



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

***(Coram: A. C. Mrima, J.)***

**CONSTITUTIONAL PETITION NO. E334 OF 2021**

**BETWEEN**

**HON. JUSTICE SANKALE OLE KANTAI.....PETITIONER**

**VERSUS**

**INSPECTOR GENERAL OF THE**

**NATIONAL POLICE SERVICE.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATIONS.....2<sup>ND</sup> RESPONDENT**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS .....1<sup>ST</sup> INTERESTED PARTY**

**AND**

- 1. GABRIEL HANNAH VAN STRATEN**
- 2. GRACE ITA NDINDA (Suing for and on behalf of the Estate of Silas M'Njamiu Ita)**
- 3. SARAH WAIRIMU KAMOTHO COHEN**
- 4. PETER NJOROGE KARANJA .....INTENDED INTERESTED PARTIES**

**RULING NO. 1**

**Introduction:**

1. The events subject of this Petition arise out of the death of one Tob Cohen. It is alleged that the late Tob Cohen did not die a natural death and currently two persons are facing murder charges before the High Court.
2. The Petition herein was instituted by a person whom the Respondents herein, *the Inspector General of the National Police Service and the Director of Criminal Investigations*, strongly believed is culpable in the death of the late Tob Cohen one hand, and on the other hand, the *Director of Public Prosecutions*, the 1<sup>st</sup> Interested Party, is of the contrary position.
3. In the main, the Petition seeks the following prayers: -

1. A declaration that the actions of the Respondents to arrest the Petitioner without prior investigations and any evidence against him- violates the right to human dignity in Article 28 of the Constitution and the right not to be deprived of freedom arbitrarily or without just cause in Article 29 of the Constitution.

2. A declaration that the actions of the Respondents to make arrests without prior investigations and any evidence against suspects is an abuse of their Constitutional powers contrary to Article 245 and 247 of the Constitution.
3. A declaration that the actions of the Respondents to arrest the Petitioner for no reason whatsoever and cause him to spend the night of 21 February 2020 at Muthaiga Police Station cells which are in sordid conditions- violates the right to human dignity as provided in Article 28 of the Constitution.
4. A declaration that the actions of the 2nd Respondent to arrest the Petitioner without informing him promptly of the reason for arrest, violates the provisions of Article 29 and Article 49(1) (a) of the Constitution.
5. A declaration that the actions of the Respondents to confiscate the Petitioner's phone forcefully, analyzing his data and messages for three months without his consent and warrant, contravenes and/or threatens the provisions of Article 31, 40 and 50(4) of the Constitution.
6. An order of prohibition directed to the Respondents, their agents, servants, or officers prohibiting them from further investigating and/or harassing the Petitioner in any manner through unnecessary arrests.
7. An order of permanent injunction be directed to the 2nd Respondent, their agents/servants and/or officers to restrain them from using any information they acquired in the Petitioner's phone in any way against the Petitioner.
8. General damages for breach of the Petitioner's Constitutional rights
9. Costs of the Petition.

4. As a result of the foregoing, four of the parties involved in the murder case now seek to be enjoined in these proceedings.

5. This ruling is, hence, in respect of the said four joinder applications.

**The Applications:**

6. The applications are as follows: -

- (a) Notice of Motion dated 29<sup>th</sup> September, 2021 by Gabriel Hannah van Straten.
- (b) Notice of Motion dated 4<sup>th</sup> October, 2021 by Grace Ita Ndinda (suing for and on behalf of the Estate of Silas M'Njamiu Ita).
- (c) Notice of Motion dated 16<sup>th</sup> October, 2021 by Sarah Wairimu Kamotho Cohen.
- (d) Notice of Motion dated 25<sup>th</sup> October, 2021 by Peter Njoroge Karanja.

7. The applications were variously supported by affidavits, written submissions and Lists of Authorities.

8. The applications were opposed.

9. The Petitioner herein opposed all the applications. To that end, he relied on his Replying Affidavit and written submissions.

