



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CONSTITUTIONAL REFERENCE NO. 26 OF 2017

IN THE MATTER OF: BREACH OF THE CONSTITUTION AND ESPECIALLY

ARTICLES 1 (1), 1(4) (B), 2, 3, 10,, 19, 20, 21, 22, 23, 27, 28, 47, 50, 73, 75, 77,

174, 175, 185, AND 197 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF: SECTION 7, 9, 12, 13 AND 14

OF THE COUNTY GOVERNMENTS ACT, 2012

IN THE MATTER OF: ARTICLES 2, 3, 4, 7, 13 AND 19 OF THE AFRICAN

CHARTER ON HUMAN & PEOPLE'S RIGHTS AND OTHER PROVISIONS THEREOF

IN THE MATTER OF: AND STANDING ORDERS 4 AND

14 OF THE COUNTY ASSEMBLY OF MERU

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION

OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE

AND PROCEDURE RULES 2013, SECTION 4

BETWEEN

DOUGLAS BUNDI KIRIMI.....PETITIONER

VERSUS

JOSEPH KABERIA ARIMBA

THE SPEAKER COUNTY ASSEMBLY OF MERU.....1ST RESPONDENT

THE CLERK, COUNTY ASSEMBLY OF MERU.....2ND RESPONDENT

THE COUNTY ASSEMBLY OF MERU.....3RD RESPONDENT

ELIAS MUREGA JULIUS.....INTERESTED PARTY

AND

THE COUNTY ASSEMBLIES FORUM...PROPOSED 2ND INTERESTED PARTY

RULING

Joinder of parties

[1] **THE COUNTY ASSEMBLIES FORUM (Hereafter CAF)** has applied through a Notice of Motion dated 18th July 2018 to be joined in these proceedings as the 2nd Interested Party. The Motion is expressed to be made pursuant to the provisions of Rule 7(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practices and Procedure Rules 2010.

Deputy speaker member of CAF

[2] The application is premised upon grounds set out in the Motion and the supporting affidavit of Hon. Johnson Osoi sworn on 18th July 2018. It has been averred that the County Assemblies Forum (**herein after “CAF”**) is the coordinating body of the 47 County Assemblies of the Republic of Kenya. It seeks to institutionalize law-making and oversight capacity for the county assemblies in Kenya and form linkages with other arms of government. The deputy speakers of all county assemblies are members of CAF and accordingly the forum has an identifiable stake and legal interest in this matter and ought to be joined as the 2nd interested party. Since it has a duty to protect and preserve the integrity of positions in all the county assemblies. According to them, it is a proper party for joinder as an interested party in the matter. They argued that the declaration by this court that the position of the deputy speaker, Meru County Assembly, is unconstitutional may be applied to remove deputy speakers of all the county assemblies in Kenya.

[3] The respondents and interested party filed written submission save CAF filed their submissions late, that is, on 31st October 2018. The submissions, however, substantially reiterated the arguments in the affidavits filed but emphasized:- (1)the centrality of CAF in matters of County Assemblies; (2) the fact that the deputy speaker is a member of the CAF; (3) this decision will affect them; and (4) they are therefore necessary parties for purposes of stay of execution application. For those reasons they urged the court to grant their application for joinder. They urged that joinder of parties is permitted by law and it can be done at any stage of the proceeding provided a common question of fact or law would arise between the existing and intended parties. They argued that the court is not functus officio as long as an appeal is pending and application for stay of execution is permitted. They relied on the case of **Lucy Nungari Ngigi & 128 others v National Bank of Kenya Limited & another [2015] eKLR; Trusted Society of Human Rights vs. Mumo Matemu [2014] eKLR** to show that they have a state in these proceedings and should be joined.

Petitioner: Proceedings have concluded

[4] In the grounds of opposition dated 24th July 2018 the Petitioner deposed that; (1) the applicant lacks the *locus standi* to participate in the proceedings; (2) the application has been overtaken by events as judgment has already been rendered; and (3) the court is now *functus officio*.

[5] The petitioner also submitted to bolster his standpoint articulated above. He buttressed that there are no further proceedings that the court can participate in. To him, the applicant is merely seeking to be enjoined as a party without stating the relief he is seeking. Further, the applicant is not seeking joinder to substitute another party in the execution process or to be a representative. He relied on the case of **Bellevue Development Company Limited v Vinayak Builders Limited & another [2014] eKLR**.

