHIENG AKUOM.....2ND PROPOSED INTERESTED PARTY

JORIM OUMA OTIENO.....3RD PROPOSED INTERESTED PARTY

MARY WASONGA.....4TH PRPOSED INTERESTED PARTY

JOSEPH OWINO ABUNGE.....5TH PROPOSED INTERESTED PARTY

HENRY APONDI OYIER.....6TH PROPOSED INTERESTED PARTY

RULING

(Application to be enjoined to a constitutional petition as interested parties; principles to be applied to joinder in a constitutional petition; applicants stating that they are residents and members of the Gem Yala Subcounty; whether applicants have demonstrated a special interest; need for interested party to file application for joinder in good time; application disallowed as it has been filed too late in the day and their interests are well catered for by the interested parties already enjoined.)

RULING

1. This ruling determines an application dated 29th March 2021 filed by six persons who are the proposed interested parties. The application was argued this morning (20th April 2020) orally with Mr. Maxwell Ogonda Advocate representing the applicants/proposed interested parties while Mr. Mung'ao Advocate held brief for Mr. Kobimbo and Mr. Were for the interested parties respectively. Mr. Odhiambo Kanyangi advocate represents the petitioners.
2. The applicants/ proposed interested parties seek leave of this court to be enjoined to this constitutional petition and proceedings as interested parties. They also urge that upon being allowed to join this Petition, this court do issue directions and timelines for the parties to file necessary documents herein and that costs of the application be provided for.
3. The applicants rely on the 8 grounds on the face of the chamber summons application. They also rely on the supporting affidavit sworn by Joseph Owino Abunge the fifth applicant.
4. The applicants claim to be residents of GemYala Subcounty hence stakeholders in the petition and that they were not aware of the petition until recently when they were notified by their area Member of the County Assembly. That they wish to participate in the proceedings as the outcome of these proceedings directly affect them; that Yala Township having been an administrative centre since before independence until recently ought not to be overtaken by Sawagongo which has no room or space for growth; that the County is currently experiencing serious economic strain hence it may not have sufficient resources and funds to develop fresh structures or buildings at Sawagongo which is underdeveloped; that no prejudice will be occasioned to anyone if this application is allowed and that it is in the interest of justice that the applicants be given the opportunity to participate in these proceedings.
5. In the supporting affidavit of Mr. Joseph Owino Abunge, he deposes reiterating the grounds reproduced above save that he is an ex councilor of Nyamninia Ward for ten years hence he understands matters of the administrative units of GemYala Subcounty adding that Sawagongo is not a central place after subdivision of Gem Subcounty into Gem Wagai and Gem Yala and that the Gazette Notice which is impugned was issued after considering a myriad of issues which shall be articulated before this court to enable the court know how the Headquarters was moved from Yala to Sawagongo in the first instance.
6. The Respondents and the interested parties did not oppose the applicant's application.
7. The Petitioners filed a replying affidavit sworn by Mr. Gabriel Otiende on behalf of his co petitioners vehemently opposing the application for joinder of the proposed interested parties.
8. In the said replying affidavit sworn on 19th April 2021, the petitioners depose in contention that this court did admit the interested parties herein on 3/2/2021 and gave directions after which all parties have now complied with directions of the court and filed affidavits and submissions, with the petition ready to be determined as only a judgment date is pending hence the applicants have come to court too late in the day to delay the expeditious disposal of the petition. Further, that whatever the applicants intend to advance before this court as interested parties is not different from what the interested parties on record have stated in their affidavits for example, the averment and assertion **that Yala Town ship is well established and strategically placed than Sawagongo to serve Gem Yala Subcounty Headquarters**. In the petitioners' view, litigation must come to an end and that the application if allowed will delay expeditious disposal of the petition yet it is a matter of great public interest.
9. The application was canvassed orally, hybrid physical and virtually, with Mr. Maxwell Ogonda advocate arguing on behalf of the applicants while Mr Mung'ao held brief for Mr. Were for the interested parties and Mr. Kobimbo for the Respondents as Mr. Odhiambo Kanyangi represented the petitioners.
10. As earlier stated, Mr. Mung'ao had instructions not to oppose the application. Mr. Ogonda argued the grounds supported by the supporting affidavit of the 5th applicant while Mr. Odhiambo Kanyangi relied on the replying affidavit sworn by the 1st Petitioner to counter the application. The arguments are a replica of what is contained in the grounds and affidavits as reproduced above hence I shall not belabor to reproduce them here.

DETERMINATION

11. I have considered the application by the proposed interested parties, the grounds and affidavit in support as well as in opposition and the submissions by the respective counsel on record. The only issue for determination is whether the application for joinder of the applicants as interested parties has merit.

12. Article 22 of the Constitution provides as follows :-

22. (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.

(3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—

(a) the rights of standing provided for in clause (2) are fully facilitated;

(b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;

(c) no fee may be charged for commencing the proceedings;

(d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and

(e) an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.

(4) The absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court.

13. Article 22 above sets out who can file a constitutional petition. Under Article 22 (2) a person can file a petition representing others or in the public interest.