10. The Respondents opposed the applications by Sarah Wairimu Kamotho Cohen and Peter Njoroge Karanja. They relied on the Replying Affidavit sworn by one *Martin Nyuguto*, a Senior Assistant Superintendent of Police and the Head of Homicide Investigations Unit. The Respondents, however, took no position on the joinder of Gabriel Hannah van Straten and Grace Ita Ina.

**Analysis and Determinations:**

11. I have carefully perused the documents filed in this matter. They include extensive and comprehensive submissions which were highlighted before Court.

12. Given the nature of this matter, this Court will not, at this point, necessarily reproduce *verbatim* the respective parties' dispositions and submissions. However, the Court has carefully perused all the documents so far filed in this matter and will take the contents thereof into account in the course of this discussion.

13. The starting point is a look at the law on joinder of interested parties. As said, the parties have already properly captured the correct legal position on the subject of joinder of interested parties.

14. In this ruling, I will reiterate what I recently 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* (unreported) on the subject. This is what I 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.

15. 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.

16. I will now apply the foregoing considerations to the applications at hand.

17. The genesis of this Petition was the decision by the Director of Public Prosecutions not to charge the Petitioner herein as one of the accused persons with the murder of Tob Cohen. The Director of Criminal Investigations did not agree with the Director of Public Prosecutions and insisted that there was sufficient evidence to demonstrate the culpability of the Petitioner herein in the said murder. It is the position of the Director of Criminal Investigations that part of the evidence was obtained from the Petitioner's phone and links the Petitioner with Sarah Wairimu Kamotho Cohen and Peter Njoroge Karanja in the said murder.

18. The impugned decision resulted to calls of incompetency of the part of the Director of Public Prosecutions in the manner in which he arrived at the decision not to charge the Petitioner. At least a Petition was filed before the Public Service Commission for the removal from

office of the Director of Public Prosecutions. In turn, several Petitions were filed in the High Court challenging the competency of the Petition filed before the Public Service Commission.

19. In the current proceedings, the Petitioner *inter alia* challenges the constitutionality of the Respondents to re-arrest and prefer charges against him without the consent of the Director of Public Prosecutions and the aspect of illegally obtained evidence. These proceedings, therefore, cut across all the matters currently *in situ* and in particular the criminal case against Sarah Wairimu Kamotho Cohen and Peter Njoroge Karanja.

20. In the criminal case, Sarah Wairimu Kamotho Cohen and Peter Njoroge Karanja are the accused persons whereas Gabriel Hannah van Straten and Grace Ita Ndinda are among the witnesses.

21. A fair approach in this matter is two-pronged. First, it is prudent for the Court to hear Sarah Wairimu Kamotho Cohen and Peter Njoroge Karanja on the constitutionality of the alleged evidence connecting them with the Petitioner. Second, the witnesses who strongly believe in the culpability of the Petitioner must also be heard. The simple reason is that the determination of the Petition herein will in different ways affect the accused persons and the witnesses in the criminal case. Needless to say, those are the intended interested parties herein.

22. The Applicants, hence, have identifiable stakes which are proximate enough in this Petition. Further, the Applicants are the only ones who can properly articulate their interests in this matter and as such, they stand to be prejudiced if they are not heard. It is also a fact that the Applicants are not the main parties in the Petition.

23. One of the objections by the Petitioner to the applications was that the Applicants' place is before the Criminal Court where the veracity or otherwise of the evidence will be tested. The Court was urged to be cautious lest it will end up usurping the role of the Criminal Court and may make determinations which may adversely affect the trial of Sarah Wairimu Kamotho Cohen and Peter Njoroge Karanja. It was also argued that the Applicants will unnecessarily expand the Petition which is a targeted one to the specific issues raised in this matter.

24. The answer to the foregoing is in the legal position in respect to parties intending to enjoin the proceedings with a view to expand the borders of the Petition. The position is that such parties will not be allowed to do so.

