



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.221 OF 2018

IN THE MATTER OF ENFORCEMENT OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, ARTICLES 19, 20,21,22,23,24,25,255,259 AND 270 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF THE ABRIGMENT OF THE NON-DEGORABLE RIGHT TO A FAIR HEARING ENSHRINED IN ARTICLES 49, 50, AND 25 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF THE ALLEGED INFRINGEMENT OF THE RIGHT TO FAIR ADMINISTRATIVE ACTION ENSHRINED IN ARTICLE 47 AND ARTICLE 10 OF THE CONSTITUTION OF KENYA, 2010 AND ACTING ultra vires THE ENABLING STATUTE

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

IN HE MATTER OF THE ARTICLES 23,159,165(3) OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

INTERNATIONAL COMMUNITY OF WOMEN LIVING WITH HIV

REGISTERED TRUSTEES.....PETITIONER

VERSUS

NON-GOVERNMENTAL ORGANIZATIONS

CO-ORDINATION BOARD.....1ST RESPONDENT

NICHOLAS LINDON OTIENO.....2ND RESPONDENT

NATIONAL INDUSTRIAL

CORPORATION (NIC) BANK LIMITED.....3RD RESPONDENT

AND

TERESIA OTIENO.....PROPOSED INTERESTED PARTY

RULING

1. Before me is a Notice of Motion brought pursuant to Rule 5(d) of the practice and Procedure Rules 2013, section 3A, 1A and 1B of the Civil Procedure Act (Cap 21) Laws of Kenya, order 1 Rule 10 of the Civil Procedure Rules 2010 and all enabling provisions of the law. The proposed interested party in her application seeks the following orders:-

- a) THAT this Application be certified urgent and be dispensed with on priority basis at the first instance.
- b) THAT this Court be pleased to enjoin the Proposed Interested Party herein as a party to these proceedings.

c) THAT the costs of this Application be provided.

2. The application is premised on six (6) grounds on the face of the application *inter-alia*:-

a) THAT the Proposed Interested Party is a director of the International Community of Women Living with HIV Registered Trustees, the Petitioner herein hence familiar with the facts of the matter which is contrary to the allegations of the Petitioner.

b) THAT the Petitioner has misrepresented the facts of this matter to this Honourable Court in its petition dated 18th June 2018.

c) THAT there has been misuse of the funds of the International Community of Women Living with HIV Registered Trustees by some of the Directors that has necessitated an audit by the Non-Government Organization Board.

d) THAT some of the Directors of the International Community of Women Living with HIV Registered Trustees have converted the Non-Governmental Organization Fund for personal use, which calls for an audit by Non-Governmental Organization Board.

e) THAT the Proposed Interested Party's presence before this Court is very essential because she has very important information that will enable this Honourable Court to effectively and completely adjudicate upon and settle all the questions raised in the Petition.

f) THAT no prejudice will be occasioned to the parties herein if this application is allowed.

3. The proposed interested party further relies on supporting affidavit by the Proposed Interested party dated 11th July 2018.

Brief Background

4. The petitioner M/s International Community of Women Living with HIV Registered Trustees filed the present petition dated 18th June 2018 on 19th June 2018 seeking inter-alia declaratory orders that the adverse actions taken by the Respondents in freezing the petitioner's bank accounts and purported directive for cancellation of work permit and deportation of the petitioner's director are unconstitutional, null and void, and that conservatory orders be granted to lift the arbitrary freezing of the petitioner's bank accounts, and an order directed at the 1st Respondent requiring it to consider the petitioner's application to be de-registered as a non-governmental organization.

5. The present petition was consequently filed as a result of actions taken by the 1st Respondent in exercise of its statutory powers to conduct investigations against the petitioner on account of several complaints received against the petitioner with regard to purported misuse of funds by some of the petitioner's directors. That due to allegation by the proposed interested party, that she is a Director of the petitioner herein and that she is familiar with the facts of the matter, that have necessitated the freezing of the accounts of the petitioner, the instant application was preferred seeking to be enjoined as an interested party.

6. The counsel for proposed interested party filed submissions dated 8th January 2019 whereas the petitioner's counsel filed petitioner's written submissions dated 4th March 2019 on 5th March 2019. The 1st, 2nd and 3rd Respondents opted not to file any responses nor are they opposed to the purported interested party's application.

7. Upon considering the proposed interested party's application dated 11th July 2018, the affidavit in support, the supplementary affidavit dated 29th October 2018 and annexures thereto, the Replying affidavit dated 23rd August 2018 and filed on 24th August 2018, the Advocates rival written submissions, as well as their oral submissions, I find that three major issues arises for consideration being as follows:-

a) Whether a Replying affidavit sworn by an Advocate who deposes to evidentiary facts on contentious matters of fact which he is not privy to is sustainable in law?

b) Whether the proposed interested party has a identifiable stake in the mater before the court?

c) Whether the proposed interested party is entitled to the orders sought?

A) Whether a Replying affidavit sworn by an Advocate who deposes to evidentiary facts on contentious matters of fact which he is not privy to is sustainable in law?

