



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CONSTITUTIONAL PETITION NUMBER 25 OF 2019**

**GEORGE PARIKEN OLE NAROK.....1<sup>ST</sup> PETITIONER**

**PAUL MAINA MUGO.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**THE CABINET SECRETARY, MINISTRY OF TRADE,**

**INDUSTRY AND CO-OPERATIVES.....1<sup>ST</sup> RESPONDENT**

**THE COMMISSIONER OF CO-OPERATIVES.....2<sup>ND</sup> RESPONDENT**

**AND**

**KENYA FARMERS ASSOCIATION LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**SAMSON CHEROP KANDAGOR.....2<sup>ND</sup> INTERESTED PARTY**

**BENARD NYAKUNDI NYAMORE.....3<sup>RD</sup> INTERESTED PARTY**

**SAMWEL CHILIA SAIKWA.....4<sup>TH</sup> INTERESTED PARTY**

**JOSEPH KIPCHIRCHIR RONO.....5<sup>TH</sup> INTERESTED PARTY**

**MICHAEL KIPROP CHEPTOO.....6<sup>TH</sup> INTERESTED PARTY**

**HOSEA BARMAO CHEMWENO.....7<sup>TH</sup> INTERESTED PARTY**

**WILSON KIPKOGET LAGAT.....8<sup>TH</sup> INTERESTED PARTY**

**SAMWEL SEREM RONO.....9<sup>TH</sup> INTERESTED PARTY**

**EDWARD KINGS ONYANCHA**

**MAINA.....INTENDED INTERESTED PARTY/APPLICANT**

**RULING**

1. What is before me is the intended interested party’s application dated 17<sup>th</sup> February, 2020 in which the applicant/interested party seeks orders that:

**(a) This Applicant be enjoined (sic) forthwith before the hearing on representation of parties scheduled for on 19.3.2020.**

**(b) The costs of this Application abide in the pending petition.**

2. It is the applicant's position that his joinder is inevitable because he is a necessary and affected party in this litigation and his presence is vital in the enhancement of equity and justice in this litigation. That he has critical and substantial evidence needed and necessary to validate and entrench the Gazette Notice Number 10384 published in the Kenya Gazette on 24<sup>th</sup> October, 2019 by the 1<sup>st</sup> respondent and is also necessary to validate and entrench the issue on the deceitful and fraudulent management and expropriation of the assets of the 1<sup>st</sup> interested party herein.

3. That his joinder is vital in the determination of representation of parties in this litigation for ends of justice to be seen to have been done to all and that the joinder of applicant is tenable under **order 1 rule 10 of the Civil Procedure Rules read with sections 1A,1B & 3 A of the Civil Procedure Act** and with Mutunga Rules **under Legal Notice Number 17 in the Kenya gazette on 28.06.2013 (REV) , Articles 1,2, 10, 19-23, 27, 40, 43, 47, 48 & 50 of the Constitution 2010** plus the gazette Notice Number 10384 published on 24<sup>th</sup> October, 2019 .

4. The Application is supported by an Affidavit of Edward Kings Onyancha sworn on 17<sup>th</sup> February, 2020. He depones that he is privy to the manner KGGU Limited transformed into KFA Limited on 31<sup>st</sup> October 2006 during the tenure of the late Mark Too as the chairman of KGGU LTD in 1993 and that the representation by Miss Gatutu Magana for the 1<sup>st</sup> interested party is questionable and is simultaneous with the schemes and period within which the assets of KFA have been defrauded and expropriated with reckless impunity.

5. He depones further that counsel for the 1<sup>st</sup> interested party legal authority that originated from the authority and tenure of Richard Kipkemboi Mibei as chairman and Symon Kipchumba Cherozony as managing director does not exist in law and that he intends to tender evidence on the resolution that changed Kenya Grain Growers Co-operative Union alias Kenya Grain Grower Co-operative Limited into Kenya Farmers Association Limited on 31<sup>st</sup> January 1996 in the Annual General Meeting that was held at ASK Nakuru.

6. Kiringai Kamau who averred that he is the chair and caretaker for Kenya Farmers Association board swore an affidavit in support of the instant application on 16<sup>th</sup> July 2020. He deponed that he is a bonafide member and delegate of the 1<sup>st</sup> interested party herein and he perused the record of the 1<sup>st</sup> interested party and noted that intended interested party was employed at the 1<sup>st</sup> interested party in 1971 as a computer room supervisor and worked there until retirement in November 1973. That the intended party was elected as a delegate and a shareholder of the 1<sup>st</sup> interested party in 1993 and reelected in 1996 and has remained so up to date and no other election has been done since.