ANALYSIS AND DETERMINATION

[6] Under Rule 7 of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**:

“(1) A person, with leave of the Court, may 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.”

[7] Therefore, as parties cited the case of **Lucy Nungari Ngigi & 128 others v National Bank of Kenya Limited & another [2015] eKLR** I find the following to be quite apt, that:

“... joinder of parties is permitted by law and it can be done at any stage of the proceedings. But, joinder of parties may be refused where such joinder: will lead into practical problems of handling the existing cause of action together with the one of the party being joined; is unnecessary; or will just occasion unnecessary delay or costs on the parties in the suit. In other word, joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from existing cause of action or the relief. The determining factor in joinder of parties is that a common question of fact or law would arise between the existing and the intended parties. This is the test I shall apply in this case.”

[8] Further postulation of the law; joinder may only happen where proceedings are still pending. See what the Court of Appeal stated in the case of **J M K v M W M & another [2015] eKLR** that:

“We would however agree with the respondent that Order 1 Rule (10)(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court.

[9] Again as parties cited the case of **Bellevue Development Company Limited v Vinayak Builders Limited & another [2014] eKLR** (Gikonyo J) the following rendition is useful, that:

“[42] Joinder of parties is possible after judgment. I will give some example where such joinder of parties is permitted; 1) in cases of representative suits; or 2) substitution of one or more parties, for instance, in case of death, or incapacity of a party or change of status of a party; or 3) in execution process. In the broader sense, it is deemed to be a kind of joinder of parties where

a contemnor was not a party in the suit where judgment has already been entered and for which he is being cited for contempt of court. Equally, it is a joinder of parties where an objector raises objection to execution under Order 22 rule 51 of the CPR. However, any joinder of parties post-judgment will have to surmount any possible constitutional objections on the front of rules of natural justice and the principle of finality of litigation. Applying the said test on the present case, I find that Mr Paul Mwaniki Gachoka was not the subject of the earlier arbitral proceedings which were the subject of these proceedings. I have also found he was not a successor of the 2nd defendant although his appointment was after the resignation of the 2nd defendant herein. Although the 1st Respondent alludes to some sort of contempt, I have also found that Mr Gachoka has not been cited for contempt of court as by law required and this application is not one for contempt of court. I hold that he is not even a necessary party and should not be joined as a party in these proceedings.” [Underlining mine for emphasis]

[10] Final judgment was delivered herein on 31st May 2018. Accordingly, these proceedings in so far as settlement of the substantive issues is concerned have concluded. What is before me are mere applications for stay of execution. No substantive argument or issue could be handled by this court at this level. Therefore, the 2nd interested party must show that joinder after judgment should be ordered. The reason they have given in seeking joinder is that this will enable them to participate in the application for stay of execution and make representations and submissions on points of law. Does this hold sway? Immediately I find myself digging from the wisdom of the Supreme Court when it stated in the case of Trusted Society of Human Rights Alliance v. Mumo Matemo & 5 Others [2014] eKLR (Petition No. 12 of 2013) that:

“... 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. [Underlining mine]

[11] The 2nd interested party has not clearly stated or shown that its interest will not be well articulated unless it appears in the proceedings to champion its cause. The parties herein are adequate and appropriate parties to apply for stay of execution. For reinforcement, the parties herein do not suffer from any deficiency in proficiency in law or facts of the case, or incapacity of sort which should, as a matter of necessity, be filled up or complimented by CAF for purposes of the application for stay of execution filed herein. In fact, arguments being made by CAF are available to and may competently be and indeed have been presented by the parties herein. Ultimately, I do not find anything on which joinder of CAF could issue in these proceedings.

[12] The foregoing recapitulation of law and facts clearly show the path the court is taking; that the application is unmeritorious and ought to be dismissed. Accordingly, I dismiss the application for joinder made by CAF. Due to the nature of these proceedings, I will make no order as to costs. It is so ordered.

Dated, signed and delivered in open court at Meru this 31st day of October, 2018

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F. GIKONYO

JUDGE

In presence of

Muriuki for petitioner

M/S Wambugu for respondent

Njenga for proposed interested party

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F. GIKONYO

JUDGE