8. The petitioner in response to the proposed interested party's application dated 11th July 2018, filed a Replying Affidavit through an Advocate, one Mr. Victor Augustus Onyango, acting for the petitioner, and sworn on 23rd August 2018 on behalf of the petitioner.

9. The learned authors of **Haslbury's Laws of England, 3rd Edition, paragraph 845** state as follows with regards to affidavit:-

"Affidavits filed in the High Court must deal only with facts which a witness can prove of his own knowledge, except that in interlocutory proceedings or with leave, statements as to a deponent's information or belief are admitted, provided the services and grounds thereof are stated..... However, under Rule 9 of the Advocates (practice) Rules, 1966, Advocates are not permitted to swear affidavits in contentious matters."

10. Under **Rule 8 of the Advocates (practice) Rules, 1966** it is provided:-

"No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear."

11. Reading from the above and by virtue of order 19 rule 3 of the Civil Procedure Rules, it is clear that affidavits should be confined to such facts as deponent is able of his own knowledge to prove. It therefore follows that Advocates, acting on behalf of their clients, should not swear affidavit on behalf of their clients, this is because the Advocate may be liable to cross-examination to prove the deponent matters. However this may not be embarrassing or wrong where the Advocate deposes on matters confined to such facts as the deponent is able of his own knowledge to prove. This therefore means not all affidavits sworn by Advocates are necessarily defective. An affidavit that is sworn by an Advocate which is confined on facts he is able of his own knowledge to prove and which does not disclose any matter requiring his cross-examination on is not in my view defective.

12. The petitioner in opposing the application relies on the case of **Kamlesh M.A. Patni Vs Nasir Ibrahim Ali & 2 others CA 354/2004** adopted by the learned Justice Aburili in **Factory Guards Limited Vs Factory Guards Limited [2014] eKLR**; in dismissing an application for the striking out of an affidavit sworn by an advocate the court stated:-

"...There is otherwise no express prohibition against an advocate who, of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client...In the foregoing premises, the objection on the replying affidavit sworn by the respondent's counsel in opposition to the applicant's application cannot be sustained and I accordingly disallow it."

13. I have perused the affidavit sworn on 23rd August 2018 by the Advocate on behalf of his client, and it is evidently clear that the advocate has deposed on contentious matters, such as resignation of the proposed interested party as a Board member of the petitioner steering committee; registration of petitioner as a Typist or not; whether proposed interested party is a resident of Republic of Kenya or not and whether she is a director of petitioner. The issue as to whether the proposed interested party has resigned as a member of the Board of the petitioner and other issues I have noted herein above are contentious issue and as such I find that it was not proper for the counsel, acting for the petitioner to have sworn the Replying affidavit on behalf of his client. I find the affidavit sworn on 23rd August 2018 by Mr. Victor Augustus Onyango defective due to the fact that the Advocate deposed of facts which only the parties in this matter can prove and be cross-examined on. In the instant matter the Advocate has not been able to demonstrate and establish that the facts deposed by the Advocate are such facts which are within his own knowledge, and which he is able of his own knowledge to prove.

14. It has time and again, been established principle of law, that Advocates should not enter into the arena of dispute by swearing affidavits on contentious matters of facts, as by doing so an Advocate exposes himself as a potential witness for cross-examination in a case he is handling, merely as an agent, and in which practice is not only embarrassing but highly irregular.

15. In **Magnolia PVT Limited vs Synermed Pharmaceuticals (K) Ltd (2018) eKLR**, court dealing with similar issue states as follows:-

"Whereas there is nothing barring an advocate from swearing an affidavit in appropriate cases, where the matters deposed to are agreed or on purely legal positions, advocates should refrain from the temptation of being the avenue through which disputed facts are proclaimed. The rationale for the said principle is to insulate the advocate, an officer of the court, from the vagaries of litigation which, on occasions may be very unpleasant. By swearing an affidavit on such issues an advocate subjects himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided like plague. In my view, however innocent an averment may be, counsel should desist from the temptation to be the pipe stem through which such an averment is transmitted."

16. In the instant matter, I find that no reason has been advanced as to why the petitioner in this case was unable to swear a Replying affidavit but as it may be, I find that the matter deposed upon by the petitioner's Advocate to be contentious matters, for which I find that there is no basis for considering the same. I find the affidavit to be defective and it should not be given any weight. I find and hold the affidavit sworn on 23rd August 2018 by the Advocate for the petitioner on contentious matters of fact which he is not privy to is not sustainable in law and should not be given any weight at all.

B) Whether the proposed interested party has an identifiable stake in the matter before the court?

17. The proposed interested party seeks to be enjoined in these proceedings as a party on the grounds on the face of the application being thus; that she is a director of the petitioner and familiar with facts of the matter herein; that the petitioner has misrepresented the facts of this matter to the court in its petition dated 18th June 2018; that there has been misuse of funds of the petitioner by some Directors that has necessitated an audit by the Non-Governmental organization Board; that some of the Directors of the petitioner have converted the organization fund for personal use, which calls for an audit by Non-Governmental Organization Board; that the proposed interested party is very essential because she has as very important information which will enable court to effectively and completely adjudicate upon and settle all questions raised in the petition and lastly no prejudice will be occasioned to the parties herein if the application is allowed.