7. That it is on account of such historical affiliation that the intended interested party possesses material and crucial information about the 1<sup>st</sup> interested party who is at the center stage of the instant suit and that the applicant herein has therefore demonstrated an identifiable stake and legal interest in the 1<sup>st</sup> interested party and he clearly has a duty to play in this proceeding. That in the interest of justice and helping this court to arrive at a justifiable conclusion of issues raised in the instant suit it is proper that the intended interested party be admitted to this suit so that this court arrive at a sound conclusion without excluding his or locking out any evidence.

8. He deposed that the 2<sup>nd</sup> to 9<sup>th</sup> interested parties were admitted to this suit yet they had remote legal interest and identifiable interests than the intended interested party herein and it's just and proper that the said intended interested party is equally admitted to make his contribution to the suit.

9. The application is opposed by the 1<sup>st</sup> interested party through replying Affidavit sworn by its acting company secretary one DAVID OLE NAEKU on 18<sup>th</sup> July, 2020. He deposed that the applicant has absolutely no locus standi to be enjoined in the suit. That the applicant was the former employee of 1<sup>st</sup> interested party herein in the 1970's and ever since he left employment he seems to have dedicated his entire life meddling into the affairs of KFA and waging petty and unwarranted fights against KFA both in and out of the court. That the applicant has never been a shareholder of KFA LTD and his membership card attached to his supporting affidavit shows that the applicant was once a member of KENYA GRAIN GROWERS CO-OPERATIVE UNION (KGGCU) which is a totally different entity from KFA LTD which membership was obtained fraudulently and has since been revoked by then KGGCU LTD and the intended interested party expelled therefrom and his challenge of the said revocation of membership and expulsion in court was lost.

10. He deposed that applicant is a busy body and vexatious litigant who has for over thirty (30) years been filing vexatious suits against KFA limited and its officials and advocates but all to no avail as the said suits have been dismissed with costs and that his purported designation as a director of board of chairman of KFA LTD was rejected by a letter dated 9<sup>th</sup> March 2007 by the company registrar and has no useful input in this matter.

11. That the applicant is not a party to all the suit involving KFA LTD as listed in his supporting affidavit and in 1996 KFA LTD had to go to court against the applicant to have him barred from meddling in the affairs of KFA LTD including issuing press statements and memos purportedly on behalf of KFA LTD. The 1<sup>st</sup> interested party urged this court to dismiss the instant application.

12. The 2<sup>nd</sup> and 9<sup>th</sup> interested parties also opposed the application through their grounds of opposition dated 17<sup>th</sup> July, 2020. The grounds therein are as follows;

- The application is bad in law and incurably defective
- That the application is premised on a defective affidavit
- That the reasons given for the joinder are irrelevant to the matters in issue and the applicant does not qualify to be joined in the matter

- That the interest (if any) of the applicant can be taken care of by the parties already in the matter.
- That the joinder of the applicant will only delay, prejudice and derail the fair and expedient disposal of the matter.

13. The applicant/intended interested party filed a further undated affidavit in response to the replying affidavit by the 1<sup>st</sup> interested party on 4<sup>th</sup> August, 2020.

14. He deponed that the subject affidavit is incompetent for reasons that there is no such organization in law or fact by the name Kenya Farmers Association Limited as it was deregistered in 1984 and there is no proof that David Ole Naeku was appointed as a company secretary of the 1<sup>st</sup> interested party. He questioned why an acting secretary is signing documents on behalf of the 1<sup>st</sup> interested party yet there is a managing director and chairman. He disputed the averments that the 1<sup>st</sup> interested party is a limited liability company and not a cooperative since the minutes purporting to expel him and court's judgements and rulings all relate to a co-operative society and urged the court to look at the documents filed in court and note that the meeting purporting to expel him did so under the law of cooperatives and there is a very clear procedure of expelling a person and which has never been completed to date.

15. He stated that the court ruling and judgment was not heard on merit and that the real issue before court is whether he should be joined as interested party in this matter as a shareholder and not in fights he had with KFA which in reality does not exist.