14. Article 22 (3) empowers the Chief Justice to make rules. The Chief Justice through the gazette notice of 28th June 2013, made the rules contemplated by Article 22 of the Constitution. Section 7 of the Rules famously known as the “**Mutungu Rules**” provides:

7. (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.

15. Generally, any party may be joined to a constitutional petition as an interested party upon demonstrating an interest. The court may also on its own motion order for a necessary party to be enjoined as an interested party.

16. However, one cannot be a proper interested party, if he cannot show any identifiable interest in the litigation before court. Litigation by its very nature inevitably has a widespread effect, even to persons who are not parties to the it. However, it does not necessarily mean that every person who may be affected by litigation, however minutely, must be allowed to participate in the litigation as an interested party. For example, in the instant Petition, all residents of Gem Yala Sub County are no doubt affected by these proceedings and more so, by the outcome thereof and therefore the question is whether all those residents must be enjoined to these proceedings so that they can articulate their issues before court.

In **Trusted Society of Human Rights Alliance v Mumo Matemu [2014] e KLR**, the Supreme Court held that:

“An interested party is one who has a stake in the proceedings, though he or she was not a 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 herself appears in the proceedings, and champions his or her cause...”[emphasis added]

18. The **Black's Law Dictionary 9th Edition, page 1232** defines an interested party as **“A party who has a recognizable stake (and**

therefore standing) in the matter." It also defines a "Necessary Party" as "*a party who being closely connected to a lawsuit should be included in the case if feasible but whose absence will not require dismissal of proceedings.*" *The elements to be satisfied where a party seeks to be enjoined in proceedings as an interested party are: the intended interested party must have "an identifiable stake" or legal interest or duty in the proceedings.*"

19. The test is not whether the joinder of the person proposed to be added as an interested party would be according to or against the wishes of the petitioner or whether the joinder would involve an investigation into a question not arising on the cause of action averred by the petitioner. It is whether the intended interested party has an identifiable stake, or a legal interest or duty in the proceedings.

20. In **Amon v. Raphael Tuck and Sons Ltd., 1956 - 1 All ER 273** it was held that a person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally that is by curtailing his legal rights.

21. In **Dollfus Mieg et Compagnie S.A.V. Bank of England, 1950-2 All ER 605 at p. 61**, it was observed that in determining whether or not an applicant has a legal interest in the subject matter of an action sufficient to entitle him to be joined as an interested party, the true test lies not so much in an analysis of what are the constituents of the applicant's rights, but rather in what would be the result on the subject-matter of the action if those rights could be established.

22. It is therefore apparent that a party claiming to be enjoined in proceedings must have an interest in the pending litigation, but the interest must be legal, identifiable or demonstrate a duty in the proceedings directly identifiable by examining the questions involved in the suit.

23. Regarding the exercise of the courts discretion on its own motion in applications of this nature, like all discretions, it must be exercised based on sound judicial principles. See **Yahaya Kariisa v. Attorney General & A'nor, S.C.C.A. No.7 of 1994 [1997] HCB 29**.

24. The main purpose of joining parties is to enable the court to deal with matters brought before it fully and exhaustively and to avoid a multiplicity of suits. It is a fundamental consideration that before a person can be joined as a party, it must be established that the party has an identifiable interest in the case. In addition, it must be clearly demonstrated that the orders sought in the case in question would directly and legally affect the party seeking to be enjoined. These considerations were augmented by the **Supreme Court of Uganda in Departed Asians Property Custodian Board v. Jaffer Brothers Ltd [1999] I.E.A 55**. where the court held:

"...for a party to be joined on ground that his presence is necessary for the effective and complete settlement of all questions involved in the suit, it is necessary to show either that the orders sought would legally affect the interest of that person and that it is desirable to have that person joined to avoid multiplicity of suit, 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."

25. In law, standing or locus standi is the term for ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case. Standing exists from one of the following:

a. that the party is likely to suffer adverse effect,

b. that the harm suffered is likely to affect others who might not be able to ask the court for relief

c. that the party is granted standing by the law see (Lee, Evan; Mason Ellis, Josephine (December 3, 2012). The Standing Doctrine's Dirty Little Secret." Northwestern Law Review. 107, 169).

26. In **Judicial Service Commission – vs – Speaker of the National Assembly & Another [2013] eKLR**, the court, referring to the definition of an interested party under The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules as defined above stated that:

"From the foregoing it is clear that an interested party is a person with an identifiable stake or legal interest in the proceedings hence may not be said to be wholly nonpartisan as he is likely to urge the court to make a determination favourable to his stake in the proceedings."

27. In **Mumo Matemu vs. Trusted Society of Human Rights Alliance and 5 Others [2013] e KLR**, the court held:

"Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion or sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. the standard guide for locus standi must remain the command in Article 258 of the Constitution."

