



**Ntutu v County Government of Narok; Friends of Maasai Mau Complex
& Mara Conservation (Interested Party) (Constitutional Petition
10 of 2017) [2023] KEELC 20011 (KLR) (26 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20011 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
CONSTITUTIONAL PETITION 10 OF 2017
CG MBOGO, J
SEPTEMBER 26, 2023**

BETWEEN

KITILAI OLE NTUTU PETITIONER

AND

COUNTY GOVERNMENT OF NAROK RESPONDENT

AND

**FRIENDS OF MAASAI MAU COMPLEX & MARA
CONSERVATION INTERESTED PARTY**

RULING

1. Before this court for determination is a notice of motion application dated 17th April, 2023 and filed in court on 12th May, 2023 by the proposed interested party (hereinafter referred to as the applicant) and which is expressed to be brought under Rule 7 of the Constitution (Protection of Rights and Fundamental Freedoms Practice and Procedure Rules) (The Mutunga Rules), Order 1 Rule 10 (2) of the Civil Procedure Rules and Section 3A of the [Civil Procedure Act](#) seeking the following orders: -
 1. Spent.
 2. That in the interest of justice, this honourable court be pleased to join Friends of Maasai Mau Complex and Mara Conservation, the proposed interested party/applicant to this petition as an interested party forthwith before the matter is heard and determined.
 3. That pending the hearing and determination of this application, this honourable court stays further hearing or proceedings of the matter.
 4. That costs of this application be in the cause.



2. The application is premised on the grounds inter alia that the proposed interested party has been involved in the Nkareta Adjudication Section and has the history on the suit property and its effect on the Mau Forest Complex.
3. The application is supported by the affidavit of Isata Ole Setek sworn on 4th May, 2023. The applicant deposed that it is a non- governmental organisation engaged in environmental governance and policy formulation. Further, that due to the role played by it, this court enjoined the applicant in Petition No. 13 and 18 of 2018 and whose issues in the said petitions relate directly and substantially with the issues in this petition which revolve around the Maasai Mau Complex.
4. The applicant further deposed that their joinder in this matter is necessary at whichever stage in order to enable the court effectually and entirely adjudicate and resolve all questions involved in the suit. Also, that there is immense public interest in the matter and the applicant would like to articulate the public interest in this matter as the Mau Complex is the largest closed canopy forest ecosystem in Kenya and the environment has been degraded through irregular and ill planned settlements, uncontrolled and illegal forest resource extraction and conversion to agricultural production threatening the right to a clean and healthy environment.
5. The applicant deposed that it is an undisputable fact that the Governor of the Narok County Government is a brother to the petitioner who is also the Member of Parliament for Narok South and as such it allays fears or perception of bias. Also, that the County Government is headed by the brother to the petitioner and the change of legal representation has been head hunted and selected by the Governor who is a brother to the petitioner to represent the County Government in these proceedings.
6. The application was opposed by the replying affidavit of the petitioner which was sworn on 13th June, 2023. The petitioner deposed that he instituted the petition herein on 3rd March, 2014 as Nakuru Petition No. 11 of 2014 and served it upon the respondent who appointed the firm of Havi and Company to represent it in the matter. That it followed that the respondent filed replying affidavits and after close of pleadings, the matter was mentioned before the ELC court in Nakuru on diverse dates in the year 2015. Further, that in a ruling delivered by the court on 12th October, 2016, the court found that the respondent did not have an opportunity to challenge his title and those of the petitioners in ELC Petition No. 306 of 2014 and in the circumstance, the court granted the respondent leave to file a suit challenging his title deed and those of the petitioners in ELC Petition No. 306 of 2014.
7. The respondent further deposed that the respondent filed Narok ELC Case No. 175 of 2017 and Narok ELC 306 of 2017 which were consolidated on 14th June, 2017 with this matter being the lead file. That pursuant to these directions, the consolidated petitions have proceeded for hearing with the respondent's case remaining. Further, that the instant application has been filed by the treasurer who has not exhibited a list of the members and the officials of the society who have authorised the filing of the application making it a non-starter.
8. Further, the petitioner deposed that the applicant has pleaded information in its possession relevant to the issues before this court but have not provided particulars or details of such information to enable the court ascertain its relevance to these proceedings. Also, that the applicant has not explained how its absence in these proceedings which it has been aware of from inception will prejudice the determination of these matter. Further, that whatever public interest the applicant seeks to adjudicate will best be canvassed by the County Government and the Land Registrar represented by the Attorney General.
9. The respondent further deposed that the application has been filed in bad faith for the reason that his property is not one of the properties subject of these petitions and if the applicant was keen on joining



this matter, there is no reason why it waited for nine years before now seeking to join on account of change of counsel which is a right of the respondent.

