



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL CASE NO. 60 OF 2019

LESIT, J.

BETWEEN

JEREMIAH OCHARO MEMBA.....INTENDED INTERESTED PARTY

AND

REPUBLIC.....PROSECUTOR

IN

REPUBLIC.....PROSECUTOR

VERSUS

SARAH WAIRIMU KAMOTHO.....ACCUSED

RULING ON APPLICATION TO BE ENJOINED AS AN INTERESTED PARTY

1. When the Intended Interested Party, alongside the Accused person and other persons and their advocates appeared before the court for the hearing of the application described herein after, the court directed that it will first entertain the Applicant to persuade the court why he should be enjoined in this case as an Interested Party.

2. The Intended Interested Party (hereinafter referred to as the Applicant) has moved this court vide a Notice of Motion dated 1st October, 2019 brought under **Articles 10, 22, 25(c), 33, 34, 35, 48, 50, 258 and 259 of the Constitution**. The Applicant seeks orders that:

i.

ii. That this honourable Court be and is hereby pleased to enjoin the Intended interested party Jeremiah Ocharo Memba as in interested party in this case.

iii. That this honourable Court be and is hereby pleased to review, vacate and/or set aside its orders on the 16th September, 2019 gagging the media from publishing details of investigations, evidence or any other information touching on this case.

iv.

3. The application is premised, inter alia, on grounds:

I. That the restriction to the media from publishing any other information touching on this case is so generalized and has gagged the media to the detriment of the greater public that largely depends on the media as a source of information.

II. That due to this error and ambiguity on the face of the record, the constitutional promises to media and the promise of an informed people is in jeopardy.

III. That be that as it is, the said orders were issued without the participation or the involvement of the media representatives

thus rendering as meaningless the rules of natural justice

4. The application is supported by the affidavit of Jeremiah Ocharo Momba. Mr. Ocharo at paragraph 2 avers that he is an ardent defender of the rule of law and passionate about public interest matters like the one presently before court. He further avers that he has been relying on the different media houses to get information about the search of the deceased tycoon, the gruesome murder and the arrest of the accused herein.

5. At paragraph 9, Mr. Ocharo avers that the restriction to the media to refrain from publishing any other information touching on this case is so generalized and has gagged the media to the detriment of the greater public that largely depends on the media as a source of information.

6. The applicant seeks to be enjoined in this matter for the sole purpose of urging this honourable Court to review its orders issued on 16th day of September, 2019.

7. The Applicant filed written submissions in which he has framed two issues for determination:

a. Whether the applicant can be enjoined as an interested party in these proceedings?

b. Whether there are sufficient grounds to warrant the review of the impugned orders?

8. It was the Applicant's contention that Rule 2 of the **Mutunga Rules (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.”

9. The Applicant contended that he has an obligation/ duty to ensure that justice is seen to be done and the public is kept informed of the proceedings before this court. The Applicant contends that the public can only be reliably informed if the impugned orders are reviewed or an attempt is made at having them reviewed.

10. The Applicant further contends that since the orders touch on the freedom of the media, he seeks joinder as a protector of the interest of the media in order to urge the court to review its orders on grounds that it was not involved when adverse orders were issued against it.

11. Mr. Shadrack Wambui learned counsel for the Applicant in oral submissions in court urged that the Applicant was interested in Public Interest Litigation and has been following the developments of the case. Counsel urged that with the Applicant relying on various media houses for the dissemination of the information, he and the general public were heavily disadvantaged by the order of the court gagging the media from publishing details of investigations, the evidence and any other information touching on this case.

12. Counsel urged that the application was grounded on **Article 22** of the **Constitution** which empowers the Applicant to seek to participate in the proceedings for the sole purpose of seeking a review of the orders made by this court in the interest of the public and all media houses. Counsel cited the case of **Francis Kariuki Muruatetu & another Vs Republic & 5 others 2016 eKLR** for the proposition of the definition of who an interested party is, and to buttress his contention that the Applicant had met the requirement to be enjoined in this case as an Interested Party.

13. Counsel Mr. Wambui urged that the Applicant bears a duty of ensuring that justice in itself is seen to be done through the constant supply of information to the public and himself. Further, justice must be seen to be done through the protection of values and principles of governance and in particular through transparency and accountability of the procedure. Counsel urged that if the Applicant is not enjoined to prosecute the review, then the freedom of the media as provided under Article 34 of the Constitution will be rendered meaningless and secondly, the public interest to hear the proceedings and understand what is happening will be greatly prejudiced.