28. I have read the affidavits by the interested parties who were enjoined to this petition and compared their interests with those of the applicants herein and the contentions by the Respondent. I find that their interests are all the same, opposing the petition and claiming that there was public participation and consultations with residents before the decision to move the Gem Yala Subcounty Headquarters to Yala from Sawagongo was arrived at hence the impugned Gazette Notice is in order. The Respondents and interested parties all claim that Yala Township is well developed with necessary infrastructure to host the Subcounty Headquarters unlike Sawagongo.

29. From the affidavit by the 5th applicant, iam satisfied that the applicants have an identifiable stake in these proceedings as residents of Gem Yala Subcounty and that the outcome of these proceedings directly affect them as such residents.

30. The question is, have the applicants demonstrated by this application that they have something very different or unique to what their fellow residents who are already enjoined as interested parties have articulated before this court? Something more needs to be demonstrated by an applicant who seeks to be enjoined to the litigation as an interested party since the court cannot accommodate all individuals in a subcounty to litigation. Moreso, Article 22 of the Constitution clearly recognizes the fact that parties can bring a petition or be enjoined on their own behalf and or on behalf of others, in a public interest Constitutional; petition of this nature.

31. This court has also already given directions in the petition and the parties have complied with pretrial and filed affidavits and submissions. The matter was due for fixing of judgment date when the applicants came in under certificate of urgency seeking to be enjoined.

32. This court having considered the interests of the applicants and those of the interested parties herein and the position taken by the Respondents, iam satisfied that the applicants are not advancing anything new. They are not injecting any new matter or issue or information to this court which would assist or enable this court determine the petition which is of a public interest nature. The applicants' interest are well articulated by the interested parties who are also residents of the Gem Yala Sub County and who defend the impugned Gazette Notice.

33. I hasten to add that the views and concerns of the applicants are well taken care of by the respondents, especially the Attorney General, who represents public interest as contemplated in Article 156 of the Constitution, and I find no special contribution that the applicants are going to make to this petition.

34. In addition, this application was filed on 30th March 2021 long after this court had heard and dismissed the Respondents' application to set aside the conservatory orders issued and directions given on 3/3/2021 on the disposal of the petition and timelines given to the parties who have since complied with those directions and filed submissions, meaning, the parties have already argued the petition by way of written submissions and the matter is pending judgment date to be fixed.

35. To reopen such a matter, in my humble view, the party seeking to be heard must demonstrate very special circumstances and show that they will suffer prejudice if they are not enjoined to the proceedings. No such prejudice has been demonstrated and I find none in view of the earlier joinder of the interested parties and the role of the Attorney General in this public interest matter.

36. The petition was filed on 19/10/2020, six months ago. It was filed after the petitioners, respondents and interested parties had already been given a timeline to file submissions in support of and against the petition. The parties already know what the pleadings are and have submitted on all the issues raised. To allow this application at this stage would change the entire character of the petition. The petitioners will now have to answer to either the same, same issues raised by the interested parties and the respondents or new matters which were not in their contemplation, although no such new or important matter is disclosed in the application.

37. Article 159 of the Constitution is clear that justice shall be administered without delay. Although the applicants claim that they recently learnt of this petition through their area Member of County Assembly, iam not persuaded that the applicants only learnt of the existence of this petition after the court had given directions and timelines for filing of all documents as the matter is in the public domain that the relocation of the GemYala Subcounty headquarters to Yala from Sawagongo was done by gazette Notice which was challenged by the petition herein and many residents have come to court and been enjoined to the petition. In addition, this court issued conservatory orders which are in force and therefore all residents including the area MCA must be in the know. In my humble view, reopening these proceedings will not serve any useful purpose but will delay the expeditious disposal of the petition, which delay, will prejudice the residents of the Gem Yala Subcounty.

38. In **Maria Soti Educational Trust v Registrar of Titles another [2014&] eKLR the court stated:**

“A party who wants to be enjoined as an interested party needs to file its application fairly early in the proceedings. If the application comes too late, then the parties to the petition will be prejudiced and hardship will be occasioned to them. It will be unfair to the original parties to allow an application for joinder as an interested party, very late in the proceedings. The original parties stand the risk of being caught flat-footed without the opportunity to rebut what the interested parties want to raise. In any event every party deserves to have his/her case heard and determined expeditiously.”

39. In the end, I finds and hold that the applicants have an identifiable interest. However, they have come to court too late in the day. They have failed to demonstrate that their interests will not be adequately articulated by the Respondents and the already joined interested parties. They have also failed to demonstrate any prejudice that they will suffer if they are not enjoined to these proceedings.

40. For the above reasons, the application dated 29th March 2021 filed by the six applicants to be enjoined to this petition as interested parties is found to be devoid of any merit and the same is hereby disallowed. I however make no orders as to costs.

41. Judgment to determine the merits and demerits of the petition shall be delivered on 7th June 2021.

42. Orders accordingly.

Dated, Signed and Delivered at Siaya this 20th Day of April, 2021 at 2pm in open court virtually via Microsoft Teams.

R.E.ABURILI

JUDGE

In the presence of:

Mr. Maxwell Ogonda Advocate for the applicants/ proposed interested parties

Mr. Odhiambo Kanyangi Advocate for the Petitioners

CA: Modestar and Mboya