16. That he is sure that if joined in this matter he will greatly contribute in assisting the court to arrive at a fair and just determination of the matter having worked with the defunct KFA LIMITED related with KGGCU & KFA COOPERATIVE LTD and having detailed account of the company and the cooperative society since the colonial time.

### **SUBMISSIONS**

17. The parties consented to canvass the application herein through written submissions.

18. The only submissions on record are for the intended interested party and the 1<sup>st</sup> interested party.

### **INTENDED INTERESTED PARTY'S SUBMISSIONS**

19. The intended interested party vide his submissions dated 4<sup>th</sup> August 2020 relied on the contents of his supporting affidavit dated 17<sup>th</sup> February, 2020 and his further affidavit dated 30<sup>th</sup> July, 2020.

### **THE 1<sup>ST</sup> INTERESTED PARTY'S SUBMISSIONS**

20. The 1<sup>st</sup> interested party filed its submissions dated 12<sup>th</sup> November 2021 on 15<sup>th</sup> November 2021. The interested party relied on the contents of its replying affidavit.

21. In addition they submitted that the applicant has no identifiable and or recognizable stake in this matter as he did not specify the nature or capacity of joinder he seeks.

22. They cited the provisions of order 1 Rule 10 of the Civil Procedure Rules in which this application is premised and submitted that there is no indication or evidence in the application that this matter was instituted whether by *bona fide* mistake or otherwise, in the name of the wrong *Petitioner* or Respondent, or that any such party were improperly joined or failed to be *enjoined* hereto, nor that that the Applicant would be a necessary party to this suit.

23. They submitted that the applicant is not the necessary and affected party in this suit but based on his reasons on enjoinment he might qualify to be a witness.

24. The 1<sup>st</sup> interested party placed reliance on the following cases which elucidated on who qualifies to be a necessary party in a suit.

- The case of *Hon. Kiarie Waweru Kiarie vs Moses Kanyira & 2 others (2018) eKLR (Nairobi HCC No. 100 of 2016)*, where the Court stated that in determining who is a necessary party the following two tests must be met;

**a. *There must be a right to some relief against such party in respect of the matter involved in the proceedings in question and***

**b. *it should not be possible to pass an effective decree in the absence of the party...***"

- The case of *CIVICON LIMITED VS KIVUWATT LIMITED & 2 OTHERS* [2015]eKLR where the court stated that ;

*"...Accordingly, a necessary party is one without whom no order can be made effectively, while a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceedings."*

25. They therefore argued that the applicant has neither met the above tests nor demonstrated how his rights will be affected by his absence

in this suit as there is no claim or relief sought against him.

26. The 1<sup>st</sup> interested party further placed reliance on the case of **Skov Estate Ltd & Others vs Agricultural Development Corporation [2017] eKLR** which the court explained the circumstances under which a person can be joined as an interested party in a matter.

27. They argued that the contention by the Applicant that he should be joined in this suit as an interested party because this court previously enjoined other people who were shareholders as such is flawed for two reasons. Firstly because he failed to demonstrate he is a shareholder and secondly even if he were, that alone would not warrant his joinder since KFA has over 69000 shareholders and all of them cannot be merely enjoined by virtue of their shareholdings.

28. They submitted that the company in law is separate from its shareholders and acts in its own name. In support of this position they relied on the cases of **Foss vs Harbottle (1843)67 ER 189** **Moir vs Wallerstainer [1975]1ALL ER 849**, **Juletabi African Adventure Limited & another vs Christopher Michael Lockley (2017) eKLR**, and **Grace Wanjiru Munyinyi & Another vs Gedion Waweru Githunguri & Others (2001) eKLR** where the courts observed that a company is a *legal person, with its own corporate identity, separate and distinct from the directors or shareholders, and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the company itself is the person to sue for the damage.*”

29. They urged this court to dismiss the instant application with costs to the 1<sup>st</sup> interested party.

### **ISSUES FOR DETERMINATION**

- whether or not the applicant herein has locus standi to be participate in this suit
- If the answer to above is in the affirmative, whether or not he should be joined in this suit as an interested party by virtue of being a shareholder

### **ANALYSIS & DETERMINATION**

For the record the Petitioners have no objection to the application for joinder, simply because they are exhausted by the interlocutory applications in this matter that have caused their petition to stall for this long. They want to proceed with their petition. However the court must determine whether the application meets the thresholds set out in case law to warrant the joinder of the applicant.

