



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 214 OF 2018

CYPRIAN ANDAMA.....PETITIONER

VERSUS

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

ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. This ruling is in respect of the interested party's application dated 29th June 2018 in which the applicant/interested party seeks orders that:
 - a) **That leave be granted to ARTICLE 19- Eastern Africa to be admitted as interested party in the above petition filed in this honourable court.**
 - b) **That the intended interested party be granted an opportunity to submit written and oral arguments in the above petition.**
 - c) **That the intended interested party be allowed to submit with leave of court any other information it may deem important and relevant to allow for the just disposition of this matter.**
 - d) **That there be no costs in relation to this application.**
2. The application is premised on the grounds inter alia that the applicant is an international non-governmental organization that is duly registered in Kenya and an international human rights organization which defends and promotes freedom of expression, access to information and freedom and independence of the media.
3. It is further stated that the applicant derives its name from Article 19 of the Universal Declaration of Human Rights which provides for the right to freedom of expression and has extensive experience of working to promote freedom of expression, information privacy and the press.
4. It is the applicants position that because of its overall legal expertise, it has intervened as *amicus curiae* or interested party in legal proceedings that affect the right to freedom of expression, privacy and access to information through briefs to international, regional and national courts such as the African Court of Human and Peoples Rights, the European Court of Human Rights, the Security Laws (Amendment) Act in the case of **CORD vs. Republic Petition 628 and 630 of 2014, Geoffrey Andare vs Attorney General, Petition 149 of 2015** and the recent case **of Jacqueline Okuta & Another vs Attorney General & 2 Others [2017] e KLR.**
5. The applicants case is that since the instant petition raises the questions as to whether Section 84D of the Kenya Information and Communications Act (KICA) violates the right and freedom of expression under Article 33 of the Constitution, it follows that the applicant has the mandate in the issues raised in the case and therefore seeks to utilize its expertise towards assisting the court to interpret and apply the right to freedom of expression and the permissible areas of limitation.
6. The application is also supported by the affidavit of **Henry Omusundi Maina**, the applicant Executive Director dated 29th June 2018 wherein he repeats the grounds stated on the body of the application and reiterates that the impugned, Section 84D of KICA under which the petitioner has been charged in a case pending trial before the court, is unconstitutional as it does not take into account the internationally accepted standards of limitation of freedoms of expression as contained in numerous interpretive documents of international authority and is therefore a violation of Article 33 of the Constitution and the corresponding Article 19 of the United Nations Declaration of Human Rights (UNDHR) and International Convention on Civil and Political rights (ICCPR).

7. The 2nd respondent opposed the application through grounds of opposition filed on 17th July 2018 wherein it states that application does not meet the threshold set out in the case of **Francis Kariuki Muruatetu and Another v Republic & 5 Others**[2016] e KLR as it fails:

- a) To identify the interested party.
- b) To identify the intended interested party's stake in the case.
- c) To identify the prejudice that it will suffer for failure to be enjoined.
- d) To explain their relevance to the proceedings and the reason for believing their submissions will be useful to the court and different from those of the other parties.

8. The 2nd respondent states that the intended interested party has not demonstrated the exceptional circumstances that would warrant its joinder to the case and that the mere fact that it has participated in other cases does not give the applicant the automatic right to be enjoined in this case.

9. The 2nd respondent maintains that the application is frivolous and incompetent as it does not cite the Rule under which it has been filed or the constitutional article on which it is based.

The intended interested party's submissions.

10. **Mr. Kiprono** learned counsel for the intended interested party highlighted the 3 issues to be considered by the court in determining the application namely:

- a) Whether the intended interested party has an identifiable stake in the matter before the court;
- b) Whether non-joinder will cause prejudice to the intended interested party; and
- c) Whether the issues raised by the applicant are different from those raised by the petitioner or any other party in the suit.

11. Counsel submitted that under Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (*Mutunga Rules*) "interested party" is defined as an entity that has an identifiable stake or legal interest in the proceedings or may not be involved in the litigation. Counsel stated that the applicant has a legitimate and identifiable stake or a legal interest or duty in the proceedings before the court by virtue of the fact that it is an international human rights organization that defends and promotes freedom of expression and access of information. He stated that the applicants mandate is to monitor, research, publish, lobby, campaign set standards and conduct strategic litigation on promotion of the right to freedom of expression.

12. Counsel submitted that the applicant's interest in the case is based on their expertise and research in matters of freedom of expression and that their address before the court will be on the topics of regional and international best practice for criminalizing speech, and whether the impugned Section 24(1) passes the 3 part test in terms of legality, legitimacy and proportionality among other concerns.

13. It was submitted that the applicant's intervention will benefit the court in regard to the interpretation and application of relevant constitutional principles, comparative law and international law it was the applicant's case that the determination of this petition will have an impact on the fundamental right to freedom of expression, a matter that falls squarely within its mandate. Counsel attached and referred to the standard setting publication titled "**Defining Defamation Principles on Freedom of expression and Protection of Reputation -2017**" which at Principle 11 deals with laws that criminalize criticism of public officials by stating, inter alia, that under no circumstances should defamation law provide any special protection for public officials whatever their rank or status.

14. Counsel relied on the decision in the case of **Trusted Society of Human Rights Alliance v Mumo Matemu** [2014] eKLR wherein the Supreme Court held:

"An interested party is one who has a stake in the proceedings, though he or she was not a 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 herself appears in the proceedings, and champions his or her cause....."

15. Counsel reiterated that the applicant will be affected by the decision of this court which interest will not be well articulated unless it appears in the proceedings to advance its cause.