18. On the issue as to whether the proposed interested party has an identifiable stake in this matter, we have to refer to the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) practice and procedure Rules 2013 (Mutunga Rules, where "a person of interest" is defined as follows. Under Rule 2 of Mutunga Rules;

"A person or entity that has an identifiable stake or 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."

Rule 7 of the Mutunga Rules also provides:-

"1) A person with leave of the court, may make an oral or written application to be joined as an interested party."

19. Rule 7 of Mutunga Rules is a *replica* of order/Rule 10(2) of the Civil Procedure 2010, which sets out the parameters for consideration by court in dealing with an application for enjoinment of a party as an interested party. The court in deciding a matter as to whether to join a party to a suit or not is enjoined to consider whether such parties presence in the matter may be necessary in order to enable it to effectively and completely adjudicate upon and settle all questions in issue in the suit. The whole purpose is to do substantive justice in the matter pending before court and not to decide the issue merely on technicalities. The court in dealing with such matters, it is clear it has unfettered discretion to consider the matter. It is also clear the court can on its own motion join any interested party to such proceedings. The court further upon satisfying itself that a person whose presence before it is necessary to assist it effectually and completely determine all questions in issue before it, it may enjoin such a person as a party.

20. In any application for enjoining a party to the proceedings the proposed interested party is required to demonstrate to the court, that it has an identifiable stake in the matter before court. That its presence in the proceedings may be necessary in effective and complete determination and settling of all questions in issue before court.

21. In the case of **Joseph Njau Kingori vs Robert Maina Chege & 3 others [2002] eKLR** lays out the requirements that need to be met for one to be included as an interested party. These are:-

22. "1) He must be a necessary party;

2) He must be a proper party;

3) In the case of the Defendant there must be a relief flowing from that Defendant to the Plaintiff;

4) The ultimate order or decree cannot be enforced without his presence in the matter;

5) His presence is necessary to enable the court to effectively and completely to adjudicate upon and settle all questions involved in the suit."

23. In the case of **Amon vs Raphael Tuch & Sons Ltd (1956) 1 ALL ER 273** the court held;

"The party to be joined must be someone whose presence before the court is necessary as a party. What makes a person a necessary party? ...the only reason which makes a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectively and completely settled unless he is a party. It is not enough that the intervener should be commercially or indirectly in the answer. The person is legally interested in the answer only if he can say that it may lead to a result that will affect him legally. That is by curtailing his legal rights. That will not be the case unless an order may be made by the action which he is legally interest."

24. The proposed interested party has in her application specifically stated that she has an identifiable stake and legal interest in the proceedings. She has demonstrated her duty in the proceedings before court as a director of the petitioner and pointed out, that it is within her interest that the funds intended for women with HIV, a terminal disease, that is killing thousands and thousands of women and girls in Africa be managed and put into the use intended. She has demonstrated her presence in the matter is necessary in enabling court to effectively and completely determine and settle all questions in dispute in the suit.

25. The above-proposition is well articulated in the decision of the Supreme Court in **Trusted Society of Human Rights Alliance vs Mumo Matemo & 5 others (2014) eKLR (Petition No.12 of 2013)** where the court 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."

26. Having considered all the above and authorities stated herein above, I am satisfied that the proposed interested party has established an identifiable stake in these proceedings and that her presence, is necessary not only for the purpose of articulating her interest in these proceedings but as the decision that shall be reached shall affect her interest and that her presence will enable court to affectively determine all issues in these proceedings. In view of this, I find the applicant's application should be allowed and the proposed interest party ought to be joined in these proceedings.

C) Whether the proposed interested party has an identifiable stake in the mater before the court?

27. The Constitution of Kenya 2010, under Article 159 (2) (a) and (d) enjoins the court in discharge of its mandate to administrator justice without undue regard to procedural technicalities; thus the court, in its discharge of its mandate it must consider doing substantive justice to all parties. In all proceeding, every person whose presence is necessary to enable court in its core mandate of administer of justice, effectively and effectually reach a determination and seeks court's leave to be joined as party, the court ought in the interest of doing justice to all parties, grant such an application, as long as party's presence is necessary for due determination of all issues presented before court.

28. I have considered the grounds in support of the application by the proposed interested party and upon analysis of all facts in support of the application, I am satisfied that the Applicant has met the threshold required in an application for enjoinment in proceedings; the

Applicant has demonstrated an identifiable stake in the proceedings, being founding member of petitioner as a Trustee and Director. She is in my view, in a position to assist the court to effectively and effectually determine all questions that are likely to arise during the proceeding, and she is a necessary party in these proceedings. I have considered all the submissions raised by both sides, and I find that no prejudice would be occasioned to the petitioner at all by allowing this application.

29. I find the proposed interested party's application dated 11th July 2018 is meritorious and I proceed to make the following orders:-

a) The proposed interested party herein is enjoined as an interested party to these proceedings.

b) Costs of the application be in the cause.

Dated, signed and delivered at Nairobi this 29th day of April, 2019.

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J .A. MAKAU

JUDGE