14. I will determine only the first of the two issues framed by the Applicant. The Applicant has urged that he is an interested party in this case and relied on the definition ascribed to same by the Supreme Court in the case of **Francis Kariuki Muruatetu & Anor. Vs. The Republic**, supra. In that case four parties applied to be enjoined in the Petition filed by two persons who had been sentenced to the death penalty and who had exhausted the appellate process. The court observed that the **Supreme Court Rules** did not have a definition of 'interested party' but that under **Rule 25** one is allowed to apply to be enjoined anytime in the course of the proceedings.

15. The Court relied on **Black's Law Dictionary, 9th Edition** for definition on Interested Party thus:

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

16. The court quoted from its own decision in the **Trusted Society of Human Rights Alliance Vs. Mumo Matemu & 5 others, Supreme Court Petition No. 12 of 2013, [2014 eKLR]** where it held:

“(17) Suffice it to say that 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.

“(18) 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...”

17. The court also quoted from a High Court case of Judicial Service Commission Vs. Speaker of the National Assembly & 8 others [2014] eKLR where the High Court quoted the definition of ‘interested Party’ in: The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 thus:

“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.”

18. The court then stated that from the legal provisions and case law it had considered the elements which emerge as applicable where a party seeks to be enjoined in proceedings as an interested party thus:

“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 court continued to observe thus:

(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) 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 a new issue to be introduced before the court.

(44) We also note that criminal matters occupy a different platform from that of civil proceedings. Criminal proceedings directly touch on the personal fundamental rights and freedom of an individual, particularly the right to liberty. Consequently, just as the standard of proof is elevated in criminal matters (beyond reasonable doubt), so should the threshold for admission of interested parties be in criminal matters as compared to civil matters, where proof is on the balance of probability.

In criminal proceedings, the accused should ordinarily be informed beforehand of the case against him/her. Therefore, the court should always guard against admitting third parties who may end up clogging the case of the petitioners in criminal matters.”

20. In this case the Applicant has approached the court through a formal application, a Notice of Motion. He has then set out what his stake in the matter is, the prejudice he stands to suffer and the submissions he intends to make in the case were also supplied. The Applicant states clearly that he seeks to be enjoined in the case for purposes of seeking a review of the court order made on 16th September, 2019. The Applicant is saying that he seeks to be enjoined in this murder trial for the sole purpose of seeking a review of an order the court made on the date stated. Is that proof he has a stake in the proceedings and proof that he stands to be affected by the decision of the court in the matter when it is made? Put it differently what prejudice does the Applicant stand to suffer in the outcome of this murder trial?

21. The applicant needed to show that he has an identifiable stake or legal interest or duty in the proceedings before court. The identifiable stake or legal interest must be in the subject matter of the case and not derived from new issues framed by the applicant.

22. There is no stake that the Applicant has in this murder trial and he did not even attempt to demonstrate any. He has no stake in this proceedings. Further, the Applicant has nothing to offer or advance of relevance to the court in this murder proceedings and therefore his enjoinder to this proceedings will not be useful.

23. I will even go further and state that the court cannot allow itself to suffer enjoinder of a party describing himself as an interested party

in a murder trial. Doing so will not only create complete new issues and therefore diversion in the murder case which can be characterized not only as meddling busy body but also irrelevant. See the Trusted Society of Human Rights Alliance, supra.

24. I find that the intended interested party in this case has neither shown the personal interest he may have in this matter, nor demonstrated the prejudice he stands to suffer if not enjoined. What he has done is to frame new issues and seeks to introduce them for determination by the court at an interlocutory stage of the hearing and not in the course of the trial proceedings.

25. I find that the Applicant has no stake in this matter, that he has no locus and cannot be enjoined in the case. The Application has no merit and is dismissed in its entirety. The Notice of Motion application, supporting affidavit, replying affidavits and all other documents filed in support of or opposition to the Notice of Motion dated 1st October, 2019 are hereby struck out of the record of these proceedings.

DATED AND DELIVERED IN COURT THIS 29TH OCTOBER, 2019.

LESITT, J

JUDGE