



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

PETITION NO. 5 OF 2017

MASHA CHENGO NGOWA.....PETITIONER/RESPONDENT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

AND

OKOMBOLI ONG'ONG'A.....INTENDED INTERESTED PARTY/APPLICANT

RULING

[PROPOSED INTERESTED PARTY'S NOTICE OF MOTION

DATED 25TH APRIL 2017]

1. Two key prayers stand out in the application dated 25th April, 2017 filed by Okomboli Ong'ong'a. In the first prayer he seeks to be enjoined in this Petition as an Interested Party. His second prayer is for the discharge or setting aside of the conservatory orders issued on 8th March, 2015.
2. The Petitioner, Masha Chengo Ngowa, who is one of the respondents in respect to the instant application strongly opposes the same. The other respondents to the application namely the Director of Public Prosecutions, the 1st Respondent in the Petition and the Attorney General, the 2nd Respondent in the Petition are not opposed to the enjoinder of the Applicant as an interested party but leave the question of setting aside the conservatory orders to the Court.
3. A snapshot of the facts of this case discloses that the Petitioner is one of the 12 accused persons in **Malindi CM Criminal Case No. 332 of 2016 Republic v Masha Chengo Ngowa & 11 others**. On 6th March, 2017, he filed this Petition seeking to quash his prosecution. At the same time he filed a Notice of Motion seeking stay of the criminal trial. The notice of motion was allowed on 14th March, 2017 by consent of the parties resulting in the issuance of an order staying the criminal trial.
4. The Applicant who is the complainant in the criminal case now seeks to join these proceedings. He also seeks an order setting aside the order staying the criminal trial.
5. The Applicant's case as gleaned from the pleadings and submissions is that he is the plaintiff in **Malindi ELC No. 73 of 2015 Okomboli Ong'ong'a v Masha Ngowa & 6 others** in which orders were issued on 19th February, 2016 restraining the defendants from trespassing or interfering with his quiet possession and enjoyment of L.R. No. 20252/13.
6. The Applicant's averment is that the Petitioner and his co-defendants lodged an appeal against the said orders and the appeal was dismissed on 20th May, 2017. It is the Applicant's disposition that it is the Petitioner's continued disobedience of the orders of 19th February, 2016 which led to his being arrested and charged along with his co-accused in the criminal case he seeks to prohibit through this Petition.
7. According to Applicant, this Petition is misconceived as it seeks to stop criminal proceedings yet the law allows for concurrent civil and criminal proceedings concerning the same subject matter.
8. He also avers that he was not consulted before the consent between the Petitioner and the Director of Public Prosecutions (DPP) staying

the Petitioner's trial was reached.

9. The Applicant urges the Court to find that he has an interest in the outcome of this Petition and he should therefore be allowed to come on board as a party. He also prays that the conservatory orders issued in favour of the Petitioner be set aside. Counsel for the Applicant relied on the decision in the case of **Parsalei Ole Meikoki & others v Commissioner of Lands & 9 others [2017] eKLR** in support of his submissions.

10. Opposing the application, counsel for the Petitioner submitted that the prayer seeking to set aside the conservatory order cannot be allowed as the same was entered into by consent and the Applicant is not a party to the consent. According to counsel for the Petitioner, the Applicant has not met the conditions for setting aside a consent order.

11. On the issue of joinder, counsel for the Petitioner submitted that the Applicant has not demonstrated that his presence in the proceedings is necessary as per the requirements of Order 1 Rule 10 of the Civil Procedure Rules, 2010.

12. It is the Petitioner's case that the DPP is the only person mandated to carry out prosecutions. Further, that this Petition is aimed at stopping the DPP from carrying out a prosecution and the Applicant has not established the stake he has in the matter.

13. Counsel for the Petitioner asserted that the Applicant ought to demonstrate an interest that stands out from anything else and also that the submissions they intend to make are not likely to be made by any other party before the court. The decision in **Marigat Group Ranch & 3 others v Wesley Chepkoimet & 19 others [2014] eKLR** was cited in support of the submissions.

14. Counsel for the Petitioner sought to distinguish the **Parsaloi Ole Meikoki** case cited by counsel for the Applicant by stating that in that particular case the petitioners had a direct claim since they had bought the land in a public auction.

15. The instant application presents two issues for the determination of the court. The first issue is whether the Applicant should be made a party to these proceedings. The second issue is whether the conservatory orders issued on 14th March, 2017 should be lifted.

16. On the question of the joinder of the Applicant as an interested party, I find the law on who is an interested party was succinctly expressed by Munyao Sila, J in **Marigat Group Ranch** (supra) as follows:-

“For purposes of one who wants to be enjoined as an interested party, I think, that such person needs to fit himself into the catch words “whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit”...It should be appreciated that an interested party is not strictly plaintiff or defendant. The contest in a suit is between plaintiff and defendant and if any person has a claim over the subject matter, then such party needs to apply to be enjoined and considered as plaintiff or defendant and not as interested party. An interested party would be a person who has a close connection to the subject matter of the suit yet not claiming any rights over it,”

17. An interested party is defined in Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, also known as the Mutunga Rules, 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.”**

18. In **Francis Karioko Muruatetu & another v Republic & 5 others [2016] eKLR (Petition No. 15 of 2015)**, the Supreme Court in a ruling dated 28th January, 2016 laid down the principles applicable to the joinder of interested parties as follows:

“[37] From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party:

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.”

19. The facts placed before this court establish that this Petition is aimed at stopping the Petitioner's criminal trial in which the Applicant is the complainant. Although the Petition challenges the decision of the DPP to prosecute the Petitioner and his co-accused persons and also seeks to have certain provisions of the Penal Code declared unconstitutional, the outcome of the petition will affect the Applicant's interests. A complainant in a criminal trial is a crucial party in a petition which seeks to quash or prohibit the prosecution of the accused person. The voice of the Applicant is important and he should be heard before the Petition is decided. The Applicant has thus demonstrated that he has an identifiable interest at stake in the Petition. For that reason his application to be enjoined in these proceedings as an interested party is allowed.

20. On the issue of setting aside the conservatory orders. I find that allowing the Applicant's application will destabilize the substratum of the Petition. Let the Applicant come on board knowing that the duel remains between the core parties. He indeed has a stake but that interest cannot supersede the issues tabled by the principal parties for the determination of the Court. That was the message of the Supreme Court in **Francis Karioko Muruatetu** (supra) when it stated that:

“[41] 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.

[42] 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. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether new issue to be introduced before the Court.”

In the circumstances, the application to set aside the conservatory orders dated 14th March, 2017 fails.

21. In summary the Applicant's Notice of Motion dated 25th April, 2017 is resolved as follows:-

- a. The Applicant is enjoined to these proceedings as an interested party. The Applicant to file and serve a response to the Petition within 14 days from the date of the delivery of this ruling.
- b. The Applicant's application to set aside the conservatory orders dated 14th March, 2017 is dismissed; and
- c. Costs in respect of the application to abide the outcome of the Petition.

Dated, and Signed at Nairobi this 2nd day of April, 2019

W. Korir,

Judge of the High Court

Dated, Delivered and Signed at Malindi this 28th day of May, 2019

R. Nyakundi,

Judge of the High Court