#### **ISSUE NO. 1**

30. It is trite law that he who alleges must prove. **Section 107 of the Evidence Act**, places the burden of proof of any fact on the person who wishes to rely on the same.

31. In this case, the 1<sup>st</sup> interested party contended that the intended interested party herein is a busy body with no *locus standi* to participate in this suit. That he is neither a member nor a shareholder of the 1<sup>st</sup> interested party. To that effect they demonstrated through various documents marked as annexure DN1 that the intended interested party herein is not its bonafide member or a member the defunct Kenya Grain Growers Co-operative Union Limited. That Kenya Grain Growers Co-operative Union Limited revoked his membership.

32. The intended interested party on his part failed to demonstrate that he is the bona fide member of the 1<sup>st</sup> interested party herein. He led no evidence to rebut the 1<sup>st</sup> interested party’s position that his membership number 134338110 was revoked. He also did not attach any share certificate to prove he is a shareholder of the 1<sup>st</sup> interested party and as such, it is my considered view that the intended interested party herein lacks the locus standi to file the instant application.

#### **ISSUE NO 2.**

33. **Black’s Law Dictionary, 9<sup>th</sup> Edition** (at p.1232)defines interested Party’ as:

**“A party who has a recognizable stake (and therefore standing) in a matter”.**

34. **Rule 2 of the Mutunga Rules** defines an interested party as 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.

35. In the case of **Trusted Society of Human Rights Alliance vs 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....”**

36. In **Moses Wachira vs Niels Bruel & 2 Others** the court quoted the Supreme Court in **Communications Commission Of Kenya & 4 Others vs Royal Media Services Limited & 7 Others** wherein the Supreme Court pronounced itself on who an interested party is and held as follows:

***“In determining whether the applicant should be admitted into these proceedings as an interested party we are guided by this Court’s decision in the Mumo Matemo case where the court (at paragraphs 14 and 18) held:***

***“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. Similarly in the case of Meme v. Republic, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:***

***(i) Joinder of a person because his presence will result in the complete settlement of all the question involved in the proceedings;***

***(ii) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;***

***(iii) Joinder to prevent a likely course of proliferated litigation.***

***We ask ourselves the following questions:***

***a) what is the intended party’s state and relevance.”***

37. The intended interested party herein averred that he is the necessary and the affected party in this litigation because he has critical and substantial evidence touching on the gazette Notice Number 10384 that was published on 24.10.2019 and on the deceitful and fraudulent management and expropriation of the assets of the 1<sup>st</sup> interested party herein.

38. Further that **he is privy to the manner KGGU LTD transformed into KFA LTD on 31.01.2006 and that his presence in this proceeding is vital.**

39. He had also intended to be joined in on the issue of representation of the 1<sup>st</sup> Interested party. That matter was dealt with in his absence, as clearly there was nothing in the application to show that he would be affected in any way by the outcome of that application.

40. Do those grounds bring him into the purview of an interested party to the main petition?

41. He needed to demonstrate that he has a stake in this proceeding such that any decision that will be arrived at by this court in his absence will be prejudicial to him, and that he has a legitimate and identifiable stake or a legal interest or duty in the proceedings before the court by virtue of the fact that he was a former employee of the 1<sup>st</sup> interested party.

42. The applicant has not shown how any of the prayers sought by the Petitioners herein will affect him as an individual, or whether any of those cannot be determined without his participation. Guided by the above precedents it is evident from his own affidavits that what he wants to do in this case is contribute evidence and information. In my view it is clear that this is something he can do as a witness and he need not be a party to contribute that evidence or information.

43. The application herein did not meet the threshold of exceptional circumstances that would necessitate joinder of the applicant in the Petition as an interested party.

44. The application is dismissed with costs.

**DATED AND SIGNED VIRTUALLY THIS 27TH DAY OF DECEMBER, 2021.**

**MUMBUA T MATHEKA**

**JUDGE**

CA: Edna

Court: on the date this was to be delivered the court was indisposed and parties informed that the same would be sent via email.

To be sent via email to:

Applicant :Edward Kings Maina Onyancha

For 1<sup>st</sup> Interested Party: Gatu Magana& Co Advocates

Petitioners:

The Attorney General;

**Nakuru Aglitigation**

For 2<sup>nd</sup> to 9<sup>th</sup> Interested Parties: Wambua Musembi &Co Advocates