25. The above legal principle has been severally discussed by the Supreme Court. Some of the decisions were integrated by the High Court in *Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* (2020) eKLR as under: -

44. *The role of an interested party in proceedings is peripheral as was expressed in Methodist Church in Kenya v Mohamed Fugicha & 3 others [2019] eKLR, where the Supreme Court was called upon to determine whether substantive orders could be granted in a matter where a cross-petition had been introduced to a constitutional matter by way of an affidavit by an interested party. In its majority decision, the Supreme Court stated as follows at paragraph 51-55:*

[51] *The interested party's case brought forth a new element in the cause: that denying Muslim female students the occasion to wear even a limited form of hijab would force them to make a choice between their religion, and their right to education: this would stand in conflict with Article 32 of the Constitution...*

[53] *... Yet this Court has been categorical that the most crucial interest or stake in any case is that of the primary parties before the Court. We did remark, in Francis Kariuki Muruatetu & Another v. Republic & 5 others, Sup. Ct. Pet. 15 & 16 of 2015 (consolidated); [2016] eKLR, as follows (paragraphs 41, 42):*

*Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.*

*Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the Court...*

[54] *In like terms we thus observed in Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others, Civil Appeal No. 290 of 2012 (paragraph 24):*

*A suit in Court is a 'solemn' process, 'owned' solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings.*

45. Similarly, an attempt to introduce new issues was considered by the Supreme Court in *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 3 Others [2017] eKLR viz:*

*The applicant, in essence is introducing new facts and issues that were not before Court. It follows that he is not in a*

*position to advance any submission that will be helpful to the Court as it resolves the main question at hand. He is, in effect introducing a new petition, and pre-empting the duly-lodged cause of the parties in the main proceedings. This cannot be allowed. Moreover, we are also not convinced that the applicant would suffer any prejudice, if his intervention is denied. Accordingly, we dismiss this application.*

*46. What emerges from the above decisions is the principle established in our jurisprudence that an interested party is a peripheral party in a suit and cannot introduce new issues for determination by the Court. Further, that in determining the matters before it, the Court will only consider the issues raised in the pleadings by the principal parties.*

26. Returning to the matter at hand, the manner in which the Applicants intend to expand the parameters of the Petition is not clearly demarcated. The fact that the Applicants are the accused persons and witnesses in the criminal case does not necessarily mean that they will transform the Petition herein into that case or part thereof.

27. This Court agrees with the Petitioner that the Petition is a targeted one. That is so. In that case, the parties will only be restricted to the matters raised in the Petition herein. Any attempt to introduce otherwise new issues will be legally thwarted. That is, indeed, the role of this Court.

28. I believe I have laid adequate basis for determining the applications. It is the finding and holding of this Court that all the four joinder applications are merited.

29. As I come to the end of this decision, I find it prudent to heed to the parties' request for directions on all Petitions arising from the death of Tob Cohen. This Court agrees with the parties that steps ought to be taken to take care of the possibility of contradictory orders. In that case, appropriate directions will issue.

**Disposition:**

30. Flowing from the above conclusion, the following final orders do hereby issue: -

**(a) The joinder applications are hereby allowed.**

**(b) Gabriel Hannah van Straten, Grace Ita Ndinda (Suing for and on behalf of the Estate of Silas M'njamiu Ita), Sarah Wairimu Kamotho Cohen and Peter Njoroge Karanja are hereby enjoined in these proceedings as the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Interested Parties respectively.**

**(c) The Petitioner and the Respondents shall within 2 days serve all the documents filed upon the enjoined Interested Parties.**

**(d) The Interested Parties shall then file and serve their respective responses to the Petition within 14 days of service.**

**(e) This matter shall be fixed for directions on 29<sup>th</sup> November, 2021 before the Presiding Judge of the Division together with all the other Constitutional Petitions revolving around the death of Tob Cohen, the prosecution of Sarah Wairimu Kamotho Cohen and Peter Njoroge Karanja and the removal from office of the Director of Public Prosecutions on grounds related to the death of Tob Cohen.**

**(f) To that end, the Hon. Deputy Registrar of the Division shall accordingly avail the said Petitions and issue notices to all the respective parties in all such Petitions.**

**(g) Costs shall be in cause.**

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF NOVEMBER, 2021**

**A. C. MRIMA**

**JUDGE**