10. On 15th June, 2023 Ms. Nyakora, Counsel for the Attorney General informed this court that it will not respond to the application as it did not concern their client.
11. The application was canvassed by way of written submissions.
12. On 17th August, 2023 the applicant filed written submissions dated 7th August, 2023. The applicant raised one issue for determination which is whether the proposed interested party should be joined in this suit.
13. On this issue, the applicant submitted that it's interest arises because the suit herein affects the larger Nkareta community represented and it is likely to be affected by the orders that the court will eventually issue thus it will suffer prejudice if denied the opportunity to be heard. Further, that due to the critical role played by the applicant, this court deemed it fit to enjoin it in both Petition 12 and 13 of 2018 (consolidated) Joseph Kimeto Ole Mapelu & Paul Chepkwony & Others v Cabinet Secretary Ministry of Lands & Others.
14. The applicant further submitted that it intends to make submissions regarding the suit property in the Mau Water Tower Complex and that this set of facts raised by the applicant's affidavit are different from the ones presented by the other parties. The applicant relied on the cases of Skov Estate Limited & 5 Others v Agricultural Development Corporation & Another [2015] eKLR, Communications Commission of Kenya & 4 Others v Royal Media Services Limited & 7 Others [2014] eKLR and Francis K Muruatetu & Another versus Republic & 5 Others [2016] eKLR.
15. The applicant further submitted that its presence is necessary so that the issues in the suit may be settled and that if not joined, the court may not be fully equipped with all the facts and the dimensions of the matter to resolve the questions or may be handicapped in one way or another. Also, that given its involvement in the Maasai Mau Forest, it is in possession of information that will help the court in decision making process and their interest will not be well articulated unless it appears in the proceedings to champion their interests. Reliance was placed in the case of Joseph Leboo & 2 Others v Director Kenya Forest Services & Another [2013] eKLR.
16. The applicant submitted that it has some knowledge which may assist the court in dealing with the matters in controversy and the only issue is how far they can be involved in the subject matter. That on the contrary, its joinder will avoid a multiplicity of suits and the court has a mandate to ensure that all matters in controversy among the parties should be ultimately and finally determined. Also, that the joinder will also allay fears of perceived or actual bias for the reason that had there been no change of representation of the respondent the circumstances could be different and there would be no perceived bias. On this issue, the applicant relied on the case of Michael Obare Tago v Fredrick Ambrose Oduor Otieno [2020] eKLR and urged this court to apply the test in determining the question of bias as it is a question of a brother appointing an advocate to defend his brother in a matter that is of immense public interest.
17. On 27th July, 2023 the petitioner filed his written submissions dated 14th July, 2023 and raised one issue for determination which is whether the proposed interested party may be joined as an interested party in these proceedings. The petitioner submitted that it is important for a party to make an application to the court for joinder in these proceeding and more importantly for the applicant to identify its stake in these proceedings and its connectedness to the issues raised in the proceedings as was held in the case of Stanbic Bank Kenya Limited v Santowels Limited & Another; Petition E005 of 2023.



18. In this case, the petitioner submitted that the applicant has been unable to establish its peculiar interest in this matter and that although it claims to be in possession of information relating to the conservation of Mau Forest Complex, it has failed to reveal this crucial information to this court. The petitioner relied on the cases of *Osugo Paul Makombi v Britam General Insurance Co. (K) Limited; Samwel Ondieki Momanyi (Intended Interested Party)* [2021] eKLR and *Communications Commission of Kenya & 4 Others v Royal Media Services Limited & 7 Others* Petition No. 15 of 2014 [2014] eKLR.
19. The petitioner further submitted that the applicant has failed to provide evidence showing how its absence from these proceedings would impact on the outcome of the case and that it would suffer prejudice. The petitioner submitted that the only trigger to this application was the change of advocates which the respondent has the right to appoint any counsel of its choice. Further, he submitted that the applicant has failed to indicate when it became aware of these proceedings and developed an interest in the same save to state that its interest was triggered by the regime change at the County Government after the 2022 general elections. Reliance was placed in the cases of *Justin Kithinji Nderi & 2 Others v Director of Public Prosecutions & Another; Njiiru Micheni Nthiga (Interested Party)* [2020] eKLR and *Habiba W Ramadhan & 7 Others v Mary Njeri Gitiba* [2017] eKLR.
20. I have carefully analysed and considered the application, replying affidavit and the written submissions filed by both parties and the sole issue for determination is whether the applicant ought to be enjoined in these proceedings. Under the Mutunga Rules the 'Interested Party' is defined under Rule 2 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 in the litigation.”
21. Rule 7 of the said rules provides that a person may with leave of court make oral or written application to be joined as an Interested Party. A court can also on its own motion join any Interested Party to the proceedings before it.
22. The legal provisions above give this court latitude in determining if and whether a party has a cognizable stake in the proceedings pending before it and therefore should be joined. In exercising this discretion, a number of guiding principles have been emerged through various court decisions. The Supreme Court has laid down the guiding principles applicable in determining an application to be joined as an interested party in *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others SC Petition (Application) No 12 of 2013*. The principles were affirmed in the case of *Francis Karioko Muruatetu & another v Republic & 5 others* [2015] eKLR where the court stated:

“...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”
23. It was the applicant's submission that as stated in paragraph 24 of its written submissions that it has some knowledge which may assist the court in dealing with the matters in controversy. The applicant



has not disclosed the so-called crucial information it says to be in possession of to enable the court determine their involvement in the proceedings. But there also seems to be a departure; the manner in which the respondent has filed a change of advocates. The applicant are apprehensive of bias as it raises a question of brother appointing an advocate to defend his brother in a matter that is of immense public importance. This court can say so much on legal representation where a party chooses whom to seek and appoint as its advocate. That is purely a right of a party and the court cannot interfere save where it has been shown that there is existence of manifest bias. In this case, no evidence has been shown to support this assertion.

24. More importantly, is the fact that the said brother to petitioner has not been sued in his individual capacity but the County Government as the respondent. It should be noted that as at the time of filing the petition, the leadership of the respondent was not vested with the current Governor and as such, it cannot be said that there is likelihood of interference.
25. Applying the principles enumerated herein above, we find that the applicant has not met the threshold for admission as an interested party as it has failed to establish a personal interest or stake that is proximate enough to occasion any prejudice to it, if not enjoined in these proceedings.
26. Arising from the above, this court finds no merit in the application and I accordingly dismiss the said notice of motion application dated 17th April, 2023. I make no orders as to costs. Further mention on 5th October, 2023 to take a date for defence hearing. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 26TH DAY OF SEPTEMBER, 2023.

HON. MBOGO C.G.

JUDGE

26/9/2023

In the presence of:

CA: Pere Meyoki

