



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL PETITION NO. 321 OF 2018

MORAA GESICHO.....APPLICANT

VERSUS

ATTORNEY GENERAL.....RESPONDENT

BUILDING BRIDGES TO UNITY ADVISORY TASKFORCE...PROPOSED INTERESTED PARTY

RULING

1. The Proposed Interested Party, Building Bridges to Unity Advisory Taskforce (the Taskforce) is through the Notice of Motion dated 13th May, 2019 seeking orders as follows:-

“a) (spent)

b) (spent)

c) THAT THE BUILDING BRIDGES TO UNITY ADVISORY TASKFORCE, the Applicant herein, be enjoined to the instant proceedings as an Interested Party

d) THAT the instant Petition be consolidated with PETITION NO. 451 OF 2018, THIRDMWAY ALLIANCE KENYA AND ANOTHER VS HEAD OF PUBLIC SERVICE, DR JOSEPH KINYUA AND OTHERS.

e) The cost of this Application be provided for.

f) Any other remedy that the court deems fit and just.”

2. The application is supported by the grounds on its face and an affidavit sworn by Paul Mwangi, one of the secretaries of the Taskforce. In summary, the Taskforce’s case is that the instant suit is directly related to **Petition No. 451 of 2018, Thirdway Alliance Kenya & another v Head of Public Service, Dr. Joseph Kinyua & others** which is pending hearing and determination before this Court. It is averred that both petitions challenge the constitutionality of the Taskforce and have sought to have the said Taskforce declared unconstitutional on various grounds.

3. It is the Applicant’s case that Petition No. 451 of 2018 is scheduled for hearing on 31st July, 2019. The Applicant’s averment is that the orders sought herein will directly affect it hence the need to enjoin it in these proceedings.

4. The Applicant also posits that there is imminent danger that this Court will be sitting on two different suits touching on the same subject matter and give conflicting or contradictory decisions. The Applicant also fears that adverse orders may be issued against it without it being accorded an opportunity to be heard in line with the rules of natural justice and the provisions of Article 50 of the Constitution on the rights to a fair trial. The Taskforce therefore prays for grant of the orders sought in the application, asserting that unless the said orders are granted it will be greatly prejudiced.

5. The Petitioner, Moraa Gesicho, vehemently opposed the application through her response dated 8th July 2019 and filed in court on the same day. It is the Petitioner’s case that the Taskforce was established through a Gazette Notice dated 31st May, 2018 by President Uhuru Kenyatta and has no life of its own. Its oxygen, she asserts, is supplied by the President and it cannot therefore sue or be sued. Her view is that the President is the person to sue or be sued in case of any dispute and not the Taskforce. She points out that the Taskforce’s interests in this petition are being taken care of by the Attorney General who, in her words, is the President’s legal advisor.

6. Turning to the substance of the two petitions, the Petitioner submitted that the petitions are not related in any way. She highlights the reliefs sought in the two petitions and urges this Court to find that the prayers sought are entirely different. Further, that the constitutional and statutory provisions upon which the petitions are grounded are also not the same. Her assertion is that a mere mention of the Taskforce in the two petitions does not make them related or similar and the Taskforce's claim that the two petitions are related is a fallacy. The Petitioner urged this court to find that the facts giving rise to the alleged unconstitutionality in the two petitions are diametrically different so that it cannot be said that the petitions will lead to the same outcome or judgment.

7. The Petitioner claimed that it would be an abuse of the court process and a mockery of justice if Petition No. 451 of 2018 is heard before her petition or if the two petitions are heard simultaneously as already directed by the Court.

8. On the Taskforce's averment that it will be prejudiced if the orders sought are not allowed, the Petitioner submitted that there is no such possibility considering that the President who appointed the Taskforce is represented in these proceedings by the Attorney General.

9. The Petitioner also asserted that the Taskforce's application is an elaborate scheme to forestall, curtail and derail the hearing and determination of her petition. In support of this statement, she points out that the term of the Taskforce was to end in May, 2019 but has since been extended to October, 2019.