16. Counsel maintained that the application accords with the Supreme Court verdict in the **Francis Kariuki Muruatetu's** case (supra) where the scope for admission as an interested party was delineated as hereunder:

"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. Enjoinder is not as a 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 participation, 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.”

17. Counsel contended that the applicant had demonstrated a clearly identifiable and sufficiently proximate interest in the case that stands apart from anything that is merely peripheral. He added that the applicant would suffer prejudice in the event of a non-joinder.

Petitioners submissions

18. **Mr. Ochiel**, learned counsel for the petitioner supported the applicant's submissions and stated that the applicant had made out a case for joinder in line with Rule 2 of the *Mutunga Rules* which defines an interested party as one with identifiable stake, legal interest, or duty in the proceedings.

19. Counsel submitted that none of the parties had shown how the intended joinder of the interested party would prejudice their case and urged the court to allow the joinder so as to benefit from the intended party's input.

2nd respondent's submissions

20. **Mr. Moimbo**, learned counsel for the 2nd respondent opposed the application for joinder while arguing that the applicant did not indicate its interest in the matter before the court as all he did was to make a statement in passing without the providing evidence in support of the accolades they alleged that they had obtained in the field of human rights and freedom of speech.

21. Counsel further stated that the applicant did not demonstrate that it would bring new ideas on board other than what is already before the court. He added that in matters of criminal element, an intended interested party needs to demonstrate exceptional circumstances that would necessitate the joinder of an interested party which requirement the applicant had not fulfilled. Reference was made to the **Francis Kariuki Muruatetu** case (supra) and the Supreme Court Rules. While conceding that the power of the court to join a party to a case is discretionary, he maintained that the court needed to be guided by Section 20 of the Supreme Court Rules and that involvement in previous proceedings is not one of the conditions set under those Rules. The respondent's case was that it did not know the applicant or what it stood for.

Applicants response

22. In response to the respondent's submissions, counsel for the intended interested party submitted on the importance of freedom of expression which, he stated, allows access to the other rights and is therefore the oxygen of democracy. He stated that in as much as the petitioner had made reference to international law, the petitioner is not an expert on the international law or freedom of expression and that the participation of the applicant in the case will be vital in bringing all the issues to the fore.

23. On the identity of the applicant, counsel submitted that the applicant duly registered as an NGO and that under Article 260 of the Constitution a person is defined as including a body corporate.

24. Counsel reiterated that the applicant's sole interest in the matter is to ensure that rights are understood and enjoyed to the greatest extent as was intended by the makers of the Constitution.

Analysis and determination

25. Upon considering the application, the parties submissions together with the authorities that they cited, I note that the main issue for determination is whether the intended interested party has sufficiently demonstrated that it deserves to be admitted to this proceedings as an interested party.

Rule 7 of *Mutunga Rules* provides as follows:

Interested party

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

2. A court may on its own motion join any interested party to the proceedings before it.

26. In the case of **Trusted Society of Human Rights Alliance v Mumo Matemu [2014] e KLR**, the Supreme Court held that:

“An interested party is one who has a stake in the proceedings, though he or she was not a 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 herself appears in the proceedings, and champions his or her cause....

27. In the instant case, the applicant maintained that as a duly registered NGO operating in Kenya, it was an international human rights organization that defends and promotes freedom of expression and access to information. The applicant explained that its name, Article 19, is derived from Article 19 of the Universal Declaration of Human Rights that provides for the right to freedom of expression with wide experience and expertise in the field of promotion freedom of expression, information privacy and the press.

28. The applicant listed a number of local, regional and international cases involving the right to freedom of expression in which it had to participated as *amicus curiae* or interested party. The applicant maintained that its core business is in the field of freedom of expression and that its interest in the case was to utilize its experience and expertise towards assisting the court interpret and apply the right to freedom of expression.

29. The petitioner supported the applicants quest to be enjoined in the suit while the 2nd respondent opposed the application while arguing that it did not meet the threshold of exceptional circumstances that would necessitate its joinder in the suit.

30. Joinder of a party to proceedings as an interested party is at the discretion of the court and in the instant case, I find that the applicant has demonstrated that as an duly registered organization whose main agenda is to promote the right of freedom of expression, it has a direct, identifiable and proximate interest in the case at hand where the main gist of the petition is the interpretation of the right to freedom of expression.

31. My take is that the applicant/interested party will be failing in its mandate and sole reason for existence if it did not participate in a case such as the one before the court where the bone of contention is the constitutionality of Section 84D of Kenya Information and Communication Act, Cap 411A which the petitioner contends, limits the freedom of speech and expression.

32. I am of the humble view that the applicant would be failing in its duty and indeed its very reason for existence if it did not provide an input in a case such as this where the novel issue of the legality of the impugned Section 84D is under discussion and scrutiny.

33. I find that this is one such case where the court could on its own motion and in line with Section 7(2) of the *Mutunga Rules* join the applicant to the proceedings so that it can gain from the applicants expertise in the field of freedom of expression. I am satisfied that the applicant has sufficiently demonstrated its interest and stake in the case. This court is of the view that it would gain a great deal from the applicants input in developing jurisprudence in the area of freedom of expression.

34. Having regard to my findings and observations in this ruling, I find that the application dated 29th June 2018 is merited and I hereby allow it with no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 24th day of September 2018.

W. A. OKWANY

JUDGE

In the presence of:

Mr Ochiel for the petitioner and holding brief Mr Kihara for Director of Public Prosecution

Mr Mwimbo for 2nd respondent

Mr Kiprono for the intended interested party.

Court Assistant – Kombo