10. Her parting shot is that this application is fraudulent and an abuse of the process of the Court and ought to be found unmeritorious and dismissed, with costs being awarded to her.

11. When the matter came up for hearing on 3rd June, 2019 the Court settled the prayer for consolidation of the two petitions by declining to consolidate the petitions and directing that the petitions be heard simultaneously. Therefore, the only question that remains unanswered is whether the Taskforce should be enjoined in these proceedings as an interested party. Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 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."**

12. In a ruling delivered on 17th June, 2015 in the case of **Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others [2015] eKLR; Supreme Court Petition No. 12 of 2013**, the Supreme Court citing its earlier ruling in the same case highlighted the characteristics of an interested party as follows:-

"[24] We have in several cases, considered the role of *amicus* and outlined the difference between *amici curiae* and *interveners*. This guideline has been followed by other Courts in our jurisdiction, in cases such as *Judicial Service Commission v. Speaker of the National Assembly and Another, High Court Petition No. 518 of 2013 [2013]eKLR*; and *Justice Philip K. Tunoi & Another v. Judicial Service Commission & 2 Others, High Court Petition No. 244 of 2014 [2014]eKLR*. We elaborated the difference between *interveners* and *amici curiae* in the application to be enjoined as *amicus* by the Law Society of Kenya, in this matter, - *Trusted Society of Human Rights Alliance v. Mumo Matemo & 5 Others, Sup. Ct. Pet. No. 12 of 2013* - at paragraphs 17 and 18 of the ruling:-

"..... while an interested party has a 'stake/interest' directly in the case, an *amicus*'s interest is its 'fidelity' to the law: that an informed decision is reached by the Court, having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Courtroom.

"Consequently, 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. On the other hand, an *amicus* is only interested in the Court making a decision of professional integrity. An *amicus* has no interest in the decision being made either way, but seeks that it be legal, well informed, and in the interest of justice and the public expectation. As a 'friend' of the Court, his [or her] cause is to ensure that a legal and legitimate decision is achieved."

13. A perusal of the petition discloses that the same is aimed at obliterating the Taskforce. The Taskforce therefore has a stake in this matter yet it was not enjoined in the proceedings from the beginning. The outcome of the petition will clearly affect the Taskforce. Its participation in this proceedings is a matter of necessity and its enjoinder should be as a matter of course.

14. The Petitioner in opposing the application for enjoinder has indicated that the Taskforce has no legal character; it can neither sue or be sued. The Taskforce's response is that it was appointed by the President pursuant to his executive powers under the Constitution and upon their appointment, the members of the Taskforce acquired responsibilities and any action to be taken against them should be done in compliance with the Fair Administrative Action Act, 2015. Further, that the provisions of Section 44 of the Interpretation and General Provisions Act, Cap. 2 empowers the President to appoint a person to any office by name and the members of the Taskforce have therefore acquired distinct legal rights and interests which cannot be taken care of by the Attorney General. This Court was therefore urged to find that the Taskforce and/or its members have a right to participate in these proceedings.

15. A perusal of the petition clearly shows that the Petitioner holds the view that the Taskforce is an unconstitutional entity. The main issue brought to the Court by the Petitioner is the question as to whether the President had authority to form the Taskforce. Whether the Taskforce is a legal entity or not will be one of the issues to be determined at the conclusion of the trial. The route the Petitioner is taking is one which seeks to completely lock out the Taskforce from participating in the proceedings. Agreeing with her will amount to condemning the Taskforce unheard. As already stated, the Taskforce has clearly demonstrated that it has a stake in the outcome of the proceedings. It is therefore entitled to be heard and it must be heard.

16. The end result is that the Taskforce's notice of motion dated 13th May, 2019 is allowed to the extent that the Taskforce is enjoined as an Interested Party to this petition.

17. Costs shall be in the cause.

Dated, signed and delivered at Nairobi this 25th day of July, 2019.

W. Korir

Judge of the High Court